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CIVIL PROCEDURE IN BRITISH INDIA, &c.

WOODROFFE & AMEER ALI'S

CIVIL PROCEDURE

IN

3013

BRITISH INDIA

A Commentary on Act V. of 1908

SECOND EDITION

By

Sir JOHN GEORGE WOODROFFE, Kt., M.A., B.C.L.,

BARRISTER-AT-LAW, A JUDGE OF THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL;

AND

FRANK JAMES MATHEW,

BARRISTER-AT-LAW.

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PREFACE TO SECOND EDITION.

SINCE the First Edition was published in 1908, the effect of the changes introduced by this Code has been interpreted by a great number of legal decisions. All these, up to August, 1914, have been considered in the text of this Edition or recorded in the footnotes; and some later cases of importance, up to May, 1915, have been added while it was in the Press. The Notifications and Rules made under the Code have been added in new Appendices, including those issued by the Government of India and the Local Governments, and by the High Courts of Calcutta, Madras, Bombay, Allahabad, the North-Western Provinces, the Punjab, and Burma.

Our thanks are due to the Registrars of the High Courts at Madras, Bombay, and Allahabad, and of the Chief Courts of Lower Burma, the Punjab, and the Revenue Secretary to the Government of Burma, for having supplied us with the valuable material in the Appendices, and to Babu Jyotish Chandra Mitra, Assistant Registrar of the Calcutta High Court, for having assisted in the collection and preparation of this material.

JOHN GEORGE WOODROFFE.
FRANK JAMES MATHEW

PREFACE TO FIRST EDITION.

THOUGH the preparation of this Commentary was commenced some five years ago when the former Code was in force, it has been since continued with reference to the various changes in the text of the Code which have been introduced from time to time. As therefore published it presents both the law as it now is and (where there has been an amendment) as it was, with an explanation of the reason and effect of the changes made. These changes in the text, even where, as is often the case, they are of a verbal character, have been indicated by the use of italics. Against each section and rule has been noted the corresponding section, if any, in the old Code, and a comparative table has been given showing the distribution of the provisions of the old Code in the present one.

The reported decisions have been noted up to and inclusive of the month of December, 1907.

In this country Procedure of all kinds is a fetish. An unnecessarily voluminous case-law is in the main concerned with it, and so it comes about that this Commentary contains some 9470 precedents, and yet more have been consulted than have been cited. The inclusion of these cases has made the book a bulky one. To those who are not acquainted with the subject this result may appear to be unnecessary in the case of a commentary on a new Act. But this is not so with the plan we set before ourselves. In the first place, a great deal which is unexpressed must be read into any Code. In some instances it is not exhaustive of the subject dealt with, either as not dealing with a particular matter at all or as incompletely

dealing with it. An example of the latter alternative is to be found in the doctrine of *res judicata*, which, as a principle, is more extensive than the particular sections which recognize it. In other cases the terms employed need explanation, such as "cause of action," "jurisdiction," "illegality," "irregularity" and the like. In some instances the application of the rule stated requires to be shown, as in the case of the former section 244 (now 47), the revision section, formerly 622, now 115, and others. Secondly, though the whole Code has been rearranged owing to the adoption of the division into clauses and rules, the substance of it is, in the main, the same as that of the Act which preceded it. The Special Committee on this point in their report said--

"The Code of Civil Procedure of 1882 has been in force for twenty-five years, and the experience of those years has shown that the general lines on which it proceeds are sound. The matters in which it has proved defective are for the most part matters of detail." They further stated that, apart from the rearrangement of the Code by the separation of clauses and rules, they "had not introduced many changes of a radical character into the Code," and that they "had advisedly adhered as closely as possible to the existing language, the meaning of which is now well understood by Courts and practitioners." In other words, the Legislature has, after many invitations to enter upon untried courses, ultimately adopted a conservative position, limiting its amendments to what it deemed to be clearly necessary. By far, therefore, the greater number of decisions cited are directly relevant as having been given on those portions of the Code which have either not been changed, or, at any rate, not materially so. Nextly, even where the present Code amends the law in the sense of superseding previous judicial decisions, a reference to these is necessary in order to understand the new provisions which so supersede them. To appreciate the scope of an amendment it is necessary to know what led to it, why it was made, and what

difficulties it was intended to remove. It is, lastly, not possible to provide for everything. The Legislature has wisely rejected the proposal to convert the Code into a Digest of the case-law—a law which is more extensive than the Acts around which it has grown. As, however, the new Code becomes the better understood, a reference to the earlier law which it supersedes will become less and less necessary.

It would, of course, have been possible, as it would have been a lighter task, to have noted selected decisions only. We, however, preferred to give as complete a record of the subject as possible, believing that we should do a greater service by endeavouring to disentangle the confusion of that Record than by following the other course. To master technicality one must be a master of it; a position which can only be obtained by a careful and thorough study of all materials available, whatever value may afterwards, and as a result of such consideration, be attributed to them. We have, however, not considered it necessary to deal with two portions of the Code as we have with the rest. These are O. XXXIV. and the Second Schedule containing the Arbitration Rules. The Order is, with some amendments, substantially a reproduction of former sections of the Transfer of Property Act relating to mortgages. These have been already sufficiently treated of in the able books of Dr. Rash Behary Ghose and Dr. Gour on the subject. The arbitration sections of the former Code have, with some slight alterations, been incorporated in the Second Schedule as a temporary measure only, the Legislature having expressed its intention of shortly dealing with the subject afresh in a separate Act. We have, therefore, in these circumstances, only recorded the cases decided since the date of the last edition of the late Mr. Justice O'Kinealy's Civil Procedure Code.

We have said that the Code is, to a large extent, what it was. At the same time it is to be noted that a considerable number of important amendments have been made which

will be found explained in the Commentary. The chief merit of the new Code is that these amendments, and the general scheme of which they form a part, recognize principles which we think make for the effective administration of justice. In this country both the litigants and Courts are apt to attribute excessive importance to what is but the mint, the anise, and the cummin of the law. Procedure is not, as seems sometimes to be supposed, an end in itself, but merely the machinery by which the Court does its work. Nextly, as it is not possible to foresee every contingency which may arise, it is not possible to provide such a machinery as will be effective to meet every want. The terms of the law itself must therefore be flexible, and to the Judges should be given a wide discretion in its administration. Freedom of action, if given, will often enable them to deal justly with cases which the most skilfully constructed provision may fail to meet. The Legislature has recognized that it is not possible to frame a fixed and rigid Code in such a manner as to sufficiently meet the varying needs of an area so diversified as that to which the Code applies. The provisions as to rules enable such variations to be introduced as may be necessary. To the latter are relegated matters of mere machinery. As they now stand they continue substantially, though with important amendments, the former state of things. But the High Courts may add to or alter them as necessity requires. Those provisions only are retained in the body of the Code in which some degree of permanence and uniformity has been considered desirable. In the amendments introduced an endeavour has been made to state general rules of procedure rather than to provide in detail for every possible contingency. The Select Committee very rightly state that they hold it "to be a sound view that excessive elaboration of details of procedure tends to cramp the action of the Court, and in consequence to encourage technicalities." Limitations have in several instances been removed, such as those which existed on the scope of suits (the issues in which

however, are to be clearly defined), the power of remand, powers in second appeal, and so forth. Technical objections to jurisdiction, misjoinder, and the like are sought to be discouraged, and greater powers of amendment are given. A wider discretion is given to the Judges, the Select Committee observing that "the principles of procedure are now so well understood that the Courts may be trusted to apply them intelligently in cases for which no provision may be made in terms." Stuart, C.J., once spoke of those "who refused to know anything about procedure beyond the letter of the Code itself" (5 A. 522). The present Code, on the other hand, recognizes in sect. 152 the inherent jurisdiction of the Court to do what is right where the Legislature has failed to make provision for any particular case which may arise. It will be no longer possible to say that the Court can do nothing, though justice requires it to do something simply because the Code is silent on, or there is no reported decision in which a Judge has had to deal with, the point raised. "Procedure," said Lord Penzance, "is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to *govern* where it ought to *subserve*" (L. R. 4 App. Cas. 525). It will be well also to bear in mind the dicta of the Judicial Committee that they will look to the essential justice of the case without considering whether matters of form have been strictly attended to (2 M. I. A. 344), and that (6 M. I. A. 410, 411) it is of the utmost importance that the Courts of this country shall constantly bear in mind that by their very constitution they are to decide according to equity and good conscience, and that the substance and merits of the case are to be kept constantly in view.

J. G. W.
A. A.

August, 1908.

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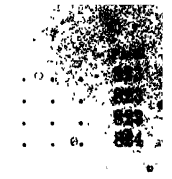
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THE CODE

OF

CIVIL PROCEDURE.

ACT No. V. OF 1908.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Received the assent of the Governor-General on the 21st March, 1908.

An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature.

Preamble.

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows:—

Previous Legislation.—Up to the year 1862 the Courts in the Presidency Towns and in the Provinces were governed by different rules of procedure. The Supreme Courts were governed in matters of procedure by their own practice, rules and orders, and certain Acts.(1) The Provincial Courts were governed by Acts and Regulations particularly applicable to them.(2) In 1859 the first Code of Civil Procedure (Act VIII. of 1859) was passed, which enacted that where it came into operation the procedure of Civil Courts was to be regulated by it only.(3) This Act, however, was originally intended for application in the Courts not established by Royal Charter, and it was not till the year 1862 that it was extended to the Courts in the Presidency Towns. In that year the Supreme Courts and the Courts of Sudder Dewanny Adawlut in the three Presidency Towns were abolished. Letters Patent constituting the present High Courts were granted in pursuance of an Act of Parliament of the Session 1861, 24 & 25 Vict. c. 104. With the abolition of the Supreme Courts, their former procedure in civil cases between party and party was abolished, and by the 37th section of the Letters Patent establishing the High Court at Calcutta, and the corresponding sections of the Letters Patent establishing similar courts at Madras

(1) See Acts XVII. of 1852; VI. of 1854.

(2) See the Schedule to Act X. of 1861, which was passed to repeal certain Acts and Regulations relating to the procedure of Civil Courts not established by Royal Charter.

(3) See Act VIII. of 1859, s. 388.

and Bombay, the proceedings in civil suits between party and party brought in the High Courts, were to be regulated by Act VIII. of 1859, and by such further or other enactments of the Governor-General in Council, in relation to Civil Procedure, as were in force at the date of the several Charters: Provided always that the regulation of such proceedings respectively should be subject to such laws and regulations as should be thereafter made by the Governor-General in Council in relation to such proceedings. This was modified by the 37th sections of the new Charters of 1865, which run as follows: "And we do further ordain that it shall be lawful for the said High Court, &c., from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases, which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Intestate and Matrimonial Jurisdictions respectively: Provided always that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII. of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority."(1) Other Acts relating to the adoption of the Code of 1859 by the High Court are mentioned below.(2) The Acts passed after 1859, modifying and amending that Code, are given below.(3) In 1877 the second Code was enacted (Act X. of 1877). This very considerably amended and added to the Code of 1859. Whereas the latter contained 388 sections only, the former contained 652. This Code was followed by amending Acts,(4) and then by Act XIV. of 1882, which was also repealed in part and amended by subsequent Acts.(5)

The present Code repeals that of 1882, as also the amending Acts VII. of 1888; XII. of 1891; V. of 1894; XIII. of 1895. The chief feature of the present Code is the distinction drawn between matters dealt with by the Act, viz. those matters which affect more than one Province and matters in which it is essential that there should be uniformity in all Provinces and minor matters which are relegated to a schedule and treated as mere rules which may be varied or amended by the High Courts and Chief Courts. These rules are to a large extent sections of the Code of 1882, amended in certain parts and added to in others. As regards the body of the Act, the greater number of alterations perhaps occur in the provisions relating to execution, although other parts of the Code have been amended, and additions made thereto. The provisions relating to insolvency have been altogether removed from the Code, and now form the subject of a separate Act III. of 1907, which came into force on the 1st January, 1908.

(1) See Broughton Civil Procedure Code, pp. 1, 2, and Appendix.

(2) Acts XX. of 1862; XXIV. of 1862; XVIII. of 1863; XXXII. of 1863. See Broughton Civil Procedure Code, 2nd ed. and 4th ed. p. 2.

(3) Acts IV. of 1860; XLIII. of 1860; XXIII. of 1861; IX. of 1863; XXVI. of 1867; VII. of 1870; XIV. of 1870; IX. of 1871; XXXII. of 1871; VII. of 1872; I. of 1877.

(4) Acts XVIII. of 1878; XII. of 1879.

(5) Repealed in part by Acts XIV. of 1885, s. 3; IV. of 1886, s. 2; X. of 1886, s. 24 (2); VIII. of 1887, s. 2 and sched.; XIII. of 1889; VIII. of 1890, s. 2; and amended by Acts VII. of 1888, ss. 3-6 4; XII. of 1891. Amended by Acts XV. of 1882, s. 3; VII. of 1887, s. 11; VI. of 1888, ss. 2-8; X. of 1888, ss. 1, 3; VIII. of 1890, s. 53; VI. of 1892, ss 2-4; V. of 1894; VII. of 1895, ss. 1, 2; XIII. of 1895.

"**Consolidate and amend.**"—The Code is a consolidating Act. The method of construction to be adopted in the case of such a Code has been expounded by Lord Herschell (1) in terms which have been adopted by the Privy Council (2) and cited and applied in other cases in this country.(3) Dealing with the English Bills of Exchange Act, which was intended to be a Code of the Law relating to negotiable instruments, he said—

"I think the proper course is, in the first instance, to *examine the language of the statute* and to ask what is its natural meaning, *uninfluenced by any consideration derived from the previous state of the law*, and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that, *on any point specifically dealt with by it*, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding, such as a demurrer to evidence. *I am, of course, far from asserting that recourse may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code.* If, for example, a provision be of *doubtful import*, such resort would be perfectly legitimate; or, again, if in a code of the law of negotiable instruments, words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the Code. I give these as examples merely; they, of course, do not exhaust the category. *What, however, I am venturing to insist upon is that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.*"(4)

It has been said that a reference to the previous history of the law and legislation on the subject is one of the means by which a Court is entitled to seek assistance in construing an Act of the Legislature.(5) And the practice of the Calcutta, Madras, and Bombay High Courts has been to consider as aids towards construction the history of the transition of an Act through the Legislature and to refer to the Reports of Law Commissioners, Proceedings of the Legislative Council, Reports of Select Committees, Draft of Bills and

(1) In Bank of England *v.* Vagliano Brothers, L. R. App. Cas. (1891), 107, at pp. 144, 145.

(2) In Norendra Nath Sircar *v.* Kamalbasini Dasi, 23, I. A. 18, 26 (1896).

(3) Dagdu *v.* Panchom Singh Gangaram, 17 B. 382 (1892); Damodura Mudaliar *v.* Secretary of State, 18 M. 91 (1894); Kondayya Chetti *v.* Narasimhulu Chetti, 20 M. 103 (1898); Lala Suraj Prosad *v.* Golab Chand, 28 C. 517 (1901).

(4) See also Administrator-General of Bengal *v.* Prem Lall Mullick, 22 C. 788; Lalla Suraj Prosad *v.* Golab Chand, 28 C. 517 (1901), and other cases discussed, *post*.

(5) Prabhakarbhat *v.* Vishwambhur Pandit, 8 B. 313 (1884); Administrator-General of Bengal *v.* Prem Lall Mullick, 21 C. 707, 771 (1894), *per* Trevelyan, J., citing Holme *v.* Guy, L. R. 5 Ch. D. 905.

Statement of Objects and Reasons. The Privy Council have, however, in the case of the Administrator-General of Bengal *v.* Prem Lall Mullick,(1) observed upon the use of these means of interpretation, expressing their disapproval of the practice of referring to the proceedings of the Legislature which result in the passing of an Act. A large number of decisions exist upon this question, which is one of some difficulty.(2)

It is, no doubt, a well-established rule of construction that when the terms of an Act are *clear and plain*, it is the duty of the Court to give effect to them as they stand, according to their plain meaning, neither adding to, nor subtracting from them. The Legislature must be taken to have intended to mean what it has so plainly expressed, and when the terms of an Act admit of but one meaning a Court is not at liberty to speculate on the intent of the Legislature, or to construe them according to its own notions of the reasons supposed to have been the cause of its enactment.(3) The primary question, in short, is not what may be supposed to have been intended, but what has been said.(4) Where, however, an Act has been considered *not* to clearly express the intention of the Legislature, it has for some years been the practice of the Calcutta, Madras, and Bombay High Courts (5) to consider (as aids towards construction) : (A) The history of previous Legislation,(6) (B) and of the transition of an Act through the Legislature, viz.

(1) 22 C. 788; S. C., 22 I. A. 107 (1895); followed in R. *v.* Sri Churn Chungo, 22 C. 1017, 1022 (1895).

(2) See an Article on the Interpretation of Statutes in the Madras Law Journal, vol. v. p. 280, by E. H. Monnier, where a full analysis of most of the cases here given will be found.

(3) Gureebullah Sircar *v.* Mohan Lall Shaha, 7 C. 127; Buzloor Ruheem *v.* Shumsoonnissa Begum, 8 W. R. P. C. 3, 12; R. *v.* Bal Krishna Vithal, 17 B. 577, 578.

(4) *Per* Lord Herschell in Brophy *v.* Attorney-General of Manitoba, L. R. (1895) App. Cas. 216.

(5) The Allahabad High Court held, on the other hand, in Kadir Baksh *v.* Bhawani Prosad, 14 A. 145 (1891), dissenting from R. *v.* Kartick Chunder Das, 14 C. 721, and Romesh Chunder Sangal *v.* Hiru Mondal, 17 C. 852, that in construing a statute the Court cannot refer to the statement of Objects and Reasons attached to a bill or to the report of a select committee, or to the debates of the Legislature, but can only look to the statute itself: and this rule as regards debates in Council was affirmed in Maharaj Tewari *v.* Har Charan, 26 A. 141, 147 (1903). It is, further, to be noted with regard to the Calcutta High Court that it was ruled, in 1862, by Sir M. Wells in Muddoosooden Dey *v.* Bama Churn Mookerjee, 1 Hyde, 100, that the meaning of an Act is to be gathered solely by reference to the Act itself and not to any official report of proceedings in the Legislative Council. These two cases are, therefore, in accord with the Privy Council case now considered. (Administrator-General of Bengal *v.* Prem Lall Mullick.)

(6) Prabhakarbhat *v.* Vishwambhar Pandit 8 B. 313 (1884) [held that the pre-existing state of law, as recognized by the Tribunals, is one of the chief means of interpretation]. In Fahamidnunissa Begum *v.* Secretary of State, 1886-1889, the High Court (14 C. 67), as well as the Privy Council (17 C. 590), fully reviewed the earlier legislation in order to determine upon the construction of Act IX. of 1847. Similarly the Allahabad Full Bench in R. *v.* Babu Lal, 6 A. 509 (1884), considered the provisions of English law and the repealed sections of the older Codes bearing upon ss. 24 and 27 of the Evidence Act, and the same Court, again in R. *v.* Ghulet, 7 A. 44 (1884), discussed the law as to alternative charges prior to the Penal Code. Sect. 132 of the Evidence Act was construed in R. *v.* Gopal Das, 3 M. 271 (1881), with reference to the previously existing state of the law on the point. And in the main case (Administrator-General *v.* Prem Lall Mullick), all the Judges in the High Court, including the dissentient Judge Petheram, C.J., referred to

(*a*) Reports of the Indian Law Commissioners ; (1)
(*b*) Proceedings of the Legislative Council ; (2)
(*c*) Reports of Select Committees of the Legislative Council.(3)
(*d*) Draft stages of a bill, (4) and
(*e*) Statements of Objects and Reasons,(5) attached to bills.

The question of the right to make use of these aids to construction came before the Privy Council in the case referred to. The Calcutta High Court in the previous and subsequent course of legislation in construing Act II. of 1874. *See also* R. *v.* Fischer, 14 M. 342 (1891), and numerous other cases.

(1) Shaik Moosa *v.* Shaik Essa, 8 B. 241 (1884), where Sargent, C.J., adopting the view of Lord Westbury in *In re* Mew, 31 L. J. Bankruptcy, 87 [where the Lord Chancellor referred to a Report of the Commissioners on Bankruptcy law], held that the Reports of Law Commissioners could be referred to in aid of the construction of a statute. In R. *v.* Ghulet, 7 A. 44 (1884), Duthoit, J., with the apparent approval of his colleague, Straight, J., referred to such reports. The admissibility of such reference was expressly ruled in Romesh Chunder Sanyal *v.* Hiru Mondal, 17 C. 852 (1890). However, in Tarack Nath Sircar *v.* Prosono Coomar Ghose, 19 W. R. 48, 53 (1873), Couch, C.J., said : "You cannot interpret Acts by Reports of Commissioners."

(2) Mathoora Kant Shaw *v.* India General S. N. Co., 10 C. 166 (1883) [reference by Prinsep, J., to speech of member in charge of a bill when moving for leave to bring it in, and when introducing a bill] ; Fadhu Jhala *v.* Gour Mohun Jhala, 19 C. 544 (1892) [a speech of a member introducing a bill and assigning its objects and reasons may be looked at] ; Yesu Ramji Kalnath *v.* Balkrishna, 15 B. 583 (1891) [Sargent, C.J., referred to speech of member when presenting Report of Select Committee on bill and moving its consideration] ; Fadhu Jhala *v.* Gour Mohun Jhala, *supra* [Prinsep, J., quoted speech of member in charge (Mr. Peacock) made even during debate]. But as to speeches of others upon a bill, it has been held by the Bombay High Court in Gopal Krishna Parachure *v.* Sakhojirav, 18 B. 133 (1894), that the debate on the bill, when before the Council, is not to be referred to. However, in Chunilal Panalal *v.* Bomanji Mancherji Modi, 7 B. 310, 315 (1883), Birdwood, J., referred to the speech not only of a member introducing a bill, but of a member speaking upon an amendment ; and *see also* Mahomed Jackariah *v.* Ahmed Mahomed, 15 C. 137 (1887). The Allahabad High Court, on the other hand, has held generally that the Courts cannot look to the debates of the Legislature : Kadir Baksh *v.* Bhawani Prasad, 14 A. 145 (1892) ; Maharaj Tewari *v.* Har Charan, 26 A. 144, 147 (1903) ; and see Goundu Pillai *v.* Thayammal, 14 M. L. J. 209 (1904).

(3) R. *v.* Kartick Chunder Das, 14 C. 721, 728 (1887) ; Romesh Chunder Sanyal *v.* Hiru Mondal, 17 C. 852 (1890) ; Fadhu Jhala *v.* Gour Mohun Jhala, 19 C. 544 (1892) ; Administrator-General *v.* Prem Lall Mullick, 21 C. 732 (1894) ; Yesu Ramji Kalnath *v.* Balkrishna, 15 B. 583, 585 (1891) ; Ramchandra Joishi *v.* Hasi Kassim, 16 M. 207, 210, 212 (1892) ; Mahomed Jackariah *v.* Ahmed Mahomed, 15 C. 139 (1887). The Allahabad High Court has, however, held to the contrary that these reports cannot be referred to : Kadir Baksh *v.* Bhawani Prasad, 14 A. 145 (1892).

(4) In R. *v.* Kartick Chunder Das, 14 C. 729 (1887), s. 22 of the Draft Bill on Evidence was referred to ; but in Shaik Moosa *v.* Shaik Essa, 8 B. 241 (1884), it was held that the Court could not look at the various forms in which a bill was brought before the Legislature.

(5) Fadhu Jhala *v.* Gour Mohun Jhala, 19 C. 545 (1892) ; Administrator-General *v.* Prem Lall Mullick, 21 C. 732 (1894) ; Shaik Moosa *v.* Shaik Essa, 8 B. 241 (1884). However, in Mathoora Kant Shaw *v.* India General S. N. Co., 10 C. 166 (1883), Prinsep, J., considered it unusual to refer to the Objects and Reasons, though he did in that case read an abstract from the Legal Member's speech containing the Objects and Reasons ; and in Kadir Baksh *v.* Bhawani Prosad, 14 A. 145 (1892), the Allahabad High Court held that the Objects and Reasons attached to a bill could not be referred to.

that case (The Administrator-General of Bengal *v.* Prem Lall Mullick), (1) in aid of the construction of Act II. of 1874, referred (*a*) to the course of legislation, (2) (*b*) the statement of the objects and reasons of the Act, (3) and (*c*) Report of the Select Committee.(4)

The Privy Council, before whom the case came in appeal,(5) held with regard to (*a*) that (i.) "a *positive* enactment in a statute of 1874 can not be qualified or neutralized by indications of intention gathered from *previous legislation* upon the same subject. And there is no legislation subsequent to that of 1874, with respect to the power of an executor to make over his office with all its rights and liabilities to the Administrator-General;" (6) and (ii.) that it is against reason and authority to maintain the proposition, "that in dealing with a *Consolidating* Statute, *each enactment must be traced to its original source*, and when that is discovered, must be construed *according to the state of circumstances which existed when it first became law*. The very object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the Consolidating Act is passed." (7) With regard to (*b*) and (*c*), the Privy Council observed as follows:—(8) "The two learned Judges who constituted the majority in the Appellate Court, although they do not base their judgments upon them, refer to the *proceedings of the Legislature which resulted in the passing of the Act of* 1874, as legitimate aids to the construction of sect. 31. Their Lordships think it right to express their dissent from that proposition. *The same reasons which exclude these considerations when the clauses of an Act of the British Legislature are under construction are equally cogent in the case of an Indian Statute.*"

The question next to be considered is how far, if at all, does this decision of the Privy Council affect the practice of the Indian Courts to which reference has been made. The result of their Lordships' decision appears to be as follows:—

(i.) *Pre-existing legislation* may still be referred to as an aid towards construction,(9) subject to this that (*a*) if the terms of an Act are *clear, positive, and express*, they cannot be modified or neutralized by indications of intention to be gathered from previous legislation upon the same subject; (*b*) that in the case of a *Consolidating* Act, it must be construed not with reference *to the circumstances existing at the time of the preceding Acts* but in relation to those *existing at the time of the Consolidating Act*.(10) This last *dictum*, it is conceived,

(1) 21 C. 732 (1894). In this case, Petheram, C.J., however, stated that in his opinion the history of the Act II. of 1874, was inadmissible to explain it, and that the Court ought not to consider what was the intention of the members of Council by whom it was introduced: ib., at p. 753. Trevelyan, J., also expressed a doubt on this point, ib., 775.

(2) Ib., 735, 751, 764, 766, 771.

(3) Ib., 737, 766, 767.

(4) Ib., 753, 766, 767.

(5) 22 C. 788 (1895).

(6) Ib., at p. 797.

(7) Ib., at p. 798.

(8) Ib., at pp. 799, 800.

(9) See cases cited *ante*, and (accepting the Privy Council test as to the English rules of Construction), Holme *v.* Guy, L. R. 5 Ch. D. 905, referred to by Trevelyan, J., in the High Court, 21 C. 771.

(10) See also *per* Lord Halsbury in Bank of England *v.* Vagliano Brothers, L. R. (1891) App. Cas. 107, 120. Nor is it an answer to the direct provisions of a particular section of an enactment to say that the enactment was described in terms as an enactment to consolidate, amend, and define the provisions of previously existing laws, and that the par-

refers to cases where the two sets of circumstances differ.(1) In all cases, however, the proper course is in the first instance to examine the language of the Act, uninfluenced by considerations as to the previous state of the law, and to resort to a consideration of the latter only if the meaning of the Act itself be not clear.

(ii.) *Reports of the Indian Law Commissioners.*—These were not referred to in the lower Court, and the Privy Council have said nothing directly as to their use. They have, however, indicated that the law in these matters should be the same as that which prevails in England, and according to this test reference is permissible. *See* Lord Westbury's view in the case of *In re* Mew, cited *ante*, p. 5, n. (1). In the case of Chuni Lal Mancharam *v.* Manishankar Atmaram,(2) the Bombay High Court in dealing with the Easements Act referred to the recommendations of the Law Commission.

(iii.) *Proceedings of the Legislative Council.*—Upon a reference to some of the terms of the Privy Council judgment, it would seem that reference to these is not now permissible. But in the case of *In re* Mew,(3) the Lord Chancellor read a speech made in the House of Commons by the member who introduced the Bankruptcy Bill of 1860. The Privy Council itself also in Hebbert *v.* Purchas,(4) referred to the Commons' and Lords' Journals, and to the details of a conference between the two Houses of Parliament. And in the Queen *v.* Bishop of Oxford,(5) Bramwell, J., read passages from the Lord Chancellor's Speech made in the House of Lords upon the Church Discipline Act. The Bombay High Court has, however, since held that it is not permissible to refer to the speech of the Legal Member of the Indian Legislative Council when proposing the enactment of a bill.(6)

(iv.) *Reports of Select Committees of the Legislative Council.*—These were referred to by the High Court in The Administrator-General *v.* Prem Lall Mullick. The Privy Council must, therefore, it seems, be taken to have disapproved of the reference to those reports, though reverting again to the English rule upon which the Privy Council rested their judgment, it appears that Sir George Turner, L.J., in Drummond *v.* Drummond,(7) referred to the proceedings of a Select Committee of which he had been a member. In the case of Assam *v.* Pathumma (8) the Madras High Court referred to the report of a Select Committee.

(v.) *Draft Stages of a Bill.*—These were not referred to in the principal case either in the judgments of the High Court or Privy Council. But they appear to fall within the principle of exclusion laid down by the latter, and

ticular rule contended for is not to be found among the previously existing laws. It is sufficient if the provision relied upon is a part of the Act, whatever the description of the purposes of the Act may be. Daimoddee Paik *v.* Kalim Tarafdar, 5 C. 300, 303 (1879).

(1) In the cases of *In re* Mew, 31, L. J. Bankruptcy, 87, a Consolidating Act was construed with reference to circumstances existing at the time of the earlier Act, where, however, the *circumstances had not changed* (as it had in the Privy Council case) at the time of the latter Act. *See* observations in Mad. L. J., *supra*, 289, 290.

(2) 18 B. 616, 625 (1893).

(3) 31 L. J. Bankruptcy 87, *supra*.

(4) L. R. 3 P. C. 648, 649.

(5) 4 Q. B. D. 535.

(6) R. *v.* Gangadhar Tilak, 22 B. 125-128 (1898).

(7) L. R. 2 Ch. App. 32, 45.

(8) 22 M. 494, 504 (1899).

there is but little authority to be found for their use. In Chuni Lal Mancharan *v.* Manishankar Atmaran (1) the Court referred to the Drafts of the Easements Bills of 1879 and 1881, as also to the opinions of the draftsman of the first-mentioned bill.

(vi.) *Statements of Objects and Reasons.* - These were referred to by the High Court in the principal case, and the Privy Council must, therefore, it seems, be taken to have disapproved of their use. The attachment of a statement of objects and reasons to a bill being a procedure peculiar to this country, there is no English authority upon the point. The preamble of an Act, which may be referred to, affords the nearest analogy. But if there be any grounds for the admission of reports of Select Committees or proceedings of the Legislative Council, it certainly seems that strong grounds also exist for the admissibility of these statements. In the case of the Delhi and London Bank *v.* Hem Lall Dutt,(2) Trevelyan, J., referred to the Objects and Reasons of the Easements Act, for the purpose of seeing what was the law at the time, and in the case of Chuni Lal Mancharam *v.* Manishankar Atmaran,(3) Candy, J., also referred to the statement of Objects and Reasons.

The Privy Council decision has been shortly referred to by the Calcutta High Court in the case of the Queen-Empress *v.* Sri Churn Chungo,(4) where Pigot, J. (Prinsep and Macpherson, JJ., concurring), said: "We do not propose to consider the history of the Penal Code from its original draft by Lord Macaulay in 1840, to its becoming law in 1860. Their Lordships of the Privy Council, in the recent case of the Administrator-General of Bengal *v.* Prem Lall Mullick, have held that it is not competent to refer to proceedings of the Legislature as legitimate aids to the construction of a law." This decision of the Privy Council was also referred to by the Bombay High Court in R. *v.* Gangadhar Tilak,(5) in which it was broadly stated that it is inadmissible to take as an aid in construing an Act the proceedings in the Legislative Council, which resulted in the passing of that Act.

In any case, and whether or not admissible to construe the Acts to which they relate, the Acts of the Legislature are instructive historically, if one has to consider not what the statute says, but what may have been the motives of one or other party in promoting the legislation.(6) And there is but little doubt that there will be a continued reference to such Acts, if not as technical at any rate as private, aids towards the comprehension of the intention of the Legislature.

The primary question in each case is, of course, What are the facts? It is, however, a common fault in this country to disregard the facts of a case in favour of authorities.(7)

The next question is, What are the words of the Code itself?

(1) 18 B. 616, 625, 626 (1893).
(2) 14 C. 839, 846 (1887).
(3) 18 B. 616, 625 (1893).
(4) 22 C. 1017, 1022 (1895).
(5) 22 B. 112, 126, 127 (1898).
(6) *Per* Edge, C.J., in Kadir Baksh *v.* Bhawani Prasad, 14 A. 149 (1892).
(7) In Kashinath *v.* Anant, 2 Bom. L. R. 47 at p. 49 (1899), Jenkins, C.J., dealing with ss. 16 and 17 of the Code, said: "In fact this case only illustrates how important it is that Courts should first ascertain with accuracy and appreciate the facts under consideration before turning their attention to the authorities."

The Act must be taken as one continuous Code, the different sections being simultaneously enacted in view of each other.(1) The Court must be governed by the language of the Legislature without considering what may have been its intention, if the words themselves are clear.(2) Its limited function is not to say what the Legislature meant, but to ascertain what the Legislature has said that it meant.(3) It is always dangerous to paraphrase an enactment, and not the less so if the enactment is perhaps not altogether happily expressed.(4) Where the Code contains provisions upon a particular question, it must be tested, not by general principles but by the expressions of the Code which relate to that question.(5) Where two procedures or two remedies are provided, one of them must not be taken as operating in derogation of the other.(6) In many cases reference has to be made to judicial precedent. For it is a principle peculiar to the English Common Law (7) that a decided case has an authoritative and binding force and is, subject to certain well-known limitations, to be followed in other similar cases. It is, however, an unfortunate circumstance that the greater bulk of the reported Indian cases deal with questions of adjective law; unfortunate because a great divergency of opinion, such as exists touching the interpretation of rules of procedure, limitation, stamp or registration, is to be avoided, involving, as it does, uncertainty in the administration of justice and an encouragement of appeals, which in many cases are due to the hope entertained of overturning the judgments of the lower Courts, not upon the merits, but upon some technicality or other.(8)

In this country the use of judicial precedent frequently leads to abuse.

Every case is independent of every other, and no decision upon facts forms a precedent for any other decision. And every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found. A case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it.(9) "The only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding

(1) Jonardan Dobey *v.* Ramdhone Singh, 23 C. 738, at p. 743 (1896).

(2) *In re* Mancharji, 5 Bom. H. C. R., O. C. J. 55, 58 (1868). Possibly this was meant, though it is not clear, when it was said, that for the application of Equitable considerations there is, as a rule, no room in matters of procedure: Debi Dayal *v.* Bhau Protap, 31 C. 433, 440, 441 (1903).

(3) Lala Surya *v.* Golab Chand, 27 C. 724, at p. 75[illegible] (1900).

(4) Durga Chowdhrani *v.* Jewahir Singh, 18 C. 23, at p. 30 (1890).

(5) Bhup Indar *v.* Bijai Bahadur, 23 A. at pp. 156, 157 (1900). As to the use of Headings, Interpretation Clauses, Illustrations, and Marginal Notes, see Authors' Evidence Act, 5th ed., pp. 100, 101.

(6) Ajudhia Prasad *v.* Balmukand, 8 A. 354 (1886), *per* Mahmood, J.; Rung Lall Misser *v.* Tokhun Misser, 25 W. R. 304, at p. 305 (1876).

(7) The Roman law and modern continental systems derived from it reject the notion. See Article in 6 Bom. L. R. 186.

(8) See Article in 7 Mad. L. J. 309.

(9) *Per* Lord Halsbury, L.C., in Quinn *v.* Leathem, 1901, A. C. 506; cited in Jehangir *v.* Secretary of State, 6 Bom. L. R. at p. 189 (1903), and see as to *dicta* Rowlandson *v.* Champion, 17 M. 21, at p. 27 (1893).

the case before him."(1) Lord Mansfield, C.J., said, "It certainly is very hard upon a Judge if a rule which he generally lays down is to be taken up and carried to its full extent. This is sometimes done by counsel, who have nothing else to rely upon; but great caution ought to be used by the Court in extending such maxims to cases which the Judge who uttered them never had in contemplation. If such is the use to be made of them, I ought to be very cautious how I lay down general maxims from the Bench."(2)

It is well to bear the remarks cited in the last paragraph in mind, though, of course, the nature of procedure law does not always admit of their application. In many cases the rules are of an artificial and arbitrary character, though in others, such as those dealing with bar by judgment or by suit and the like, questions of principle are widely involved.

As Holloway, J., said, the application to practical life of sound principles presents no more difficulty than that of empirical maxims (or, we may add, case law), based mainly upon a misunderstanding (or lack of understanding) of the great practical jurists, whom all admit to be the only guides.(3)

In questions of procedure it is generally important that there should be uniformity of decision, and that existing practice should not be upset,(4) for

(1) *In re* Hallet's Estate, 13 Ch. D. 712, *per* Jessel, M.R.; Osborn *v.* Rowlett, *per* Jessel, M.R., 13 Ch. D. 774, 785. See remarks of Edge, C.J., and Straight, J., in R. *v.* Gobardhan, 9 A. 528, 555, 575 (1887); R. *v.* Mahomed Humayoon Shaw, 13 B. L. R. 353 (1874). Lord Mansfield, in R. *v.* Bembridge, 3 Doug. 332, said: "The law does not consist of particular cases, but of general principles which are illustrated and explained in those cases"; and as to *dicta*, see remarks of Best, C.J., in Richardson *v.* Mellish, cited in R. *v.* Chagan Dayaram, 14 B. 346 (1890): "The expressions of every Judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion." Mr. Ramanathan, K.C., in his speech on behalf of the Ceylon Bar upon the news of the death of Sir John Phear, late Chief Justice of Ceylon, said: "The so-called 'uncertainty of the law' is nothing more than the uncertainty of ill-trained Judges as to the true facts of the case and the proper principles of law applicable to it. He (Sir John Phear) made the Bar argue cases upon first principles of law. Before his advent legal principles were of little avail in the determination of a case unless supported by a judgment of a competent Court here or in England. If in arguing an advocate cited a decided case without going into first principles he would say, 'I don't want authorities. Let us solve this case even as a mathematician would solve a problem by applying the axioms and propositions we have learned in our books.' If they passed on to authorities too speedily he would say, 'We do not want authorities just yet; they are only of corroborative value. Let us solve the question by the proper application of first principles and then look into authorities to discover whether our conclusions on first principles are corroborated by them.' In this way first principles became paramount" (Ceylon Court, April 10, 1905; *cor.* Sir Charles Layard, C.J., and Moncrieff, J.).

(2) Brisbane *v.* Dacres, 5 Taunton, p. 162.

(3) De Souza *v.* Coles, 3 Mad. H. C. R. 384, at p. 420 (1868).

(4) Fulkumari *v.* Ghanshyam, 31 C. 511, at p 513 (1903), *per* Rampini, J.; Mundal & Co. *v.* Fazul Ellahil, S. C. C. Rep. 2 of 1912, 3 Feb. 1914, *cor.* Jenkins, C.J., and Woodroffe, J. In Dymond *v.* Croft, 3 Ch. D. at p. 515, James, L.J., said: "What my decision would have been if this point had come before me in the first instance I need not say. The rule (as to substituted service) has already been construed by Huddlestone, B., in accordance with what seems to have been the general understanding of the Judges in Chambers, and it is very important that there should be uniformity of decision." And see *per* Edge, C.J., in Sheo. Prasad *v.* Lalit Kuar, 18 A. at p. 409: "Settled principles of law administered by a Court of Justice ought not to be lightly dis-

in such cases it is often not so much the nature of the rule as the fact that there is a fixed rule which really matters. In Sadasiva Pillai *v.* Ramalinga Pillai,(1) the Privy Council said: "The alleged consensus of the Indian Courts being thus established, their Lordships, whatever their opinion upon the construction of this clause might have been, had the question been *res integra*, do not think it would be right to run counter to so long a course of decision upon what is in fact merely a question of procedure, it being admitted that the plaintiff may assert rights of this nature, if they exist, in a separate suit."

"It is the duty of a Judge not to declare what he considers the law ought to be, but to decide what, according to the best of his judgment, he finds it is; and if he finds a principle laid down upon competent authority it is far better to accept and apply it broadly and honestly, even if he is not in his own mind satisfied with the foundation of the rule, than to attempt to fritter it away in its application to cases which manifestly come within it."(2) The reasons, however, which Judges have assigned for their opinions have not the same degree of authority as the decisions themselves.(3) As regards these, if two cases are not to be reconciled, the authority which is at once the more recent and the more consistent with general principles ought to prevail.(4) As already stated, if a principle is laid down upon competent authority it is far better to accept and apply it broadly and honestly, even if the Judge is not in his own mind satisfied with the foundation of the rule, than to attempt to fritter it away in its application to cases which manifestly come within it.(5) The same rule applies when dealing with the provisions of the Code itself. "We ought not," said Sir Barnes Peacock, C.J., "to fritter away the law by construing words according to a mere technical sense instead of giving them a broad meaning so as to embrace all cases intended by the Legislature to be provided for."(6)

The Courts here must be guided in the first place by the terms of the Code itself, and, secondly, by those decisions of the Indian Courts which interpret the Code and which are binding on them. The Subordinate Courts are bound to follow the rulings of the High Courts, to which they are subject, where there are different rulings of different High Courts,(7) and in the absence of such

turbed or doubt cast upon them without very sufficient reason." And as to overruling a series of precedents, see Prabhakarbhat *v.* Vishwambar, 8 B. 313, 317 (1884); Kusum Kumari *v.* Satya Ranjan, 30 C. 999, 1003 (1903).

(1) 15 B. L. R. 383, at p. 398 (1875); 5 C. 21 A. at p. 228.

(2) Usill *v.* Hales, L. R. 3 C. P. D. 327, *per* Lord Coleridge; R. *v.* Chagan Dayaram, 14 B. 352 (1890).

(3) Caledonian Railway *v.* Walker's Trustees, 7 App. 259.

(4) *Per* Lord Selborne, L.C., Campbell *v.* Campbell, 5 App. Cas. 787, 798. In the High Court a case of this kind would be referred to a Full Bench. See also Caledonian Ry. Co. *v.* Walker's Trustees, L. R. 7 App. Cas. 259, 279; Redgrave *v.* Hurd, L. R. 20 Ch. D. 1, 14. *Ex parte* Reynolds, ib., 294, 298. As to judgments of Courts of co-ordinate jurisdiction, see Gathercole *v.* Smith, 44 L. T. 439, 440; Smith *v.* Lambeth Assessment Committee, L. R. 10 Q. B. D. 327, 328, *In re* Buller's Settlement, 8 Jur. N. S. 205.

(5) *Per* Lord Coleridge, in Usill *v.* Hales, 3 C. P. D. 327.

(6) Hurro Chunder *v.* Shooroodhonee, 9 W. R. 402, at p. 406 (1868).

(7) Swamirao Narayan *v.* Kasinath Krishna, 15 B. 419 (1890); Balaji Ganesh *v.* Sakharam Parashram, 17 B. 555 (1892).

ruling will do well in following the decisions, if any, of other High Courts and Chief Courts in India. As regards the High Courts themselves, Norris, J., sitting on the Original Side of the Court, said, with reference to a decision of an Appellate Bench of the same Court, that though he was not prepared to say that he should consider every judgment of an Appellate Bench binding upon him when sitting on the Original Side, yet every such judgment should receive respectful consideration and careful attention and should be followed, unless the Court was very clearly of opinion that the conclusion arrived at was an erroneous one.(1) As regards Appellate Benches, all are bound by decisions of the Privy Council and by Full Benches of the same Court, and if one Appellate Bench differs from a previous decision given by another the matter must be referred for determination of a Full Bench.(2) The High Court is, however, not bound by, though it will give respectful consideration to, the decisions of another High Court. As regards other countries, reference may be made to English case law, when in point, as also to the decisions of those countries such as the United States,(3) whose law is derived from a common source with our own. As regards, however, the decisions of the United States Courts, citation should not be generally approved unless where it is shown to be necessary by reason of the novelty of the point involved and the want of Indian or English precedents.(4) As regards these latter it has, no doubt, been said that "the Code of Civil Procedure does not prevail in England, and we must interpret its terms as best we may without reference to English cases."(5) It is, however, submitted with all respect that this is neither a correct nor useful view of the matter. The Courts in this country can ill afford to disregard the results of the learning and experience of the English Judges. And for the most part they have been glad to avail themselves of both. This has been where either general legal principles are involved—principles of common application in all countries, or in those in which English notions of jurisprudence prevail—or in cases where similar provisions to those prevailing here exist elsewhere, as in the case of many sections of the Code which are based upon or taken from the English rules under the Judicature Act. Where it was argued that an English decision had no application to India, the Privy Council said, that though that case would not be binding as an authority upon a Court in India not administering English law, their Lordships were far from holding that, decided as it was on the application of

(1) Oriental Bank *v.* Gobind Lall, 9 C. 604, at p. 607 (1883) [but see Jubbayya *v.* Krishna, 14 M. at p. 191 (1890)], for example, the decision of an Appellate Bench might proceed upon law or practice different from that prevailing upon the Original Side of the Court. On the other hand, a decision on appeal from the Original Side would be clearly binding. See Saral Chand Mitter *v.* Mohun Bibi, 25 C., at p. 380 (1898).

(2) One Judge cannot refer to the Full Bench without the concurrence of the other, Chunder Kant *v.* Bindabun Chunder, 7 W. R. 277 (1867). A Judge of the High Court sitting alone to hear cases below Rs. 50 cannot make a reference to the Full Bench, Nabu Mondul *v.* Cholim Mullik, 25 C. 896 (1898).

(3) See Malcolm *v.* Smith, Taylor's Rep. 283, 288 (1848); Braddon *v.* Abbott, ib., 342, 349, *per* Sir Laurence Peel, C.J., Scaramanga *v.* Stamp, 5 C. P. D. 295, 303.

(4) See *In re* Missouri Steamship Co., 42 Ch. D. 321, 330, 331.

(5) Sourindra Mohun Tagore *v.* Siromoni Debi, 28 C. 171, at p. 175 (1900), *per* Rampini and Pratt, JJ.

a maxim expressing a principle recognized by the laws of all civilized countries, it did not afford a rule applicable to circumstances of the same character in India.(1) So also, West, J., in delivering the judgment of the Full Bench,(2) dealing with a question arising under sect. 622 of the former Code, said: "In such a conflict of opinions as has arisen on the subject we are now considering, it may be useful to see how similar questions have been dealt with by the Courts in England. Their decisions can, of course, only afford analogies, not precedents, for Courts so differently constituted as those in India; but these analogies point to principles of general application, and thus repay our attentive consideration." As already stated, many of the provisions of the Code are taken from the English Rules and Orders, and there is no reason why the decisions given on those Rules and Orders should not be applicable here, or on such portions of them as are of equal application in this country and in England. Where a principle declared in an English decision does not depend on any peculiarity in English law it may be applicable here.(3) Again, where a Colonial Legislature has passed an Act in the same terms as an Imperial Statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the Courts of the Colony,(4) though, of course, when the Indian Legislature has rejected or declined to follow the law of England upon a particular point the case is altogether different.(5)

It cannot, however, be too much insisted upon that procedure is mere machinery. Its rules should be observed; but it is to be remembered that these rules exist to enable the Courts, in a settled and convenient manner, to dispense justice. Mere technicality is to be avoided therefore as much as possible. This does not mean that the provisions of the Code are to be disregarded, but they are to be construed liberally, and if found to have been infringed it must be seen whether such infringement has affected the jurisdiction of the Court or the merits of the case.(6) Courts of law should be especially careful in dealing with technical objections to see what effect their decision will have in defeating substantial justice.(7) The Court may, however, find itself constrained to set aside an order on a ground which has unfor-

(1) Madras Railway *v.* Zemindar of Carvetnagarum, 22 W. R. 279, at p. 281 (1874).

(2) Shun Nathaji *v.* Soma Kashinath, 7 B. 341, at p. 359 (1883).

(3) Nandi Singh *v.* Sita Ram, 16 C. 677 (1888).

(4) Trimble *v.* Hill, 5 App. Cas. 342; Kathama Natchiar *v.* Dorasinga Tever, 2 I. A. 169. "We must construe each Act on its own wording and in accordance with its own context," Mata Din *v.* Kazim Husain, 13 A. at p. 457 (1891). In construing an Act provisions of other statutes which are in *pari materia* may be referred to, Assam *v.* Pathumma, 22 M. at p. 502 (1897).

(5) R. *v.* Ghulet, 7 A. 44, 50, 51 (1884).

(6) See s. 99, *post*. So the Judicial Committee will look to the essential justice of the case without considering whether matters of form have been strictly attended to, Ghirdharee Sing *v.* Korlahul Sing, 2 M. I. A. 344 (1840). In Bishishur *v.* Nam Churun, 5 All. H. C. R. 25, 28 (1872), Stuart, C.J., said that he did not desire to apply strict rules to any unnecessary requirements of legal art to work out the requirements of the Code.

(7) Haranund *v.* Prosunno, 9 C. 763, at p. 765, *per* Sir Richard Garth, C.J. (1883); S. C., 12 C. L. R. 556, 558; and see the dictum of Lord Denman, C.J., cited in Mahabala *v.* Kunhanna, 21 M. 373, at p. 381 (1898). "It is always unpleasant to defeat justice by adherence to technical and arbitrary rules."

tunately no relation to the merits of the case, as for want of jurisdiction, even though no objection has been taken by the parties.(1) So in the case now cited,(2) the Privy Council said: "This objection to the award was apparently not brought to the notice either of the Subordinate Judge or of the High Court. But the statute is there, and the Judges were bound to take judicial notice of it." And the Court is bound to take judicial notice of a change in the Statutory Law while a suit is pending, and a party is not estopped from calling attention to it, since the Court is taken to have known it.(3) And though it is exceedingly undesirable that any suit should fail on account of any technical objection, such, for instance, as that of misjoinder, at the same time when the objection is raised at the earliest opportunity, and when serious inconvenience and expense are likely to be caused to the parties, it is impossible for the Courts not to adjudicate upon the objection, and to relieve the parties from it.(4) Rules of procedure are, however, mere machinery; the means by which the Courts are enabled to dispense the justice for which they exist. As the Privy Council have said, it is of the utmost importance to the right administration of justice in the Courts of this country that it should be constantly borne in mind by them that by their very constitution they are to decide according to *equity* and *good conscience*, and that the substance and merits of the case are to be kept constantly in view.(5) Again, Lord Penzance said: (6) "Procedure is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve."

The Code is not exhaustive.—The Code is not exhaustive. It is not uncommonly thought that it is sufficient to defeat an application or to reverse an order that no particular section of the Code can be cited as an authority for it. It is true that Strachey, C.J.,(7) stated that the Code contained the whole law of Civil Procedure. We are not, however, aware of any other authority to this effect, and that observation was not adopted by Banerjee, J., in the same case, and both in earlier and later cases in the same Court it was held that the Code was not exhaustive.(8) The latter view, it is submitted, is undoubtedly the correct one, and is supported by numerous cases to which reference will be made. Indeed, in one of these, Mahmood, J., said: (9) "I may therefore at the outset state that, according to my view of the rules of construction applicable to statutes like the Civil Procedure Code, the Courts are not to act upon the principle that every procedure is to be taken

(1) Joynarain Singh *v.* Mudhoo Sudun, 16 C. 13 (1888); Vaithinatha Pillai *v.* R. (P. C.), 17 C. W. N. 1110 (1913).

(2) Raja Harnarain *v.* Chaudhrain Bhagwant, 13 A. 300, at p. 304 (1891).

(3) Lakshmi Bibi Kujrani *v.* Atal Bihary Aldar, 40 C. 534 (1913).

(4) Sudhendu *v.* Durga Dasi, 14 C. 435, at p. 438 (1887).

(5) Hunoomanpersaud Panday *v.* Musst Babooee, 6 M. I. A. at pp. 410, 411 (1856).

(6) In Kendall *v.* Hamilton, L. R. 4 App. Cas. at p. 525, cited in 22 A. 320.

(7) Habil Baksh *v.* Baldeo Prasad, 23 A. 167, at p. 173 (1901).

(8) Durga Dihal *v.* Anoraji, 17 A. 29, at p. 31 (1894); Dhonkal Singh *v.* Phakkar Singh, 15 A. 84, 95 (1893), *per* Sir John Edge, C.J.

(9) Narsingh Das *v.* Mangal Dubey, 5 A. at pp. 172, 173 (1882).

as prohibited, unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle, prohibitions cannot be presumed, and in the present case, therefore, it rests upon the defendants to show that the suit in the form in which it has been brought is prohibited by the rules of procedure applicable to the Courts of Justice in India."(1) This statement, if it is not to be liable to misconception, is in need of explanation and qualification. It is not to be supposed that it was intended to warrant any and every rule of procedure which a Court may arbitrarily choose to devise or to follow. It has been already pointed out (2) that the Code is exhaustive on the matters in respect of which it declares the law; that is, on any point *specifically dealt with by it*, the law must be ascertained by reference to its provisions. The Code, however, is not exhaustive in the sense that, for instance, the Evidence Act has been said to be, the second section of which, it has been held, in effect, prohibits the introduction of any kind of evidence not specifically authorized by the Act itself. The Code binds the Court so far as it goes.(3) If it prescribes a particular course in a particular case, that course must be taken. If, on the other hand, as in the case of the former section 561 (now omitted), it contains an express prohibition, the latter must be given effect to. Many matters are dealt with under a settled practice.(4) But even such a practice, however inveterate, cannot be legal if it is contrary to an express enactment or is inconsistent with it.(5) It was, however, pointed out by Wilson, J., in the case cited.(6) that if the Court had power before the introduction of the Code

(1) So in Radha Kishen *v.* Radha Pershad, 18 C. 515, 518 (1891), the Court held that in the absence of any provision in the Code directing an application to be made for execution of an entire decree, a second application for execution was not barred. See observation of Mahmood, J., "Everything is permissible unless there is some prohibition against it." in Muhammad Sulaiman *v.* Muhammad Yar Khan, 11 A. at pp. 287, 288 (1888).

(2) *Ante*, p. 9.

(3) Doorga Charan Dass *v.* Nitto Kally Dossee, 5 C. 859 (1880); Punchanun Singh *v.* Dwarkanath Roy, 3 C. L. J. 29 (1905); Hukum Chand Baid *v.* Kamalanand Singh, 3 C. L. J. 67 (1905).

(4) See Prabhakarbhat *v.* Vishwambhar, 8 B. at pp. 316, 317. "The established practice of the Court in matters of procedure is the law of the Court, unless it be inconsistent with some higher law or legal principle," *per* West, J., delivering judgment of Full Bench.

(5) Jehangir *v.* Secretary of State, 6 Bom. L. R. 210 (1904); Glyn *v.* Bonnaud, 2 Tayl. & Bell, 196, at p. 205 (1857). ["But if the practice has been departed from in this instance, what is the practice of a Court compared to the direction of a statute?" *per* Peel, C.J.] *A fortiori*, a definite provision of law cannot be evaded on the ground of convenience; Ram Prosad *v.* Sachi Dassi, 6 C. W. N. 585, at 589 (1902); Balkaran Rai *v.* Gobind Nath, 12 A. 129 (1890). In Palmer *v.* Hutchinson, 6 App. Cas. 619, cited in Bai Amrit *v.* Haribhai, 8 B. at p. 389 (1884), the P. C. said that "no practice of the Court can confer upon it any power or jurisdiction beyond that which is given to it by the charter or law by which it is constituted:" Shiva Nathaji *v.* Joma Kashinath, 7 B. 341, 344, 348 (1883). As to an incorrect practice, see Nathmull *v.* Malharrao, 19 B. 350, 351 (1844).

(6) Doorga Charan Das *v.* Nitto Kally, *supra*, at p. 820 (1880), followed, Punchanun Singh *v.* Dwarka Nath Roy, 3 C. L. J. 29 (1905); Hukum Chand Baid *v.* Kamalanand Singh, 3 C. L. J. 67 (1905).

to make an order, and that power is not expressly taken away by the Code, it must remain.(1) So it was held in that case, that although Chapter XXVI. of the former Code only provided for suits to be brought by a pauper, the Court had yet power to allow a defendant to defend *in formâ pauperis*. So also in a case (2) which dealt with the inquiry into the question of minority, where a suit was brought by a person professing himself to be adult, but denied to be such by the defendant, upon which an issue was raised for trial, the Court pointed out that sect. 442 of the former Code did not apply to the case, which was not provided for by the Code. It however referred to the practice which prevailed before the Code was passed, and held that that practice had not been abrogated by any provision in the Code, and must be considered to be in force.(3) As regards, therefore, matters not specifically dealt with by the Code, the Courts are empowered to act under and according to their original powers and practice. Cases may, however, arise for which no provision can be found, either in the Code or in previous enactments or practice. As the Code does not affect previously existing powers expressly given and acted upon, neither does it affect the power and duty of the Court to act according to the well-known rule (governing alike the rules of substantive and adjective law (4)) in cases where no specific enactment exists, according to justice, equity, and good conscience. The Court has therefore in many cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to do that justice for the administration of which it alone exists.(5) So it has been held that

(1) So the jurisdiction of the High Court to imprison for contempt, which it has inherited from the Supreme Court, and which was conferred upon that Court by the Charters which invested it with all the powers and authority of the then Court of King's Bench and Court of Chancery, has not been removed or affected by the Civil Procedure Code: Martin *v.* Lawrence, 4 C. 655 (1879). And see Legal Remembrancer *v.* Matilal Ghose (1913), 41 C. 173 (the Calcutta High Court can commit for a contempt within its original jurisdiction but not for contempt of a Mofussil Criminal Court); and *in re* Amrita Bazar Patrika, 17 C. W. N. 1253 (1913).

(2) Beni Ram Bhutt *v.* Ram Lal Dhukri, 13 C. 189, 190, 191 (1886).

(3) See also Ghanu Krishna *v.* Ram Das, 20 A. 162, 165 (1897); Rattan Bai *v.* Chabildas, 13 B. 7, 11 (1889).

(4) See s. 21, Beng. Reg. III. of 1793; s. 17 Mad. Reg. II. of 1802; Naoroji *v.* Rogers, 4 Bom. H. C. R., O. C. J. 1, at p. 27 (1867). See, now, Act XII. of 1887 (Bengal N. W. P. and Assam Civil Courts), s. 37 (2); and Act III. of 1873 (Madras Civil Courts), s. 16; Ishri *v.* Gopal Saran, 6 A. 351, 355 (1884 [the rule governs alike substantive and adjective law]; Lalla Sheo Churn *v.* Ramnandan Dobey, 22 C. 8, at p. 12 (1894), where the rule was applied in the absence of any statutory provision. These principles, however, are to be invoked only in cases for which no specific rules may exist—Ram Coomar *v.* Chandrucanto Mookerjee, 4 I. A. 23, 50 (1876); Jugdeo Narain *v.* Raja Singh, 15 C. 656, at p. 664 (1888).

(5) Panchanan Singha *v.* DwarkaNath Roy, 3 C. L. J. 29 (1905); Hukum Chand Baid *v.* Kamalanand Singh, 3 C. L. J. 67 (1905); Rasik Lall Dutt *v.* Bidhu Mukhi Dasi, 10 C. W. N. 719, 721 (1906); Gurdeo Singh *v.* Chandrikah Singh, 5 C. L. J. 611 (1907). Sir John Edge, C.J., said: "Although I am most reluctant to decide questions of procedure on the basis of Courts having inherent power to invent procedure for themselves, yet when I find that the Legislature has provided no procedure to be followed in cases which must and do arise, I am compelled to hold in such cases that such inherent power does exist in the Courts, for otherwise the work of the Courts could not be disposed of, and the Courts

although the Code contained no express provision on the matters hereinafter mentioned, the Court has an inherent power *ex debito justitiae* to consolidate suits; (1) to postpone the trial of some of several suits pending the decision of a test or governing action, (2) according to common practice to advance the hearing of the suit, or accelerate the hearing of an appeal; (3) to ascertain whether or not it has before it the proper parties; (4) to add (sect. 32 of the former Code not being exhaustive) parties; (5) to entertain the application of a third person to be made a party to a suit; (6) to allow a defence in *forma pauperis*; (7) to stay, on the ground of convenience, proceedings in a cross suit; (8) to inquire whether a plaintiff is, as he professes himself to be, an adult, and if the finding be in the negative, to suspend proceedings; (9) to decide one question and to reserve another for further investigation, the Privy Council pointing out that it did not require any provision of the Code to authorize a Judge to do what in this matter was justice and for the advantage of the parties; (10) to remand a suit in a case to which neither sect. 562 nor sect. 566 of the last Code applied; (11) to stay the drawing up of the Court's own orders, or to suspend their operation if the necessities of justice so require; (12) to dismiss an application for execution when the applicant fails through his own laches to put the Court in a position to proceed with his application; (13) to proceed forthwith to decide an application for

would have no power to bring litigation in such cases to a close." Dhonkal Singh *v.* Phakkar Singh, 15 A. at p. 95 (1893); and in Ranjit Singh *v.* Ilahi Baksh, 5 A. 520, 522 (1883). Stuart, C.J., spoke of those "who refused to know anything about procedure beyond the letter of the Code itself."

(1) Nehal Singh *v.* Alai Ahmed, 15 W. R. 110 (1871); Peacock *v.* Byjnath, 10 C. 58 (1883); Kalicharan *v.* Surja Kumar (1912), 17 C. W. N. 526. See notes to O. II. rr. 3, 6 and 7, *post*.

(2) See notes to same and Vithu *v.* Narayan, 5 Bom. H. C. R., A. C. J. 30, 32 (1868).

(3) Dharram Singh *v.* Kishen Singh, 12 C. L. R. 532, 533 (1883). As to the principle upon which the Court acts in allowing causes to be advanced, see Rawson *v.* Samuel, 1 Cr. & Ph. at p. 181, 182, where the Lord Chancellor said: "That it could not be assumed upon an application of this kind, that a cause would occupy but a short time in hearing; and that, although any objections which the defendant might personally make to the application were entitled to very little attention, yet that it was due to the other suitors of the Court, whose causes were also waiting to be heard, that no one should be allowed a precedence, unless upon some special reason being shown why justice could not otherwise be effectually administered in it, and that a strong case would therefore be required to justify a departure from the ordinary course."

(4) Muhammad Husain *v.* Khusalo, 10 A. 223 (1888).

(5) Gayanananda *v.* Kristo Chandra, 8 C. W. N. 404 (1901).

(6) Oriental Bank *v.* Charriol, 12 C. 642 (1886).

(7) Doorga Churn Dass *v.* Nitto Kally Dossee, 5 C. 819 (1880).

(8) Meckjee *v.* Kasowjee, 4 C. L. R. 282 (1879).

(9) Beni Ram Bhutt *v.* Ram Lal Dhukri, 13 C. 189, 191 (1886).

(10) Maulvi Muhammad *v.* Mahammad Abdul, 24 I. A. 22, 32 (1896).

(11) Durga Dihal *v.* Anoraji, 17 A. 29 (1894); Ganesh Bhikaji *v.* Bhikaji Krishna, 10 B. 398, at p. 400 (1886). See also notes to O. VI. r. 17; O. VII. r. 11, *post*, dealing with the cases where a Court of Appeal has amended a plaint and remanded the case for re-trial; the view expressed by Rampini, J., in Dhani Ram *v.* Bhagirath, 22 C. at p. 714 (1895), not having been accepted.

(12) Mussamut Brij Coomaree *v.* Ramrick Das, 5 C. W. N. 781, at p. 796 (1901); and see Hukum Chand Baid *v.* Kamalanand Singh, 3 C. L. J. 67 (1905).

(13) Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893).

execution on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application, and that act has not been done; (1) to stay, apart from the question whether the case fell within sect. 545 of the former Code, the carrying out of a preliminary order pending the hearing of an appeal; (2) to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stay; (3) to control the Court premises; (4) to admit an appeal from an order granting a review on a ground not referred to in sect. 629 of the last Code, but which is a necessarily appealable ground where an appeal is allowed; (5) to retransfer a suit withdrawn; (6) to deal with an application to set aside an order made *ex parte*, and to set it aside upon a proper case being substantiated; (7) and to set aside an order obtained by fraud and made without jurisdiction; (8) to amend a power of attorney by putting in the name of the attorney which has been omitted by mistake; (9) to rehear a matter before the order passed by the Court has been perfected (10). The Court in practice allowed amendments of written statements in cases not provided for by sect. 116 of that Code, as also amendments of applications for execution in cases other than those provided for by sect. 245 of the same Code.(11) It has been held that the Court has power to prevent an abuse of its procedure, and to stay or dismiss frivolous or vexatious actions; (12) to return a plaint after it has been presented and admitted; (13) or in cases not mentioned in sect. 57 of the last Code; (14)

(1) Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893).

(2) Balkishen Sahu *v.* Musst. Khugno, 8 C. W. N. 572 (1904).

(3) Punchanan Singh *v.* Dwarka Nath Roy, 3 C. L. J. 29 (1905).

(4) *In re* Khoda Bux Khan, 15 C. 638 (1888).

(5) Ramanadhan *v.* Narayanan, 27 M. 602, 607 (1904).

(6) Gurdeo Singh *v.* Chandrikah Singh, 5 C. L. J. 611 (1907).

(7) Bebee Tulsiman *v.* Harihar Mahato, 9 C. W. N. 81 (1903). The Full Bench adding that there was nothing in the Code to militate against this view: Sudevi Devi *v.* Sovaram Agarwallah, 10 C. W. N. 306, 310 (1906); Sheo Prosunno *v.* Buldharee Lall, 13 W. R. 232 (1870); Ramchandra Narayan *v.* Draupade, 20 B. 281, 283 (1895).

(8) Sarat Chandra Mookerjee *v.* Mahomed Hossein, 8 C. W. N. 468 (1904).

(9) Chayyemannessa *v.* Basirar, 37 C. 399 (1910).

(10) Padmabati *v.* Rasik, 37 C. 259 (1909), and it was held that the Court had power to assign a guardian *ad litem* to a defendant who was of unsound mind, though not so adjudged: Lakhya Dasya *v.* Uma Kant, 14 C. W. N. 256 (1909). This power is now given by O. XXXII. r. 15.

(11) Jiwat Dube *v.* Kale Charan, 20 A. 478 (1896). This was no doubt thought to be justified by reference to s. 647 of the last Code: Sattappa *v.* Jogi, 17 M. 67 (1893); but that section had no application to proceedings in execution which are proceedings in suits, and s. 245 of that Code had no words corresponding to clause (*c*) of s. 53 of the same Code.

(12) Atturmoney Dossee *v.* Bepin Behary Dhur, Suit 875 of 1904, Cal. H. C. Jan. 23, 1906. Pryag Singh *v.* Raja Singh, 25 C. 203, at p. 206 (1897). See notes in Annual Practice to s. 24, sub-s. 5 of the Judicature Act, 1873, and Lee *v.* Ashwin, 1 Times R. 291; scandalous counter-claim: Sham Kishore *v.* Shooshibhoosun, 5 C. 707 (1880); Zamindar of Tuni *v.* Bennayya, 22 M. 155, 158 (1898) [scandalous memorandum of appeal; where it was held Court had inherent power to stop abuse of its records].

(13) Prabhakarbhat *v.* Vishwambar, 8 B. 313, 318 (1884); the Calcutta High Court, however, has held that this was covered by s. 57 of the former Code. See notes to Ord. VII. r. 10.

(14) Ladhaji *v.* Hari, 1 Bom. L. R. 176 (1899).

or to restore to its files any case which the Court has itself removed therefrom undetermined, as where a case has been struck off under a misapprehension that the parties had settled it.(1) It has been held that if sect. 206 of that Code did not apply, the Court exercising appellate jurisdiction had an inherent jurisdiction to bring its decrees into accordance with its judgments,(2) and that although sect. 463 of that Code applied only to cases where persons have been adjudged lunatics under the statute, and was silent as to persons not so adjudged, the Court would, in the interest of justice (the provisions of Chapter XXXI. of the former Code not being exhaustive), appoint guardians *ad litem* of such persons, and allow them to sue by next friends.(3) A Court has inherent jurisdiction to amend the plaint and decree,(4) and to allow a set-off of costs against purchase-money in a case not provided for by sect. 211 of that Code.(5) So also it was held that though there was no special provision in the Code enabling the Court to refuse, on the ground of fraud, to confirm a sale, such as there was in the case of irregularity, neither was there any provision declaring that the Court should not have such a power; that there was no necessity for any special provision, and that if a Court were powerless to repress fraud, and was bound to ratify it, "equity and good conscience," the leading principles of administration of the law, are violated, and the Court had inherent jurisdiction to refuse to confirm the sale.(6) The Court has an inherent power to prevent an abuse of its processes, and is competent to reverse an order made in the absence of the opposite party without service of notice upon him, and which the law directs should be served.(7)

What has been said applies generally. Other questions arise in regard to the original side of the High Court, which has inherited all the jurisdiction and powers of the Supreme Court.(8) It has been held that the powers of the High Court in its original Civil Jurisdiction are not limited in all cases to those given by the Code, and in many respects its procedure is peculiar to itself.(9)

(1) Deen Dyal *v.* Ram Coomar, 9 W. R. 283 (1868).

(2) Muhammad Naim-ullah *v.* Ihsan Ullah, 14 A. 226, 229, 237 (1892).

(3) Nabbu Khan *v.* Sita, 20 A. 2 (1897); Venkatramana Rambhat *v.* Timappa Devappa, 16 B. 132 (1891); Kadala Reddi *v.* Narisi, 24 M. 504 (1901); Pransukhram Dinanath *v.* Bai Ladkor, 23 B. 653 (1899); Rasik Lall Dutt *v.* Bidhu Mukhi Dasi, 10 C. W. N. 719 (1906). This matter is now dealt with.

(4) Narayanasami *v.* Natesa, 16 M. 424, at p. 427 (1892), *per* Muttusami Ayyar, J., Karim Mahomed *v.* Rajooma, 12 B. 174 (1887) [the Court has inherent power over its own records so long as these records are within its power, and it can set right any mistake in them]; and this power, as regards decrees, was held to be independent of ss. 206, 582, and 632 of the former Code; Muhammad Naim-ullah *v.* Ihsanullah, 14 A. 226, 229, 237 (1892). See Ann. Pr., 1905, pp. 360, 361, notes to Ord. XXVIII. r. 11.

(5) Ishri *v.* Gopal Saran, 6 A. 351 (1884); for another *casus omissus* in pre-emption law, see Kashi Nath *v.* Mukhta Prasad, 6 A. 370, 373 (1884), and notes to Ord. XX. r. 14, *post*.

(6) Subbaji Rau *v.* Srinivasa Rau, 2 M. 264, at pp. 267–269 (1880). And see as to the inherent power in cases of fraud and misrepresentation: Birj Mohun *v.* Raibuna, 20 C. 8, at p. 9 (1892).

(7) Krishna Chandra *v.* Protap Chandra, 3 C. L. J. 276 (1906).

(8) Atturmoney Dossee *v.* Hurry Doss Dutt, 7 C. 74, 75 (1881).

(9) Mohabir Singh *v.* Kartick Singh, Suit 757 of 1896, July 31, 1905, Cal. H. C. Hirji Jina *v.* Narran Mulji, 12 B. H. C. R. 129, at

These instances (and there are doubtless others) are sufficient to show, firstly, that the Code is not exhaustive, there being matters with which it does not deal, and that in such cases the Court will, in the absence of any other express provision, exercise that inherent jurisdiction to do such justice between the parties as the nature of the case requires. There are, however, cases in which a question may arise whether the exercise of a power or the right to make an application is derived entirely from express legislation. So the right of appeal must be given by the enacted law, or equivalent authority,(1) and it has been debated whether a question of costs is one of procedure or one affecting vested rights,(2) in which case it was held that the power to award costs was derived entirely from Acts of the Legislature. As pointed out, however, by Sir Barnes Peacock, C.J., the laws cannot make express provision against all inconveniences, so that their dispositions shall express all the cases that may possibly happen; and it is therefore the duty of a Judge to apply them, not only to what appears to be regulated by their express provisions, but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law, or within the consequences that may be gathered from it.(3) So, as is well known, sects. 11-14 (formerly 13 and 14), of the Code do not embody the entire rule of *res judicata*, which as a principle exists independently of the statute enacting it; and indeed, even as regards sect. 13 itself (now sect. 11), it has been said that it cannot be applied too literally.(4) The principle has therefore been applied to cases with which the Code does not expressly deal.(5) In the undermentioned case,(6) Blair, J., said that there are cases of misfeasance grosser than anything provided for in the Code, and that he declined to believe that those are cases where a High Court must fold its hands and allow obvious injustice to be done. At the same time, it is well to bear in mind the observations of Sir John Edge, C.J., adopted by Sir John Stanley, C.J.: "Justice, equity, and good conscience," he said, "are captivating terms, and before a Judge applies what may appear to him at first sight to be in accordance with justice, equity, and good conscience, he must be careful to see that his views are based on sound general principles and

p. 136 (1875) [the Civil Procedure Code must be considered in conjunction with the rules and practice of this Court]. In Gobind Chandra *v.* Ganga Dhye, 17 B. L. R. 333, at p. 335 (1871), Phear, J., speaking of the original side practice as regards plaints, said: "We in some slight measure deviate from strict observance of the practice laid down in Act VIII. (of 1859) because . . . and this Court has power to mould its procedure as it thinks fit, only keeping as near as it reasonably can to the procedure prescribed by Act VIII." And see *per* Markby, J., in Cumming *v.* Green, 4 B. L. R. App. 75, 76 (1870), dealing with the question of appearance. "But in this Court the practice, ever since its establishment, appears to have departed in some respects from Act VIII." And see Jointee Chunder *v.* Anundo Lall Doss, 14 W. R. A. C. 1 (1865), where the Court held that though there was no power under the Code of 1859 to order parties not on record to pay costs, yet that the High Court had the same equitable jurisdiction in this respect as the Supreme Court had.

(1) Minakshi Naidu *v.* Subramanya, 11 M. 26 (1887).

(2) Yonosuke *v.* Ookerda, 21 B. 779 (1897).

(3) Hurro Chunder *v.* Shooroodhonee Debia, 9 W. R. 402, at p. 406 (1868).

(4) See *post*, notes to s. 11, *post*.

(5) Ib.

(6) Durga Dihal *v.* Anoraji, 17 A. at p. 31 (1894).

are not in conflict with the intentions of the Legislature, or with sound principles recognized by authority; (1) as also what was said by West, J., that the High Court, whose special function it was to curb any illegal excess of authority in others, must sedulously guard against such excess in itself, and resist the temptation which in some cases exists to transgress the proper limits of its authority."(2) The equity to be followed in the Courts of this country is natural equity or fairness, and is not affected by the particular meaning given to that word in English Law.(3)

It has been already pointed out that the jurisdiction to act in cases for which the Code has made no provision, rests upon the nature of the constitution of the Courts themselves and of the statutory rule,(4) enjoining them, in cases where no specific rule exists, to act according to justice, equity, and good conscience.(5) Vague notions are sometimes found to prevail with reference to clause 15 of the High Court Charter Act, 24 & 25 Vict. c. 104, which, however, has nothing to do with the matter now under discussion. This clause affects the High Courts only. To these it gives the power of superintendence over subordinate Courts. This power comes under the head of the appellate jurisdiction of the High Courts.(6) Under clause 21 of the Letters Patent, the law, equity and rule of good conscience to be applied by the High Court in the exercise of its appellate jurisdiction is the law, equity and rule which the Court in which the proceedings were originally instituted ought to have applied to the case. The proceedings therefore of a subordinate Court are revised under sect. 115 (formerly 622), or superintended under clause 15 on the ground that such Court did *not* comply with the law which governs it. In such cases, therefore, it is necessary to ascertain, firstly, what the law is which governed the subordinate Court in the proceedings complained of, and, secondly, to determine whether that law has been given effect to. It is obvious that a superior Court exercises jurisdiction under clause 15 or sect. 115 (formerly 622), only when the Court below has done wrong. Neither provisions apply when the Court below has done right—that is, has acted according to the law which controls it. If a subordinate Court declines jurisdiction because there is no section of the Code which empowers it to act, the High Court must determine whether it had an inherent jurisdiction or not in the matter. If it had, then the High Court interferes because the subordinate Court was bound to act according to justice, equity, and good conscience. The subordinate Court has jurisdiction, but declines to exercise it. On this the High Court interferes and compels the subordinate Court to exercise the inherent jurisdiction it has. Clause 15 does not enable the

(1) Ibn Hasan *v.* Brij Bhukan, 26 A. at p. 427 (1904).

(2) *In re* Pleaders of High Court, 8 B at 143 (1883).

(3) Debnaryan Dutt *v.* Chunilal Ghose, 41 C. 136 (1913). See Debnarain Dutt *v.* Ramsadhan Mondal, 17 C. W. N. 1143 (1913); Kwaja Muhammad Khan *v.* Husaini Begam, P. C. (1910), 32 All. 410; 37 I. A. 152; 14 C. W. N. 868.

(4) See *ante*.

(5) Hukum Chand Baid *v.* Kamalanand Singh, 3 C. L. J. 67 (1905); Rasik Lall Dutt *v.* Bidhu Mukhi Dasi, 10 C. W. N. 719, 721 (1906); Panchanan Singh *v.* Dwarka Nath Roy, 3 C. L. J. 29 (1905).

(6) See judgments in Chappan *v.* Moidin Kutti, 22 M. 68 (1898), dealt with in the notes to s. 115, *post*.

High Court to say, "It is quite true that the lower Court had no power to make the order; but we will." The power given by clause 15 is not an original but a superintending power. It assumes that the subordinate Court had jurisdiction but has wrongly declined to exercise it. If the subordinate Court had jurisdiction, it is because of the inherent power and duties cast upon it by the rule which binds it to act in all cases where no specific provision exists according to equity, justice, and good conscience. It has been recently held that proceedings on applications for enhancement of rent under sect. 27 of the Chota Nagpur Tenancy Act (Beng. VI. of 1908) are judicial proceedings, and the Deputy Commissioners in performance of their duties under that Act are Courts subject to the appellate jurisdiction of the High Court, which has jurisdiction to interfere when the Courts of Collectors have either exceeded, or failed or refused to exercise, the jurisdiction vested in them by that Act.(1)

Inherent jurisdiction.—The inherent jurisdiction of the Court to which reference has been made in the last paragraph has now been expressly recognized in sect. 151 of the present Code.

"The laws."—In the under-mentioned case,(2) Stuart, C.J., speaking of this expression as occurring in the Preamble of the preceding Code, observed that it meant all the laws in operation at the time of the passing of the Code, including the General Clauses Act of 1868; but, as has been pointed out,(3) this is not correct, as the expression must be used with the words "relating to the procedure," etc., and the General Clauses Act cannot be deemed a law "relating to the procedure of the Courts of Civil Judicature."

"Courts of Civil Judicature."—Subject to what is hereinafter stated, the Preamble shows that the Code applies to all Courts of Civil Judicature. Its provisions will therefore govern the procedure of all Civil Courts in British India, subject to the provisions contained in this preliminary portion of the Code, and to any other special Act providing a special procedure for proceedings under it. The general power to entertain suits of a Civil nature except suits of which cognizance is barred by any enactment does not include a general power to make declarations.(4) The Act applies to suits in the ordinary civil jurisdiction. As to other cases, see the following paragraphs:—

Special jurisdiction. (*a*) **Insolvency jurisdiction.**—Insolvency procedure is civil procedure. Insolvency procedure governing the Provincial Courts was formerly dealt with in the Code, but is now the subject of a separate Act (III. of 1907). The insolvency law applicable to the Presidency Towns of Calcutta, Madras, and Bombay, is contained in 11 & 12 Vict. c. 21 (1848). Clause 18 of the Letters Patent, 1865, provides that the Insolvent Court in these Presidency Towns shall be held before one of the

(1) Kartik Chandra Ogha *v.* Gora Chand Mahto, 40 C. 518 (1913); Chaitan Patgosi Mahapatra *v.* Kunja Behari Patnaik, 38 C. 83 (1911).

(2) Uda Begam *v.* Imad-ud-din, 2 A. 74, 90 (1878), dissenting from Full Bench ruling in Thakur Prasad *v.* Ahsan, see 1 A. 668 (1878).

(3) Hukm Chand, C. P. C. 1.

(4) Bai S. Vaktuba *v.* Thakore Agatsinghji, 34 B. 676 680 (1910).

Judges of the High Court (called the Commissioner in Insolvency), and the High Court and any such Judge thereof shall have and exercise within the Bengal Division of the Presidency of Fort William, and the Presidency of Madras and Bombay respectively, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India. The Insolvent Court in the Presidency Towns is constituted by a separate Act of Parliament. It is a Civil Court existing for the purpose of giving relief to persons unable to pay their debts. By the Royal Charter Act, 1861 (24 & 25 Vict. c. 104), upon the establishment of the High Courts the Supreme Courts were abolished. In 1862 and 1865 Letters Patent were granted. The Insolvent Court was not then merged in the High Court, but continued in existence side by side with the High Court. The appeal to the Supreme Court (Insolvent Act, sect. 73), and the power to make rules (ib. sect. 76), were transferred to the High Court.(1) But though the Insolvent Court is a separate tribunal from the High Court, it nevertheless stands in such a special relation to the High Court that a limitation or exclusion of the latter's jurisdiction may indirectly limit or exclude its own.(2) Sect. 5 of the Insolvent Act gives the jurisdiction, which is that of the Supreme Court. Sect. 18 of the Letters Patent declares the jurisdiction to be that constituted by the laws relating to Insolvent Debtors in India. But under clause 44 of the Letters Patent this is subject to the Legislative powers of the Indian Government. Therefore when Act V. of 1872 declared that the High Court at Bombay had no jurisdiction in Sind, it was held that the petition must be dismissed, though the Insolvent was a European British subject.(3) But the Supreme Court's jurisdiction was twofold local as regards the inhabitants of the cities and personal as regards European British subjects residing in any part of the territories subject to the Presidency Governments. So it was held that an European British subject residing in the Bombay Presidency, but outside the local limits of the High Court's jurisdiction, was entitled to petition; (4) and that though the personal jurisdiction did not now exist as regards civil actions, it had not been interfered with as regards the Insolvent Court. This would appear also to have been the view of Peacock, C.J.,(5) but not of Markby, J.,(6) though in the latter case the actual decision was that the jurisdiction of the Insolvent Court was limited to the Bengal Division of the Presidency of Fort William, that is Bengal proper, the petitioner's permanent residence being in the North Western Provinces.

The Insolvent Court is a Civil Court, its proceedings are civil proceedings and (as was apparent from Chapter XX. of the former Code now repealed) its procedure is Civil Procedure. But under sect. 120, nothing in this Code extends or applies to any Judge of a High Court in the exercise of

(1) *In re* Bhagwandas Hurjivan, 8 B. 511 (1884).

(2) *In re* James Currie, 21 B. 408.

(3) Ib. 405.

(4) *In re* George Blackwell, 9 Bom. H. C. R. 461 (1872); *In re* James Currie, 21 B. 405, 411 (1896).

(5) *In re* William Cockburn, 2 Ind. Jur. N. S. 326 (1867).

(6) *In re* Tietkins, an Insolvent, 1 B. L. R. O. C. 84 (1868).

jurisdiction as an Insolvent Court.(1) Orders in insolvency are not orders under the Code of Civil Procedure. They are orders under a special law, but they are under a special law in which different procedure is provided.(2) Execution is not taken out from this Court as it has no machinery for the purpose. Formerly the Insolvent Court availed itself of the machinery of the Supreme Court as auxiliary to its own. Subject to the provisions of the Charter Act and Letters Patent, the High Court exercises the same jurisdiction, took over all the work, and inherited all the powers that vested in the Supreme Court, whose jurisdiction it superseded. The Insolvency Act, however, has nothing to do with procedure in execution, which is governed by the Civil Procedure Code.(3) So although the Insolvent Court determines the substance of the questions relating to the insolvent's estate, the proceedings in execution and the judgment are the High Court's. Thus a judgment entered up under sect. 86 of the Insolvent Act, in the name of the Official Assignee against the insolvent, is entered up in the ordinary jurisdiction of the High Court.(4) The Provincial Insolvency Act does not interfere with any right of appeal to the Privy Council which may otherwise exist.(5)

(*b*) **Admiralty jurisdiction.** -The rules regulating Admiralty practice were framed when the Code of 1859 was in force. Rule 54 directs that proceedings not provided for by the rules shall be regulated by the rules and practice of the High Court in suits brought in it in the exercise of its ordinary original civil jurisdiction. The Code applies to proceedings on the Admiralty side of the High Court; sect. 645A of the former Code was held to show that this is so.(6) In Vice-Admiralty cases, the effect of appearance, the mode of objecting to the jurisdiction, and the mode of questioning the validity of a pleading,(7) the admission of appeals,(8) and costs (9) are matters governed by a settled practice under the Code, the Privy Council rules issued under Statute 2 & 3 Wm. IV. c. 51, having no operation, except in case of suits *in rem* in which no appearance has been entered, and of other matters to which the Code cannot be applied.(10) Though the Admiralty rules do not apparently contemplate a suit *in rem* and *in personam* being combined, they do not expressly or by necessary implication forbid it.(11) In a case such as an application for consolidation not provided for by either the Rules or the Code, the practice of the Court of Admiralty in England ought to be followed, so far as such practice can be applied to this country by analogy.(12)

(1) See *In re* Hormaiji Ardesir, 17 B. 334, 340 (1892), so s. 545 did not apply, ib. at 340.

(2) In the matter of R. Brown, 12 C. at p. 634 (1886).

(3) *In re* Bhagwandas Hurjivan, 8 B. 511, (1884).

(4) Navivahu *v.* Turner, 13 B. 520 (1889).

(5) Chataprat Singh Dugar *v.* Kharag Singh Lachmiran, P. C., 40 C. 685 (1913).

(6) Bombay and Persia S. N. Co. *v.* Shepherd, 12 B. 237, 240, 241 (1887).

(7) *In re* ship *Fanny Skolfield*, 17 C. 337 (1889).

(8) *In re* ship *Champion*, 17 C. 66 (1889).

(9) *In re* steamship *Drachenfels*, 27 C. 860, 889 (1900).

(10) *In re* ship *Fanny Skolfield*, *supra*.

(11) Bombay Persia S. N. Co. *v.* Shepherd, *supra*.

(12) *In re* ship *Falls of Ettrick*, 22 C. 511 (1895).

(c) **Testamentary and intestate jurisdiction.**—The procedure in testamentary and intestate jurisdiction, whether in the High Court (1) or Provincial Courts, is governed by the Indian Succession Act (X. of 1865), and the Probate and Administration Act (V. of 1881); and by these Acts the proceedings in relation to the granting of probate and letters of administration are, except as in those Acts otherwise provided, to be regulated, so far as the circumstances of the case will admit, by this Code.(2) In any case in which there is contention the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of this Code, in which the petitioner for probate or letters of administration, as the case may be, is the plaintiff and the person who may have appeared to oppose the grant is the defendant.(3) Although a petition before a caveat has been entered is not a suit in the ordinary acceptation of the term, sect. 647 of the former Code, which provided that the procedure for suits should be followed so far as it could be made applicable in all proceedings other than suits and appeals, made the provisions of the Code applicable to all miscellaneous civil proceedings. Having therefore regard to this section and sects. 238, 261 of the Succession Act, it has been held that Chapter XXXVI. of the former Code was applicable to petitions for probate.(4) If the provisions of the Code are inconsistent with those of the Probate and Administration Act, those of the Code must prevail, as it is the later enactment.(5)

The Code only applies so far as the circumstances of the case admit, and though generally applicable, the circumstances peculiar to testamentary cases must be considered. So though probate proceedings are generally regulated by the Code it was held in the undermentioned case that the Court was not justified under sect. 177 of the former Code (corresponding with O. XVI. r. 20) in deciding against a caveator because he refused to answer a question and in dispensing with proof of the execution of the will, though that section would be applicable under proper circumstances.(6) So also unless a will is proved in some form, no grant of probate can be made merely on the consent of parties. Hence an agreement or compromise as regards the genuineness and due execution

(1) Mr. Stokes in his Commentary on the Succession Act, expresses an opinion that, having regard to the definition of District Judge in s. 3 of that Act (and the same definition is repeated in the Probate and Administration Act), as "the judge of a principal Civil Court of original jurisdiction," this section applies to proceedings of High Courts in their testamentary and intestate jurisdiction and that their proceedings also must be regulated by this Code; *cf.* Umrao Chand *v.* Bindraban Chand, 17 A. 475 (1895); *In re* Monohur Mookerjee, 5 C. 756 (1880); Esoof Hasshim Dooply *v.* Fatima Bibee, 24 C. 30 (1896); Yeshwant *v.* Shankar, 17 B. 388 (1892); *In re* the will of Dawubai, 18 B. 237 (1893). By the Rules of the Calcutta High Court the procedure in all cases is to be regulated, so far as the circumstances of the case admit, by the rules of procedure laid down in the Succession Act, whether that Act itself applies to the law or not; and in cases in which such rules are inapplicable the procedure is to be regulated by this Code, Rule 65, Belchambers, R. & O.

(2) Act X. of 1865, s. 238; Act V. of 1881, s. 55.

(3) Act X. of 1865, s. 261; Act V. of 1881, s. 83.

(4) *In re* the will of Dawubai, 18 B. 237 (1893).

(5) Esoof Hasshim Dooply *v.* Fatima Bibee, 24 C. 30, 33 (1896).

(6) Ravji Ranchod Naik *v.* Vishnu Ranchod Naik, 9 B. 241 (1884).

of a will, if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of O. XXIII. r. 3, of this Code.(1)

(*d*) **Matrimonial jurisdiction.**—In the case of matrimonial causes, as regards matters of procedure, all proceedings under the Indian Divorce Act between party and party are subject to the provisions therein contained to be regulated by this Code.(2) Thus any question as to the time within which a respondent may file an answer to a petition is to be decided not by the Rules of the English Divorce Court but by the provisions of the Code dealing with written statements.(3) But by sect. 7 of the Indian Divorce Act, which does not apply to questions of procedure,(4) the Court is enabled to follow the principal rules of the English Divorce Act in all matters which are not expressly dealt with either in the Act itself or in the Code. Thus, the Court has adopted Rule 158 of the English Rules and ordered a husband to give security for his wife's costs.(5) In a recent case in the Bombay High Court where a Parsi had married a Christian in London and had remained there, it was held that the jurisdiction was limited to Christian subjects residing within the Presidency.(6)

Special Courts. (*a*) **Small Cause Courts.**—See notes to sects. 7 and 8, *post*. These are Courts of inferior jurisdiction, and when in a Presidency Town are subject to the order and control of the High Court.(7)

(*b*) **Mamlatdars' Court.**—The object of the Mamlatdars Act (Bom., Act III. of 1876) was to consolidate and amend the law relating to the powers and procedure of Mamlatdars' Courts. The purpose of the Act was temporary only, and chiefly to provide for the cultivation of the land and to prevent breaches of the peace until the Civil Court should determine the rights of the disputants, and such being its purpose the procedure provided is of a very summary character.(8) These Courts are Civil Courts and subject to the revisional jurisdiction of the High Court.(9) The Act, however, provides a

(1) Monmohini Guha *v.* Banga Chandra Das, 31 C. 357 (1903).

(2) Act IV. of 1869, s. 45.

(3) Abbott *v.* Abbott, 4 B. L. R. (O. C.) 51 (1869).

(4) Abbott *v.* Abbott, *supra*; King *v.* King, 9 B. 416, 419 (1882); the principles and rules referred to are rules of quasi-substantive rather than of mere adjective law. A. *v.* B., 22 B. 612 (1898).

(5) Mayhew *v.* Mayhew, 19 B. 293 (1894); followed in Georgucopulas *v.* Georgucopulas, 30 C. 619 (1902); and as to costs of appeal, Fowle *v.* Fowle, 4 C. 260, 269, 281 (1878).

(6) Nusserwanjee Pestonjee Ardesir Wadia Eleonora Nusserwanjee, 38 B. 125 (1913); Thornton *v.* Thornton, 10 B. 422 (1886), (jurisdiction of Calcutta High Court when defendant resident in England). See also Phillips *v.* Batho, 17 C. W. N. cclxi (1913).

(7) *In re* Juggessur Roy, 5 C. L. R. 170 (1879).

(8) Ganpatram Jebhai *v.* Ranchhod Haribhai, 17 B. 645 (1892).

(9) Kasam Sabeb *v.* Maruti, 13 B. 552 (1888); and as to the jurisdiction of the High Court over the Mamlatdars' Courts as subordinate Courts, and applications under s. 115, *post*, the cases therein cited and case in last note and Nathekha *v.* Abdul Alli, 18 B. 449; Dattatraya *v.* Vaman, 21 B. 88 (1895); Sayad Saifulla *v.* Sayad Haji Miya, 24 B. 238 (1899) [Minor may sue]; Chinaya *v.* Gangava, 21 B. 775 (1896) [dispossession of third person]; Ningappa *v.* Adveppa, 24 B. 397 (1900) [id.]; Balvantrao *v.* Sprott, 23 B. 761 (1899) [jurisdiction of Mamlatdar over officers of Government]; Som Gopal Bhogale *v.* Vinayak Bhikambhat, 25 B. 395 (1900) [natural water-course—obstruction—injunction].

special procedure, and there is no indication in it of any intention that the rules of this Code should apply to cases for which the special procedure makes no provision. The provisions of the Code therefore do not apply to such Courts in Bombay.(1)

(*c*) **Revenue Court.**—The term is defined in sect. 5, clause (2), *post*, which see. There is a distinction between Rent Courts and Civil Courts, as referred to in the Rent Acts; Civil Courts being Courts exercising all the powers of Civil Courts as distinguished from the Rent Courts, which only exercise powers over suits of a limited class. But a Rent Court is a Civil Court in the sense that it decides civil questions between persons seeking their civil rights.(2) It has therefore been a question in certain cases whether Rent Courts being Civil Courts in the latter sense their procedure is, in the absence of any special provision, governed by the Code. The answer to this question is to be determined not so much by an inquiry into the question whether they are Civil Courts, but whether, assuming they are such, the provisions of the Acts constituting those Courts do not exclude the provisions of the Code; in other words, are those Acts complete Codes in themselves or are they governed in matters upon which they are silent by the Code? This question, which has arisen with respect to Act XII. of 1881, and Act X. of 1859, is dealt with *post*.

In the majority of cases, however, no such question can arise, as most of the Tenancy Acts make special provision as regards the applicability of the Code to proceedings in Revenue Courts. In the case of Act XVIII. of 1881 (Land Revenue Central Provinces) the Code does not of itself apply, but the Chief Commissioner may, with the previous sanction of the Governor-General in Council, make rules consistent with the Act for regulating the procedure of Revenue Officers in cases for which a procedure is not prescribed by the Act, and may by any such rule direct that any provisions of the Code shall apply, with or without modification, to all or any classes of cases before Revenue Officers.(3)

The Punjab Tenancy Act (XVI. of 1887) provides that the Local Government may, with the previous sanction of the Governor-General, make rules consistent with the Act, for regulating the procedure of Revenue Courts in matters under the Act for which a procedure is not prescribed thereby, and may by any such rule direct that any provisions of the Code shall apply, with or without modification, to all or any classes of cases before those Courts. Until rules are made and subject to those rules when made, and to the provisions of the Act, the Code shall, so far as is applicable, apply to all proceedings in Revenue Courts whether before or after decree.(4)

The Lower Bengal Rent Act of 1869, now repealed, enacted that save as otherwise provided all proceedings under that Act should be regulated by the Code of Civil Procedure.(5) Under the provisions of the present Bengal

(1) Kasam Saheb *v.* Maruti, 13 B. 552 (1888).

(2) Nilmoni Singh Deo *v.* Taranath Mukerjee, 9 C 295, 300, 301 (1882); Ram Lochan *v.* Beni Prosad, 13 C. W. N. 791 (1908).

(3) Act XVIII. of 1881, [repealed in part and amended by Acts XVI. of 1889, XII. of 1891, and XII. of 1898], s. 19.

(4) Act XVI. of 1887 [amended by Reg. VII. of 1901], s. 88.

(5) Act VIII. of 1869, (B. C.) s. 34.

Tenancy Act (VIII. of 1885), the High Court may from time to time, with the approval of the Governor-General in Council, make rules consistent with that Act, declaring that any portions of the Code shall not apply to suits between landlord and tenant as such or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules. Subject to any rules so made, and subject also to the other provisions of the Bengal Tenancy Act, this Code shall apply to all such suits.(1) Sects. 121–127, 129, 305, 320 326 of the former Code and the corresponding sections of the present Code do not apply to suits for the recovery of rent, and special rules of procedure in respect of certain matters are prescribed for such suits.(2) No rules have been made by the High Court declaring any portions of the Code inapplicable to suits between landlord and tenant.

The N. W. P. Rent Act (XII. of 1881) appears to contain complete rules of procedure upon the trial of rent suits under it, and it was the opinion of Stuart, C.J., in the under-mentioned case,(3) that it was intended to exclude the provisions of the Code. But it was held by the Full Bench of the Allahabad High Court in that case, that the Courts of Revenue in the North Western Provinces, in those matters of procedure upon which the Rent Act of these provinces is silent, are governed by the Code, and that therefore the procedure furnished by sects. 43 and 373 of the former Code was applicable to suits tried under the N. W. P. Rent Act, 1881.(4) The grounds of that decision, which is, in fact, based upon the decision of the Privy Council in Nilmoni Singh Deo *v.* Taranath Mukerjee,(5) is that Revenue Courts are Courts of Civil Judicature within the meaning of the Code, and that unless exempted (which they were not) by the Code itself, they would in all matters, except those in which special procedure is provided in the Rent Act, be governed by the law of the Civil Code. The Full Bench decision does not apply where the Act provides a machinery of its own independent of the Civil Procedure Code, as in the case of references of suits to arbitration.(6) And though the procedure prescribed by the Code, such as that prescribed by sect. 285, of the former and sect. 63 of the present Code may be applicable as between Courts of Revenue of different grades, it cannot be applied where the conflict is between a Court of Revenue and a Civil Court.(7)

A similar question arose as regards the Bengal Rent Act, X. of 1859, which is still in force in certain places. Formerly it was held, following the Full Bench decision of the Allahabad High Court already referred to, that the

(1) Act VIII. of 1885, s. 143.

(2) Ib, s. 148, see also ss. 144–147, 145–154.

(3) Madho Prakash Singh *v.* Murli Manohar, 5 A. 406, 413 (1883), for amending Acts see Act IX. of 1887, VI. of 1888, s. 10 (2), XIV. of 1886.

(4) Ib.

(5) 9 C. 295 (1882); followed in Maharaja of Bhartpur *v.* Kachera, 19 A. 510 (1897) [Civil Procedure Code, ss. 37, 432]; Raghubar Dayal *v.* Banke Lal, 22 A. 182, 185 (1900) [Civil Procedure Code, ss. 285, 295]. In Onkar Singh *v.* Bhup Singh, 16 A. 496, 498 (1894), the Court said: "We find in Revenue Courts that when the Civil Procedure Code is to be applied it is expressly so provided, so that as a general rule they are outside the scope of the Code of Civil Procedure."

(6) Fahim-un-Nissa *v.* Ajudhia Prasad, 6 A. 170 (1884).

(7) Raghubar Dayal *v.* Banke Lal, 22 A. 182 (1900).

Revenue Courts in those matters of procedure, upon which the Act is silent, are governed by the Code, and that in consequence sect. 43 of the former Code applied to a suit instituted under the Rent Act.(1) The decision of the Privy Council in a preceding case (2) lends support to this view in so far as it was there held that though there was nothing in the Act which provided for execution beyond the Collectors' jurisdiction, there was nothing in it to forbid the conclusion that such executions were left to the operations of Act XXXIII. of 1852 (an Act to facilitate the enforcement of judgments in places beyond the jurisdiction of the Courts pronouncing the same), or the corresponding portion of Act VIII. of 1859 (Civil Procedure Code). When a decree for rent, made by a Collector under sect. 23, Act X. of 1859, is transferred for execution to a Civil Court, no doubt the latter assuming the transfer to have been validly made will act under the procedure which governs it. The Privy Council, however, went further and held that the Collector might make the transfer himself under the provisions of the Code which were applicable, there being nothing in the Rent Act to exclude them. It has, however, subsequently been held, upon the authority of the reasoning in the Full Bench decision in Nagendro Nath Mullick *v.* Mathura Mohun Parhi,(3) that Act X. of 1859 is a Code complete in itself, and unaffected by the general laws of limitation, and that therefore the provisions of this Code do not apply to cases under Act X. of 1859.(4) These cases proceed in substance upon certain of the grounds taken in the dissentient judgment in the Full Bench of the Allahabad High Court, viz. that apart from the question whether Revenue Courts are Civil Courts, and Civil Courts within the meaning of the Code, the enactment of a special procedure in a special Act excluded the supposition that it was intended to import into that Act the provisions of the Code upon matters not dealt with by that Act. If it had been so intended, it would have been so enacted, as was done in the subsequent Act of 1869. When, however, an appeal goes from a Collector to a higher Court, the decree which is given on appeal is the decree of a Civil Court, and a second appeal lies to the High Court, according to the same procedure which obtains in respect of second appeals in suits tried in the ordinary Civil Courts.(5) In other words, the removal of the matter to a Civil Court brings it under the provisions regulating the procedure of that Court.

In the case of a sale held under sect. 110, Act X. of 1859, it was held that sect. 310A. of the former (corresponding to O. XXI. r. 89, of the present) Code, did not apply, as the Code was applicable up to the sale, and not after it.(6)

The Code does not apply to cases under the Chota Nagpore Landlord and Tenant Procedure Act.(7)

(1) Adhirani Narain *v.* Raghu Mohapatro, 12 C. 50 (1885).

(2) Nilmoni Singh Deo *v.* Taranath Mukerjee, 9 C. 295 (1882); Hare Krishna *v.* Bishun Chandra, 35 C. 799 (1908).

(3) 18 C. 368 (1891).

(4) Mokunda Bullav Kar *v.* Bhogaban Chunder Das, 21 C. 514 (1894); Radha Madhub Santra *v.* Lukhi Narain Roy Chowdhry, 21 C. 428 (1893). *See* Chaitan *v.* Kunja, 15 C. W. N. 863 (1911).

(5) Sadai Naik *v.* Serai Naik, 28 C. 532, 537 (1901).

(6) Harish Chandra Ghose *v.* Ananta Charan Patra, 2 C. W. N. 127 (1897).

(7) Khedu Mahto *v.* Budhun Mahto, 27 C. 508, 514 (1900). Act I. of 1879, B. C., is modified by I. of 1903, and Bengal Acts IV.

Apparently the Code is applicable in cases under the Madras Rent Recovery Act.(1) But though sect. 43 (O. II. r. 2, of present Code) precludes a landlord from suing for rent not included in a previous suit, this does not preclude him from adopting any other remedy the law gives him to recover his rent, as for instance by distraint under the Rent Recovery Act.(2)

The Code saves any law by a Governor or Lieutenant-Governor prescribing a special procedure for suits between land-holders and their tenants or agents, and gives power to the Local Government to modify the Code in its application to Revenue Courts. See sects. 4 and 5, *post*.

Judicial discretion. The Code in many of its sections leaves matters dealt with thereby to the discretion of the Court. "Discretion when applied to a Court of Law means discretion guided by law. It must be governed by rule, and not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular."(3) In some sections the word "*may*" occurs. Great misconception is caused by saying that in some cases "*may*" means "*must*." It never can mean "*must*" so long as the English language retains its meaning, but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word "*may*," it becomes his duty to exercise it.(4)

Construction of act of Court. The assumption on which all rules of law are founded is that the constituted tribunals are fairly competent to carry them out.(5) According to the well-known rule, the Court may presume that judicial and official acts have been regularly performed.(6) The rule is to presume that a lower Court has done its duty; neglect of duty cannot be assumed at the mere suggestion of an appellant.(7) When an act of a Court can be so construed as to have an operation consistently with law, it would be contrary to ordinary rules of construction to attach to it another signification which would altogether destroy its effect (8) Courts, however, should take care that their orders are framed strictly in accordance with the provisions of the law.(9) The presumption of regularity is a rebuttable one. Irregularity may be shown, and a mistaken petition on the part of a pleader is no ground for the Courts passing an illegal order.(10)

of 1897, and V. of 1903, and VI. of 1908. And *see* Kartik Chandra Ogha *v.* Gora Chand Mahto, 40 C. 518 (1913) (appellate jurisdiction of High Court). For case where this Act was extended to a property before the final decree, *see* Lakshmi Bibi Kujrani *v.* Atal Bihary Aldar, 40 C. 584 (1913).

(1) Act VIII. of 1865 repealed in part of Act VII. of 1870; XII. of 1873, amended by Act VI. of 1888, and Madras Acts II. of 1871, and III. of 1890, and see Act I. of 1906.

(2) Rajah Eswara Doss *v.* Venkataroyer, 21 M. 236 (1897).

(3) *Per* Lord Mansfield in Wilke's Case, 4 Burroughs Rep. 2539, cited in Harbuns Sahai *v.* Bhairo Pershad Singh, 5 C. 259 (1879), 265; and see as to the manner in which judicial discretion should be used, observations of Jardine, J., in R. *v.* Chagan Dayaram, 14 B. 331 (1890), 344, 352.

(4) Nichols *v.* Baker, 44 Ch. D. 202. See cases cited in Rukm Chand, C. P. C. 337 340.

(5) Gopeenath Singh *v.* Anundmoyee Debia, 8 W. R. 167, 169 (1867).

(6) Evidence Act, s. 114, ill. (*e*). See notes to this section in Author's Evidence Act, 6th ed.

(7) Rash Beharee *v.* Nobaye Poddar, 11 W. R. 465 (1869).

(8) Saroda Persaud *v.* Lulchmeeput, 10 B. L. R. 214, at p. 229 (1872).

(9) Doucett *v.* Wise, 1 W. R. 322 (1864).

(10) Musst Ackjoo *v.* Lallah Ramchunder, 23 W. R. 400, 401 (1875).

PRELIMINARY.

1. (1) This Act may be cited as the Code of Civil Pro- [1
Short title, commencement and extent. cedure, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) This section and *sections 155 to 158* extend to the whole of British India: the *rest of the Code* extends to the whole of British India except the Scheduled Districts.

Local Extent: (*a*) **British India.**—These words exclude the territories of Native Princes and States in alliance with His Majesty, the relation between such Princes and His Majesty being a political relation, and the territories of such Princes and States forming no part of the British Dominions, although, in a political point of view, such Princes and States may be subordinate to the British Crown as the Paramount Power.(1) They were formerly declared (2) to mean the territories for the time being vested in Her Majesty by the Statute 21 & 22 Vict. c. 106 (1858), other than the settlement of Prince of Wales' Island (Penang), Singapore, and Malacca, and the first section of the statute there referred to vested in Her Majesty all territories then in the possession or under the Governments of the East India Company, and all territories which might become vested in Her Majesty by virtue of the rights transferred to Her Majesty from the East India Company. Apparently any new province acquired would become, on its acquisition, part of British India.(3) Cession of territory confers local jurisdiction.(4) The term includes territories ceded "in full sovereignty" or "in perpetuity," there being no difference between the two.(5) Prior to the General Clauses Act, 1897, it was held not to include cases where, as in the case of the British cantonment of Secunderabad, there has been no actual cession of territory; (6) nor in the case of Raj Kote, where the agreement between Government and the Native State, although in different respects dealing with the use of the land and conferring certain powers and jurisdictions on the officers of Government, did not relate to the sovereignty of the land; (7) nor as in the case of the Berars, where

(1) Bikrama Singh *v.* Bir Singh, 1888, P. R. No. 191. Cited in Hukm Chand, 3.

(2) S. 2, Act I. of 1868 (General Clauses).

(3) Ouseley *v.* Plowden, Boulu. 161, 162.

(4) Sayad Muhammad Yusuf-ud-din *v.* R., 2 C. W. N. 1, 9 (1897), in which case there was held to have been no cession of territory.

(5) Triccam Parachand *v.* Bombay Baroda Railway Co., 9 B. 244, 247, 248 (1885).

(6) Hossain Ali Mirza *v.* Abid Ali Mirza, 21 C. 177 (1893).

(7) R. *v.* Abdul Rahman, 10 B. 186 (1885).

land was held under a sort of mortgage as a security for the fulfilment of certain engagements, which was held to be a tenure distinguishable from that on which the Crown held land assigned to it in perpetuity for the purpose of establishing a British station.(1) The definition of the words given in the present General Clauses Act (X. of 1897) is wider than that given in the former Act of 1868. The expression "British India" is now defined to mean "all territories and places within Her Majesty's dominions which are *for the time being governed* by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India." The effect of this altered definition is to widen the extent of what will be recognized as British India for the purposes of Indian legislation, and to avoid the difficulties which arose from its restriction to the territories vested in Her Majesty by the Statute 21 & 22 Vict. c. 106. The question of the extent of British India will now, under the Code as well as under most other Acts, depend on the fact of the place or territory being *governed* by His Majesty without regard to the manner in which this government was acquired, and the result being the same whether it was acquired by cession or otherwise, and permanently or temporarily.(2) From the first and under both definitions, the words "British India" have had a wider meaning than is understood by the term when used in its merely geographical sense, as appears from the Scheduled Districts Acts, 1874, and the Laws Local Extent Act, 1874, the Schedules annexed to which mention, amongst other places, the Laccadive and Nicobar Islands and Aden as parts of British India.(3) So also British Burma is a part of British India.(4)

(*b*) **Scheduled Districts.**— The term is defined in Act XIV. of 1874 to mean the territories mentioned in the first schedule thereto annexed, and also any other territory to which the Secretary of State for India, by resolution in Council, may declare the provisions of 33 Vict. c. 43, s. 1, to be applicable. The conclusion that a district is a non-regulation district does not necessarily lead to the inference that the general Acts of Legislature are there inoperative. If the Legislature has made the law in terms large enough to extend to the whole of the British territories in India, it must have full effect. It must be seen in each case in what terms the law is expressed, especially in respect of its territorial operation.(5)

Definitions.

2. In this Act, unless there *is anything* repugnant in the subject or context,—

(*1*) "*Code*" *includes rules:*

(2) "decree" means the formal expression of an adjudication *which*, so far as regards the Court expressing it, *conclusively determines the rights of the parties with regard to all or any of the*

(1) Triccam *v.* Bombay Baroda Railway Co., *supra*, at p. 249.

(2) See Hukm Chand, 3.

(3) See Triccam *v.* Bombay Baroda Railway Co., *supra*, at p. 249.

(4) Aga Mahomed Hamadani *v.* Cohen, 13 C. 221, 223 (1886).

(5) Dick *v.* Heseltine, 1 N. W. P. 280, 284 (1869).

matters in controversy in the suit *and may be either preliminary or final. It shall be deemed to include the* rejection *of* a plaint and *the* determination *of* any question *within* section 47 *or section 144, but shall not include-*

(*a*) *any adjudication from which an appeal lies as an appeal from an order, or*

(*b*) *any order of dismissal for default.*

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final:

(3) "decree-holder" means any person in whose favour a decree *has been passed* or *an* order capable of execution has been made:

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court:

(5) "foreign Court" means a Court situate beyond the limits of British India *which has no* authority in British India *and is not* established *or continued* by the Governor General in Council:

(6) "foreign judgment" means the judgment of a foreign Court:

(7) "Government Pleader" includes any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader *and also any pleader acting under the directions of the Government Pleader:*

(8) "Judge" means the presiding officer of a *Civil* Court:

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order:

(10) "judgment-debtor" means any person against whom a decree *has been passed* or *an* order *capable of execution* has been made:

(*11*) "*legal representative*" *means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued:*

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, *but shall not include*

profits due to improvements made by the person in wrongful possession :

(*13*) "*moveable property*" *includes growing crops :*

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree :

(15) "pleader" means *any* person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court :

(*16*) "*prescribed*" *means prescribed by rules :*

(17) "public officer" means a person falling under any of the following descriptions (namely) :—

(*a*) every Judge ;

(*b*) every *member of the Indian Civil Service ;*

(*c*) every commissioned *or gazetted* officer in the military or naval forces of *His* Majesty, *including His Majesty's Indian Marine Service*, while serving under *the* Government ;

(*d*) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties ;

(*e*) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

(*f*) every officer of *the* Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

(*g*) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of *the* Government, or to make any survey, assessment or contract on behalf of *the* Government, or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of *the* Government, or to make, authenticate or keep any document relating to the pecuniary interests of *the* Government, or to prevent the infraction of any law for the protection of the pecuniary interests of *the* Government ; and

(*h*) every officer in the service or pay of *the* Government, or remunerated by fees or commission for the performance of any public duty :

(*18*) "*rules*" *means rules and forms contained in the First Schedule or made under section 122 or section 125 :*

(*19*) "*share in a corporation*" *shall be deemed to include stock, debenture stock, debentures or bonds : and*

(20) "signed," *save in the case of a judgment or decree*, includes stamped.

"**Code.**"—See as to Rules, sects. 121–131.

"**Decree.**"—The term was first defined in the Code of 1877 to mean "the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied." This definition, which was found defective, received, after several modifications, the form in which it was enacted in 1882. The present Code omits the words "upon any right claimed or defence set up in a Civil Court," substituting the words "*which conclusively determines the rights*," etc. As regards cases decided under the law prior to 1882, it was observed that the law has been altered by the introduction of a more comprehensive definition of the term "decree,"(1) and that a narrow construction should not be placed upon the language of sect. 2.(2) But, as has been held by the Privy Council, the question whether an adjudication is an order or decree is to be tested, not by general principles but by the expressions of the Code, and those words are to be construed in their plain and obvious sense.(3) Thus it has recently been held that an order assessing no value, but only reproducing the statements of the decree-holder and judgment-debtor,(4) and an order assessing the value according to the statement of the decree-holder alone, after rejecting the judgment-debtor's application for time to prove a higher value, are not decrees, since they do not involve a judicial adjudication of value.(5) There has been a considerable conflict of decisions on the former section, notably as to the question as to the meaning of the term "right" employed in the section, as will be seen from the following notes. The chief importance of the definition will be found in the question whether in any particular case an appeal lies. A decree, though not according to law, if not appealed against, is binding,(6) between the parties whether principal or *pro forma*,(7) and their representatives who, after decree, cannot open up the original proceedings.(8) It creates an obligation superseding that existing before it,(9) which is enforceable so long

(1) Khadem Hossein *v.* Emdad Hossein, 29 C. at p. 769 (1901).

(2) Radha Nath Singh *v.* Chandi Charan Singh, 30 C. at p. 663 (1903).

(3) Bhup Indar *v.* Bijai Bahadur, 23 A. at pp. 156, 157 (1900).

(4) Sakhichand *v.* Kulanand 14 C. L. J. 607 (1911).

(5) Deoki *v.* Bansi, 14 C. L. J. 35 (1911), referring to Saurendra *v.* Harrukchand, 12 C. W. N. 542 (1907).

(6) Sri Raja Papamma *v.* Sri Vira Pratapa, 19 M. 249, at p. 253 (1896) ; s. c., 23 I. A. 35.

(7) Trilochun Chuckerbutty *v.* Govind Chunder Roy, 1 Shome, 244 (1878).

(8) Ram Bhunjun *v.* Munder Koer, 23 W. R. 127 (1874).

(9) Navlu *v.* Raghu, 8 B. 303, 305 (1884) [and it is not subject to modification like a contract] ; Tatya Vithoji *v.* Bapu Balaje, 7 B. 330 (1883).

as the decree is not set aside in a suit constituted for that purpose; (1) but it must be enforced in execution, and does not support a new action,(2) though a second suit will lie for possession if the plaintiff has obtained merely formal possession under the first decree.(3)

"**Formal.**"—The expression of the Court's adjudication must be both deliberate and given in the manner provided by the Code. This word will, however, probably be not construed too strictly. In the under-mentioned case (1) the point might have been, but was not, taken, and was therefore not dealt with. Pigot, J., however, said: "I must add that had the point been raised I should have felt a difficulty in holding that a paragraph in the judgment, not drawn up in the form of a decree, and not embodied in a separate form, is, within the terms of the Code of Civil Procedure, a decree at all."

"**Adjudication.**"—An adjudication ordinarily exists where the Court exercises its mind in the determination of a contested cause. In the case of *ex parte* decrees in the Court of first instance, the Code speaks of them as decrees, and treats them as such. They come within the definition, the plaintiff being present, and there being an adjudication on the merits. Where, however, it was objected that a decree was not within this section, upon the ground that it was not passed after argument and after a judgment, but merely upon a default, viz. the non-appearance of the appellant, it was held that the decree was none the less a formal expression of an adjudication, because it was not preceded by an argument or by a judgment—written or otherwise.(5) An order of dismissal for default is now excepted.

"**Conclusively determines.**"—The expression "*decides*," which was employed in the last Code, was used to denote what is generally denoted by a "final" adjudication; the term "final" having been avoided apparently as it more usually denotes non-appealable, or rather conclusive.(6) Thus it has been said that when permission is given under sect. 373 (now O. XXIII. r. 1) to withdraw a suit or appeal, it does not decide the suit or appeal. When permission is given as regards the suit, the matter in issue is withdrawn from the adjudication of the Court, and when the order is made in the course of appeal, it decides nothing as to the merits of the decree of the first Court, but it merely wipes out that decree by reason of the suit being withdrawn.(7) And an order

(1) Cf. Huro Chunder Biswas *v.* Nobo Kissen Mookerjee, W. R. 159 (1864).

(2) Rash Munjoree *v.* Radha Soondaree, 23 W. R. 283 (1875); Mohunt Narsingh Doss *v.* Moonshee Kumrooddeen, 20 W. R. 412 (1873).

(3) Shama Churn *v.* Madhub Chandra, 11 C. 93 (1884); Juggobundhu *v.* Purnanund, 16 C. 530 (1889); Hari Mohan Shaha *v.* Baburali, 24 C. 715 (1897).

(4) Dulhin Golab Koer *v.* Radha Dulari Koer, 19 C. 452, 467 (1892). See as to the necessity for formality, Khadem Hossein *v.* Emdad Hossein, 29 C. 758 at p. 760 (1901).

(5) Radha Nath Singh *v.* Chandi Charan Singh, 30 C. 660, 662; s. c., 7 C. W. N. 486, 488 (1903); see cases, *post*.

(6) Hukm Chand, 19; as to the meaning of the word "final," see Balkaran Rai *v.* Gobind Nath Tewari, 12 A. 155, 156 (1890).

(7) Genda Mal *v.* Pirbhu Lal, 17 A. 97 (1895). *Vide post*, "The rights of the parties."

disallowing an application under sect. 372 (now O. XXII. r. 10), inasmuch as, although it may be a formal expression of adjudication on the right claimed to be made a party to the suit, yet such an adjudication does not decide the suit so far as regards the Court expressing it.(1) But an order dismissing an interpleader suit (under O. XXXV.) is a decree within the meaning of this section, for it is the formal expression of an adjudication on the defence.(2)

A final decree is sometimes understood as meaning the concluding and conclusive ruling of the Court as opposed to an interlocutory order.(3) In another sense a decree becomes final when the time for the last appeal allowed has expired, or, if appealed, it has become final by the decree of the High Court as the ultimate Court in the country.(4) It is not, however, necessary that the decree should be final in the sense that there is nothing further to de done. Questions may have to be determined in order to carry the decision into effect. Where a decree ascertains and fixes the rights of the parties, the fact that further proceedings before a Master, Referee, or other person are necessary to carry it into effect, does not render it any the less final, if all the directions depending on the result of the proceedings are given in the decree.(5) Thus an order determining that a certain person is a partner in a business, and directing an account to be taken, is a decree.(6) While every decree consists of a final adjudication, such decrees are termed interlocutory or preliminary, whilst those that bring the suit to an absolute end are termed final. So again the preliminary decree for partition adjudicates the plaintiff's right to obtain a partition, and practically decides the suit. All that remains to be done being an inquiry into minor matters necessary for the final disposal of the case.(7) The fallacy in the objection to treating the preliminary order as a decree lay in treating the words "*deciding the suit*" as equivalent to finally disposing of the suit, it being argued that the suit is not disposed of until the arithmetical result is worked out. In the case of the preliminary order everything has been decided, except what physical pieces of property will be the equivalent of certain shares. Therefore an order in a suit for partition, which declares the specific rights of the parties and the property to be partitioned, decides that the suit must be decreed, as after such an order the suit could not be dismissed by the Court by which it was made, and is therefore an order which adjudicates upon the right claimed and the defence set up in the suit, and which, as far as the Court expressing it is concerned, decides the suit within the definition of a "decree," and is

(1) Lalit Mohan Roy *v.* Shobock Chand Chowdhry, 4 C. W. N. 403 (1900); Jamna Bibi *v.* Sheikh Jhan, 24 A. 532, F. B. (1902); Tej Singh *v.* Chabeli Ram, 24 A. 342 (1902).

(2) Orr *v.* Chidambaram, 33 M. 220 (1909).

(3) See Neill *v.* Duke of Devonshire, 8 App. Cas. 135, 165; Khadem Hossein *v.* Emdad Hossein, 29 C. 758, at pp. 764, 765 (1901).

(4) Shaikh Ewaz *v.* Mokuna Bibi, 1 A. 132 (1876); Ram Sahai *v.* Gaya, 7 A. 107 (1884).

(5) See Hukm Chand, 21, 22.

(6) Biswa Nath Chaki *v.* Beni Kanta Dutta, 23 C. 406 (1896). See *post* as to order directing accounts.

(7) Bepin Bihari Moduck *v.* Lal Mohun Chattopadhya, 12 C. 209 (1885); Bholanath Das *v.* Sonamoni Dasi, 12 C. 273 (1885), distinguished in Bhoobun Moyi Dabea *v.* Shurut Sundery Dabea, 12 C. 275 (1885), in which case the position of some only of the parties was determined, but no declaration was made of the exact rights of each of the parties; and see Bharat Indu *v.* Yakub 35 A. 159 (1913).

therefore appealable as a decree.(1) These decisions have now been recognised, and the section expressly includes a preliminary decree.

An order, however, passed in a suit for partition, subsequently to the preliminary decree, appointing a commission to make the partition, is not an order in execution, and, therefore, is not appealable under sect. 244 (now sect. 47) of the Code. It is an interlocutory order pending the suit which has not been finally decided; and the appellant may take objection to it in an appeal against the final decree.(2)

An order directing accounts (see O. XX. r. 16) was not appealable by the Codes of 1859 or 1877. It was only when the amending Act of 1879 was passed declaring that such an order came within the definition of a decree that it became appealable; (3) and it is still within the definition as a preliminary decree. The definition of "decree" implies that an order directing accounts is separable from the rest of the decree adjudicating on the rights claimed or the defences set up in the suit, and therefore though a provisional decree, is appealable.(4) An order determining that a certain person is a partner, settling the shares of each of the partners in a business and directing an account to be taken, is a decree and is appealable, and was held to be so appealable in a preliminary stage or when appealing from the final decree.(5) But where in a decree to take accounts an order was made which was a mere matter of procedure and not a question as to the rights of the parties, such as an order refusing to require the defendants to give inspection of certain books, the order was held not to be a decree or an order on a question relating to the execution of a decree.(6) Moreover, the words "*directing an account to be taken*" were held to be used in a precise and technical sense.(7) Accordingly an order declaring that the defendants were liable to pay such sum as the Government Surveyor might certify was held not to be a decree, as it neither came within these words nor was an adjudication which decided the suit.(8) The substitution

(1) Dulhin Golab Koer *v.* Radha Dulari Koer, 19 C. 463, F. B. (1892); followed Boloram Dey *v.* Ram Chundra Dey, 23 C. 279 (1895). This latter case is overruled on the point whether the preliminary order can be questioned for the first time in the appeal from the final decree by Khadem Hossein *v.* Emdad Hossein, 29 C. 758 (1901), which decides the question in the affirmative. But see now s. 97.

(2) Jogodishury Debea *v.* Kailash Chundra Lahiry, 24 C. 725 (1897); it is an order made in further proceedings in the suit before final decree, and not an order in execution of decree, ib., at p. 739.

(3) Biswa Nath Chaki *v.* Beni Kanta Dutta, 23 C. 406, 409 (1896). As to the earlier law, see Sreenath Roy *v.* Radhanath Mookerjee, 9 C. 773 (1882); Rustomji *v.* Kessowji, 3 B. 161 (1878). An omission to appeal against the preliminary order was held not to debar the party from questioning it on appeal from the final decree: Khadem Hossein *v.* Emdad Hossein, 29 C. 758; s. c., 5 C. W. N. 617 (1901). But as to appeal see now sect. 97. As to the nature of a decree for account, see Bhup Indar *v.* Bijai Bahadur, 23 A. at p. 156 (1900).

(4) Krishnasami Ayyangar *v.* Rajagopala Ayyangar, 18 M. 73, 87 (1894).

(5) Biswa Nath Chaki *v.* Beni Kanta Dutta, *supra*; approved in Khadem Hossein *v.* Emdad Hossein, 29 C. 758, *supra*, overruling Boloram Dey *v.* Ram Chundra Dey, 23 C. 279 (1885). See Rahimbhoy Habibbhoy *v.* Turner, 18 I. A. 6 (1890); s. c., 15 B. 155; but see now sect. 97.

(6) Rustomji *v.* Kessowji, 8 B. 287 (1884).

(7) Coverji Luddha *v.* Morarji Punja, 9 B. 183, 195 (1885).

(8) Ib.

of the words "*conclusively determines*" for "decides" does not appear to effect any change in the law as above stated.

"**The rights of the parties.**" The last Code used the words "*right claimed or defence set up.*" There can, we think, be little doubt that what the Legislature originally meant by these words to refer to, were rights of a substantive as distinguished from rights of a merely processual character. In other words, that a decree was, so far as the right claimed, an adjudication on the merits (that is, the right to recover land, money, etc., claimed in the suit), and so far as the defence set up, an adjudication on the defence which might be grounded either on the merits, using that term in its generally accepted sense, or on some point of law affecting the merits, such as limitation. The contrary construction,(1) namely, that the right might be one merely of procedure, appeared to be negatived both by the general language of the section and by the circumstance that if it were correct there could not be any occasion for specifically making an order rejecting a plaint, a decree, as such an order directly involves an adjudication against the plaintiff's right to proceed with the suit as brought by him (2)

The view here contended for has been expressly adopted or applied in several cases. In an early case Wilson and Field, JJ., were disposed to hold that a decree must be an expression of opinion upon the rights of the parties, and therefore the dismissal of a suit on a ground wholly apart from the merits of the case, such as a dismissal under sect. 97 (now O. IX. r. 2) for non-service of summons, was not a decree.(3) It has been held that a decision under sect. 5 of the Court Fees Act is not a decree, and that the right obtained or defence set up must be a right or defence set up in the suit or appeal, and not a right to have the suit or appeal heard on a particular stamp or the plaint or the memorandum of appeal rejected on account of the stamp.(4) Similarly it has been held by the Allahabad High Court,(5) and was formerly held by the Calcutta High Court,(6) that the order of dismissal of an appeal under sect. 556 (now O. XLI. r. 17) is not a decree. It was observed by the Court in the first of the Calcutta cases cited that such an order was not "*the formal expression of an adjudication upon a right claimed;*" that through the

(1) Contended for in Hukm Chand, 15, 16.

(2) The explanation, ib., 16, that this may have been expressly provided for *ex cautela*, does not seem to us to have much force.

(3) Luckhy Churn Chowdhry *v.* Budurunissa, 9 C. 627 (1882); but see comment on this case in Maharaj Adhiraj Mansingji *v.* Mehta Hariharlam Nashariam, 19 B. at p. 308 (1894), referred to *post*. Previously it had been held that a decision directing a penalty to be enforced under the Stamp Act was not appealable as a decree, as it could not be said to affect the merits of the case or jurisdiction of the Court: Sonaka Chowdhrain *v.* Bhoobunjoy Shaha, 5 C. 311 (1879).

(4) Balkaran Rai *v.* Gobind Nath Tewari, 12 A. 129, 156; F. B. (1890), but a distinction must be drawn according to the decisions of the other High Courts between a question "relating to valuation" and a question as to the clause under which valuation is to be made. In the latter case there is an appeal: Dada *v.* Nagesh, 23 B. 486 (1898).

(5) Mukhi *v.* Fakir, 3 A. 382 (1880); Mansab Ali *v.* Nihal Chand, 15 A. 359 (1893).

(6) Jagarnath Singh *v.* Budhan, 23 C. 115 (1895); Anwar Ali *v.* Jaffir Ali, ib., 827; dist. in Lal Narain Singh *v.* Mahomed Rafuiddin, 28 C. 81 (1900) (dismissal for default in execution).

default the appellant had rather lost his right to obtain the adjudication of his right claimed in the proceedings or suit; that the mere right to be heard did not come within the definition of a decree. It was, however, held by one of the Judges of the Bombay High Court,(1) and more recently by a Full Bench of the Calcutta High Court (2) (Prinsep, J., dissenting), that such an order is a decree on the ground as stated by the Bombay High Court that it is an adjudication adverse to the appellant's right to have his appeal heard and it decides the appeal. In the last case it was argued with, as it is submitted, considerable force that the word "right" means a substantial right arising out of the merits of the case; that the juxtaposition of the words "right claimed" and "defence set up" showed that the right asserted or sought to be enforced meant the right asserted or sought to be enforced in the suit or appeal. It must have some connection with the relief sought, and therefore with the merits of the case, and does not connote the processual right of a party to be heard, which is ancillary to the enforcement of the substantive right claimed in the suit or appeal itself. It was further argued that the words "defence set up" cannot mean the mere opposition by a defendant or respondent to his adversary being heard, but must mean an answer to the relief sought. There must be an adjudication of right, and in the case of a dismissal for default the Court declines to adjudicate and does not enter into the merits of the case. These contentions were overruled by the majority of the Court.(3) Previously, moreover, it had been held by the Calcutta,(4) the Allahabad (5) and Madras (6) High Courts, that the analogous case of the dismissal of a suit under sect. 102 (now O. IX. r. 8) was not a decree. On the other hand, it has been held that an order under sect. 381 (now O. XXV. r. 2), dismissing a suit for failure to furnish security for costs, is a decree notwithstanding that the right adjudicated upon in the order under sect. 381 is the plaintiff's right to sue and not the right which he claims in the suit.(7) On the other hand, an order rejecting an appeal under sect. 549 (now O. XLI. r. 10) for failure to furnish security has been held not to be a decree,(8) the Court observing that the adjudication must be on a right

(1) Ramchandra Pandurang Naik *v.* Madhar Purushottam Naik, 16 B. 23 (1891).

(2) Radha Nath Singh *v.* Chandi Churn Singh, 7 C. W. N. 486 (1903), where the case is better reported than in 30 C. 660, and cases there cited; referred to in Gosto Behary Sardar *v.* Hari Mohan Adak, 8 C. W. N. 313 (1903), in which it was held that an order under s. 102 of the former Code dismissing a suit was as much a decree as an order under any other section deciding a suit.

(3) The grounds given by the referring judgment were that the order was the expression of an adjudication which was formal, and which decided the appeal. The question, however, remains was it a formal decisive adjudication of a "right" in the sense in which that word is used in the section? See pp. 488, 489, 7 C. W. N.

(4) Amrito Lal Mukherjee *v.* Ram Chandra Roy, 29 C. 60 (1901); it may, however, be contended that, as this case appears to have proceeded upon the two cases overruled by the last-mentioned Full Bench case, it also is impliedly dissented from. But see also Chand Kôur *v.* Partab Singh, 16 C. 98, in which the Privy Council held that the dismissal of a suit in terms of s. 102 of the former Code did not operate as *res judicata*.

(5) Mansab Ali *v.* Nihal Chand, 15 A. 359 (1893).

(6) Gilkinson *v.* Subramania Ayyar, 22 M. 221 (1898); Somayya *v.* Subhamma, 26 M. 599, at p. 601 (1903).

(7) Williams *v.* Brown, 8 A. 108 (1886); but see next case.

(8) Lekha *v.* Bhauna, 18 A. 101 (1895).

claimed or defence set up. And it has recently been held by the Calcutta High Court that an order for security in stay of execution is not a decree within the meaning of this section because it does not determine the rights of the parties.(1) It has also been held that an order rejecting an application for permission to sue as a pauper and striking the case off the Court's file was a decree, as the matter disposed of was in fact whether the plaintiff had a right to institute the suit, and the effect of the order was to negative that right and to strike the case off the file.(2) Here again the matter has been subject of dissent, it being subsequently held that no appeal will lie from an order rejecting an application for leave to appeal in forma pauperis, the ground being that it was not an adjudication deciding a right claimed in a suit.(3) On the other hand, an order made under sect. 366 (now O. XXII. r. 3) that a suit do abate has been held to be virtually a decree, though it is a question to be determined before the suit or appeal is heard on the merits, on the ground that it disposes of the plaintiff's claim as completely as if the suit had been dismissed.(4) This decision again has been dissented from by the Allahabad High Court.(5) The Allahabad High Court has in one case (6) held that an order giving leave to withdraw a suit under sect. 373, or 373 and 582 (now O. XXIII. r. 1, and sect. 107), is a decree; but subsequently that Court (7) and the Bombay (8) and Calcutta (9) High Courts have held that such an order is not a decree on the ground that it does not express any adjudication on the thing claimed, but leaves all issues in the suit undetermined and relegates the parties to the position they occupied before the suit was filed. Where the Appellate Court passed an order directing the case to be sent back to the original Court, with orders to pass a formal decree in accordance with the award of an arbitrator, it was held that the order was a decree as the matter was before the Appellate Court on the merits and the order was intended to finally dispose of the matter.(10) In the under-mentioned case a person claimed to appear in a suit as guardian. The Court decided that he had not got that right, and it was held, *per* Tyrrell, J., that that order decided his position in the suit, that the order was a decree and that an appeal

(1) Saraswati Barmania *v.* Golap Das Barman, 41 C. 160 (1911); and see Deoki Nandan Singh *v.* Bansi Singh, 14 C. L. J. 35 (1911).

(2) Baldeo *v.* Gula Kuar, 9 A. 129 (1886).

(3) Secretary of State *v.* Jillo, 21 A. 133 (1898).

(4) Bhikaji Ramchandra *v.* Purshotam, 10 B. 220 (1885), followed in Subbayya *v.* Saminadayyar, 18 M. 496 (1895), which also deals with s. 367 of the former Code.

(5) Hamida Bibi *v.* Ali Husen Khan, 17 A. 172 (1895).

(6) Ganga Ram *v.* Data Ram, 8 A. 82 (1885). The contrary had been previously held in Kalian Singh *v.* Lekhraj Singh, 6 A. 211 (1884).

(7) Jagdish Chaudhri *v.* Tulshi Chaudhri, 16 A. 19 (1893); Genda Mal *v.* Pirbhu Lal, 71 A. 97 (1895) [*per cur.* "it does not adjudicate on any right claimed or decide the suit; it decides nothing as to the merits"].

(8) Patloji *v.* Ganu, 15 B. 370, 373 (1890).

(9) Jogodindro Nath *v.* Sarut Sunduri, 18 C. 322, 323 (1891) [ref. to Ramakissoor *v.* Suranga, 21 M. 421 (1898)]; Syed Abul Hasan *v.* Kashi Sahu, 4 C. W. N. 41 (1899); s. c., 27 C. 362; if, however, such an order is appealed from, and the lower Appellate Court sets aside the order and dismisses the suit, then the order of the lower Appellate Court is a decree: Abdul Hossein *v.* Kari Sahu, 27 A. 362 (1899).

(10) Bhugwan Doss Marwari *v.* Nund Lall Sein, 12 C. 172, 176 (1885).

might have been preferred.(1) In a recent case in the Bombay High Court it was said that in applying this definition of decree it will be found that in the reported cases in that Court the rights of the parties with regard to the matter in controversy have been taken to mean general rights (such as rights in relation to status, jurisdiction, limitation and frame of suit) which if decided must have a general effect on the proceedings.(2)

Where the plaintiff failed to reply to interrogatories and the Court dismissed the suit under sect. 136 (now O. XI. r. 21), it was contended that the order of dismissal was not a decree as it did not adjudicate on the merits of the right claimed. But this contention was overruled and the view adopted that when the procedure of the Court finally disposes of the suit it is a decree.(3)

It was observed by Sargent, C.J., in dealing with the objection that the order did not adjudicate on the merits of the right claimed, that having regard to the numerous authorities the other way (namely, those treating as decrees orders not dealing with the merits), it was too late to re-open the question, although had it been *res integra* it must be admitted that there was force in the argument based on the words of the section and also on the circumstance of there being a special provision for an order rejecting the suit, and that where the procedure of the Court finally disposes of the suit it is a decree.(4)

It appears to be advisable to adopt an interpretation which affords a ready test to distinguish between decrees on the merits and merely processual orders. If this is not done each case must be more or less empirically decided as and when it arises and on its peculiar circumstances. In such case the general test would appear to be—"does the order finally dispose of the suit?" It may be noted in this connection that in the report of the Select Committee (March 12, 1903) on the Bill introduced in December, 1901, the Committee stated that they omitted the words restricting "decree" to adjudications "upon the merits," as was proposed to be done because they might be held to exclude final decisions given wholly upon questions of law. But as to this it is perhaps sufficient to point out that while a claim with merits in its popular sense can be defeated by a defence based upon a point of law, such as limitation, it can only succeed by virtue of a favourable adjudication on the merits. The section, however, has since been expressly amended so as to exclude *any* order of dismissal for default. This appears to indicate that the "*rights of the parties*" referred to do not include mere processual rights, and that to constitute a decree there must be an expression of opinion on the rights of the parties in the sense of an opinion upon the merits of the case, that is on the right asserted in the suit or upon the defence, whether of law or fact, set up to defend such alleged right. Moreover, a dismissal for default does not "conclusively determine" the right of the party against whom it is passed.

"**Civil Court.**"—In the corresponding definition in Act X. of 1877, the word "civil," which was introduced in the last Code, found no place. It has been held that a Civil Court does not include a Revenue Court in the N. W. P.,

(1) Buldeo Das *v.* Gobind Shankar, 7 A. 914 (1885).

(2) Narayan Balkrishna *v.* Gopal Jiv Ghadi, 38 B. 392 (1914).

(3) Maharaj Adhiraj Mansingji *v.* Mehta Harriharram, 19 B. 307 (1894).

(4) Maharaj Adhiraj Mansingji *v.* Mehta Harriharram, 19 B. 307 (1894).

and the term "decree" in this Code does not include the decree of such a Court.(1) Though the words "*Civil Court*" have been now omitted, probably as unnecessary, the definition of course only applies to such Courts.

"In the suit."—Where there is no civil suit there is no decree, and in consequence no appeal.(2) No doubt there is authority for the view that the term "suit" is a very extensive one,(3) but the term ought to be confined to such proceedings as under that description are directly dealt with by the Code, or such as by the operation of the particular Acts which regulate them are treated as suits.(4) The term "suit" has not been defined for the purposes of the Code.(5) The conjunction of the words "suit or appeal" in the last Code appeared to show that appeals, which are often considered a stage of the suit, are not to be deemed to fall within it. The section now refers to suit only. The word is wide enough to cover every proceeding, whether original or appellate, terminable in such an adjudication (as is referred to in the first part of the clause), under this Code.

The particular orders mentioned in the second clause of the last Code as constituting a decree did so by way of addition and exception to the general definition of that term in the first clause.(6) This, as has been pointed out,(7) is particularly evident from the mention of orders passed in execution proceedings under sect. 244 of the last Code, as they cannot be said in any sense to finally decide the suit or appeal; though an order rejecting a plaint may be said to finally determine, so far as the Court which makes the order is concerned, that the suit as brought will not lie, and may have been made a decree on that ground.(8) The enumeration of orders was held to be exhaustive, and not merely illustrative or explanatory.(9) Though it cannot be said that the rule was always strictly observed (*vide post*), analogy could not extend the term to any orders other than, though like, those specifically mentioned.

(*a*) **Execution proceedings.**—Under the last Code, sect. 647 (now sect. 141) was held to show that applications for execution were not suits, but only proceedings in a suit, and appeals from orders on applications were dealt with

(1) Onkar Singh *v.* Bhup Singh, 16 A. 496 (1894).

(2) Minakshi *v.* Subramanya, 11 M. 26 (1889). Thus a decision under s. 5 of the Court Fees Act not being a decree no appeal lies: Balkaran Rai *v.* Gobind Nath Tewari, 12 A. 129, 156 (1890).

(3) Venkata *v.* Venkatarama, 22 M. at p. 257; and see Bhoopendro *v.* Baroda, 18 C. 500, 504 (1891).

(4) Watkins *v.* Fox, *infra*, at p. 948. The general power under sect. 9 to try all suits of a civil nature except those expressly or impliedly barred does not involve a similar power to make declarations: Bai S. Vaktuba *v.* Thakore Agarsinghi, 34 B. 676 (1910).

(5) See Watkins *v.* Fox, 22 C. at p. 948 (1895). The third section of the Limitation Act distinguishes suits from appeals or applications.

(6) Hukm Chand, 27, 28.

(7) Ib.

(8) It is essentially different from an order admitting a plaint, as such an order determines nothing, but is merely the first step towards putting the case in a shape for determination: Justices of the Peace for Calcutta *v.* Oriental Gas Co., 8 B. L. R. 433 (1872).

(9) Coverji *v.* Morarji, 9 B. 183, 195 (1885); Dulhin Golab Koer *v.* Radha Dulari Koer, 19 C. at p. 468 (1892).

in sect. 588 (now sect. 104, O. XLIII. r. 1).(1) Orders passed in execution were expressly provided for in the second clause of the section, the first clause of which referred to suits or appeals only. Under sect. 48 (now sect. 26) of the Code a suit must commence with a plaint, and therefore a proceeding under sect. 244 (now sect. 47), though it is a proceeding in a suit, is not a suit.(2) The corresponding words in the Code of 1877 were, "*suit or other judicial proceeding*," which last expression was held to include proceedings in execution. But now execution proceedings are not suits, and an order thereon is not a decree unless it determines a question within sect. 47.(3)

(*b*) **Insolvency proceedings.** Insolvency proceedings under the former Code were held to be proceedings in a suit. Thus an order under sect. 358 of the former Code, declaring an insolvent absolved from further liability, was held to be a decree as finally deciding the suit; (4) but as has been pointed out,(5) it is not easy to understand what was the suit decided by such order, as even execution proceedings, though included in a suit, are not themselves a suit. An appeal from such an order,(6) as well as from an order refusing to declare a person absolved,(7) has been heard, but without any objection or argument. The matter is now regulated by Act III. of 1907.

(*c*) **Probate proceedings.** Contentious proceedings for the grant of probate were held to be a suit, as an order granting probate, though spoken of in the Probate Act as an order, is for the purposes of the Code a decree, because, so far as the Court granting the probate is concerned, it decides not only a right to have the probate granted, but also the defence set up against the grant.(8) This is the law now. But where in an Administration suit the first Court recorded a finding on a substantial question of right between the parties and receivers, and the plaintiff (without applying to have a formal decree drawn up) appealed against the finding on the ground that it was a decree, it was held that there was no formal decree from which he could appeal.(9)

(*d*) **Arbitration proceedings.**– As regards these proceedings the position under the former Code was this:—When an order for reference to arbitration was made in a suit under sect. 508 (now clause 3, Sch. II.), judgment was given on the award, and upon the judgment so given a decree followed under sect. 522 (now clause 16 of same); but no appeal lay from such decree except

(1) Venkata *v.* Venkatarama, 22 M. 256, 258 (1898). In Gokul Kristo *v.* Aukhil Chunder, 16 C. at p. 464 (1889), it was held for the purpose there dealt with that suit *included* proceedings taken to execute the decree.

(2) Venkata *v.* Venkatarama, 22 M. 256 (1898). As regards proceedings under ss. 523, 525, which have been held in certain cases to be suits, this is because the applications are directed to be numbered and registered as suits. See *post*.

(3) Saraswati Barmania *v.* Moti Barmonya, 17 C. W. N. 1240 (1913).

(4) Hukm Chand *v.* Robinson, 1894, P. R. No. 43, cited in Hukm Chand, Civ. Pr. Code, 25.

(5) Hukm Chand, *loc. cit.*

(6) Rura Mal *v.* Jalal-ud-din, 1885, P. R. No. 30, cited in Hukm Chand, 25.

(7) Downes *v.* Richmond, 5 A. 258 (1883). This last case may have been decided upon the old Code.

(8) Umrao Chand *v.* Bindrabun Chand, 17 A. 475 (1895).

(9) Bai Divali *v.* Shah Vishnav, 34 B. 182 (1909).

so far as it was in excess of or not in accordance with the award. Orders under sect. 514 superseding such an arbitration or under sect. 518 modifying such award were appealable under the provisions of sect. 588 of the former Code. There was a difference of opinion in and between the High Courts whether orders passed on an application under sect. 523 of the former Code to have an agreement for reference to arbitration, or under sect. 525 of the same Code to have an arbitration award, filed in Court were or were not decrees in a suit. The determination of this question considerably depended upon the meaning to be given to the words in both these sections—"The application shall be in writing and shall be numbered and registered *as a suit*," etc., and whether an order of reference under sect. 523, or an order under sect. 525, was the formal expression of an adjudication upon a right claimed or defence set up which finally decided the suit. In some cases the words cited were held to show that the proceeding was a suit; in others it was considered that they were merely intended for administrative purposes. The Allahabad High Court held that neither proceedings under sects. 523 (1) nor 525 (2) were suits, and the Madras High Court, on the contrary, held that both proceedings under sects. 523 (3) and 525 (1) were suits, and the orders made thereunder were decrees and appealable. The Calcutta and Bombay High Courts did not deal with sect. 523, but the first Court held that orders under sect. 525 were decrees,(5) and the second Court held that a proceeding under that section was not a suit.(6) Proceedings under the Land Acquisition Act (I. of 1894) are not suits.(7) It is a special Statute enacted to deal with special cases, and orders made under it are outside the ordinary course of the jurisdiction of the Civil Courts, and it gives no right of appeal to the Privy Council.(8) Under this Act the High Court is the ultimate umpire in a series of arbitration proceedings, and its award is neither a decree under this section nor a final judgment or order within the meaning of clause 39 of the Letters Patent.(9). Clause 16 of the second schedule determines the cases in which only an appeal will lie from decrees or orders passed in arbitration proceedings. See that schedule and cases there cited.

(*e*) **Miscellaneous proceedings not suits.**—A final decision in a miscellaneous proceeding was not, under the last Code, a decree, though it was

(1) Daya Nand *v.* Bakhtawar Singh, 5 A. 333, F. B. (1883); *contra*, Sadik Ali Khan *v.* Imdad Ali Khan, 3 A. 286 (1880).

(2) Bhola *v.* Gobind Dayal, 6 A. 186, F. B. (1884); dist., Janki Tewari *v.* Gayan Tewari, 3 A. 427 (1880); Kunji Lal *v.* Durga Prasad, 32 A. 484 (1910).

(3) Gowdu Magata *v.* Gowdu Bhagavan, 22 M. 299 (1898).

(4) Ponnusami Mudali *v.* Mandi Sundara Madali, 27 M. 255, F. B. (1903); *contra*, Vikrama *v.* Kristnan Nambudri, 3 M. 68 (1879).

(5) Mahomed Wahiduddin *v.* Hakiman, 25 C. 757, F. B. (1898); *contra*, Sree Ram Chowdhry *v.* Denobundhoo Chowdhry, 7 C. 490 (1881), which, however, was not referred to in the judgments in the F. B. case.

(6) Mohan *v.* Tukàram, 21 B. 63 (1895), in which Farran, J., said that it was only by an extension of the usual meaning of the term that an application to file an award can be regarded as a suit, and that it is in truth an application to have legal operation given to a legal decision already arrived at by a Judge chosen by the parties.

(7) Nobodeep Chunder *v.* Brojendra Lal Ray, 7 C. 406 (1881).

(8) Rangoon Botatoung Co. *v.* Collector Rangoon (P. C.), 40 C. 21 (1912).

(9) Special Officer Salsette Building Sites *v.* Dosabhai Bezonji, 37 B. 506 (1912).

held (1) to be so under the Code of 1859. A settlement case under sect. 104 (2) of the Bengal Tenancy Act, before it was modified by Act III. of 1898, B. C., was held not to be a suit.(2) Proceedings contemplated by sect. 27, Act VIII. of 1865, Madras, are summary, and an order passed in them cannot, it was held, be said to have decided a suit or appeal and was therefore not a decree.(3) An order under the Indian Trusts Act, refusing to remove a trustee, has been held not to be a decree.(4) An order appointing a person a member of a committee, under sect. 10 of the Religious Endowments Act, 1863, has been held by the Privy Council not to be a decree for the purposes of sect. 540 (now sect. 96); their Lordships observing that "*there was no civil suit respecting the appointment.*" (5) An order refusing (6) or granting (7) leave to sue under the Religious Endowments Act is not a decree nor is an order passed on a contempt of Court.(8) There appears to be no change in this respect.

Rejection of a plaint. -An order rejecting a plaint is a decree, whatever may be the grounds, or absence of grounds, for that order. In every case an order falling within sect. 54 (now O. VII. r. 11) is a decree (9) The words are, however, not limited to the cases provided for in sects. 53 and 54 (now O. VI. r. 17, O. VII. r. 11), *post.*(10) Nor does it make any difference that the rejection may be due to a misapplication of the rules of the Code or practice.(11) So not only is an order rejecting a plaint on the ground that it is insufficiently stamped (12) a decree, but also an order given on the ground that the plaintiffs are minors.(13) And orders which are substantially in effect orders rejecting plaints have been held to be decrees; as an order returning a plaint for including causes of action which could not be joined without leave of the Court; (14) or an order under sect. 331 (now O. XXI. r. 99) refusing to number and register a claim as a suit, which is of the same effect as a refusal to register.

(1) Reasut Hossein *v.* Hadjee Abdoollah, 3 I. A. 221 (1876).

(2) Upadhya Thakur *v.* Persidh Singh, 23 C. at p. 729 (1896). Proceedings under ss. 84 [Goghun Mollah *v.* Rameshur, 18 C. 271 (1891); Peary Mohun Mukerji *v.* Baroda Churn Chuckerbutti, 19 C. 485 (1892)] and 93 of the same Act [Hossain Bux *v.* Mutookdharee Lall, 14 C. 312 (1887)] are not suits. An order under s. 37, Act VIII. of 1869, was held to be a decree: Brojendro Coomar Roy *v.* Krishna Coomar Ghose, 7 C. 684 (1881).

(3) Perumal *v.* Rajagopala, 13 M. 248 (1899).

(4) Nathu Wilson *v.* McAfee, 19 A. 131 (1896).

(5) Minakshi *v.* Subramanya, 14 I. A. 160 (1887); s. c., 11 M. 26.

(6) Kazem Ali *v.* Azim Ali Khan, 18 C. 382 (1891).

(7) Mozaffer Ali *v.* Hedayet Hosain, 34 C. 584 (1907).

(8) Goda Ram *v.* Suraj Mal, 27 A. 380 (1904).

(9) Muhammad Sadik *v.* Muhammad Jan, 11 A. 91, 93 (1888).

(10) Beni Ram Bhutt *v.* Ram Lal Dhukri, 13 C. 189 (1886).

(11) See last case in which the usual course would have been to suspend proceedings [see Rattonbai *v.* Chabildas, 13 B. 7, 11 (1888)], and Bandhan Singh *v.* Solhu, 8 A. 191, in which s. 44, r. (*a*) of the last Code was misapplied.

(12) Ajoodhya Pershad *v.* Gunga Pershad, 6 C. 249 (1880); ref. Muhammad Sadik *v.* Muhammad Jan, 11 A. 91, 93 (1888).

(13) Beni Ram Bhutt *v.* Ram Lal Dhukri, *supra.*

(14) Bandhan Singh *v.* Solhu, 8 A. 191 (1886). As to return for presentation to proper Court, see Kahan Das *v.* Nawal Singh, 1 A. 620 (1878).

a plaint, or which, in other words, amounts to the rejection of a plaint.(1) An order refusing to entertain a suit because the section of the law to which it related was not cited in the plaint, was held under the Code of 1859 to be a judgment. The Court pointed out that such an order ought to state whether the suit was dismissed or the plaint rejected, and under what sections respectively.(2) An order rejecting an appeal stands on the same footing. An order rejecting a plaint is a decree, and by sect. 532 (now O. XXXVII. r. 2) of the Code the provisions thereinbefore contained are made to apply to appeals, so far as such provisions are applicable. An order therefore rejecting or dismissing an appeal is a decree of the Appellate Court under the terms of the definition.(3) In the Code there is no separate provision which allows the Appellate Court to "reject" a memorandum of appeal on the ground of its being barred by limitation. Sect. 543 (now O. XLI. r. 3) is limited to cases in which the memorandum is not drawn up in the manner prescribed by the Code, and it is only by applying sect. 54 (*c*) (now O. VII. r. 11), *mutatis mutandis* (as provided by sect. 582, now sect. 107, O. XXII. r. 11), to appeals that the Code can be understood to make provision for rejection of appeals as barred by limitation. Sect. 4 of the Limitation Act says that the appeal shall be dismissed. It is clear therefore that such an order of dismissal is a decree as it disposes of the appeal.(4) So an order dismissing an appeal as being presented out of time,(5) rejecting an appeal as not duly presented, the vakalutnamah being executed in favour of two vakils but accepted only by one; (6) or for deficiency of court-fee; (7) an order rejecting a memorandum of appeal on the ground that it contained language disrespectful to the Court of first instance,(8) have been held to be decrees. On the other hand, it has been held that an order returning a memorandum of appeal on the ground that the value of the suit was beyond the pecuniary limits of the Court's jurisdiction is not a decree, as it did not decide but refused to decide the appeal.(9) And an order returning a plaint for presentation to the proper Court is not a decree.(10) Where there is no appeal and no appellate decree there can be no second appeal. Where an appeal petition having been presented bearing

(1) Fonindro Deb Raikut *v.* Rani Jugodishwari Dabi, 14 C. 234 (1886); foll. Gopalu *v.* Fernandes, 16 M. 127 (1892).

(2) Sheikh Golam Ehya *v.* Lalla Doorga Dyal, 3 W. R., Act X., 17 (1865).

(3) Gunga Das Dey *v.* Ramjoy Dey, 12 C. 30 (1885). See Mathura Mohun *v.* Amiruddi, 8 C. W. N. 64 (1903), where an appeal was dismissed on the ground that no appeal lay.

(4) Gulab Rai *v.* Mangli Lal, 7 A. 42 (1884) [foll., Raghunath Gopal *v.* Nilu Nathaji, 9 B. 452 (1885)].

(5) Ib.; Gunga Das Dey *v.* Ramjoy Dey, *supra*; Saminatha *v.* Venkatasubba, 27 M. 21 (1903); Rakhal *v.* Ashutosh, 17 C. W. N. 807 (1913).

(6) Ayyanna *v.* Nagabhoorhanam, 16 M. 285 (1892).

(7) Rup Singh *v.* Mukhraj Singh, 7 A. 887 (1882). An order dismissing an appeal in a suit for non-payment of the additional stamp duty which should have been paid in respect of the plaint and the petition of appeal, has been held to be a decree under the general words of the definition: Mela Mal *v.* Harbhay, P. R. No. 165 (1884), cited in Hukm Chand, C. P. C., p. 28.

(8) Zamindar of Tuni *v.* Bennayya, 22 M. 155 (1898).

(9) Mahabir Singh *v.* Behari Lal, 13 A. 320 (1891).

(10) Chinnasami Pillai *v.* Karuppa Udayan, 21 M. 234 (1896); [foll., Wahidullah *v.* Kanhaya Lall, 25 A. 174 (1902)]; Dalip Singh *v.* Kundan Singh, 36 A. 58 (1913).

an insufficient court-fee stamp was returned to the appellant and was presented again after the period of limitation, and the appeal was refused, it was held that no appeal lay.(1)

"The determination of any question within sect. 47 or sect. 144." —These are orders of the Court executing a decree determining any question relating to the execution, discharge or satisfaction of the decree, provided that these questions arise between the parties to the suit in which the decree was passed or their representatives; and orders for restitution upon the variance or reversal of a decree. It is stated that the word "*within*" has been substituted for "mentioned or referred to in" with a view to bringing within the definition of decree orders against sureties (see sect. 145) and orders as to Court fees in pauper suits (see O. XXXIII. r. 13), and thus providing for appeals therefrom. It has been recently held that an order on an application under O. XXXIII. r. 12 for payment under O. XXXIV. r. 10 or 11 is an order under sect. 47 and appealable accordingly.(2)

The Privy Council (3) and the Courts in India (4) have held that a narrow construction is not to be placed upon the language of sect. 47 (formerly sect. 244). The object of that section is that the Court having the parties already before it should decide all questions relating to execution, etc., arising between them in place of allowing one or the other of them to put his adversary to the delay and cost of a separate suit in cases in which but for this section it might be possible for him to do. In order to affect this object completely without injustice to the parties an order under this section has been included within the definition of "decree" so as to allow an appeal.(5) It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible.(6) If where a proceeding is sought to be set aside, that proceeding is one which relates to execution, and if the contest as to its validity is between the parties to the suit, the specific ground on which the proceeding is impeached, whether it be fraud in the execution proceedings or other ground, is not material within the meaning of sect. 47.(7) The expression "*relating to execution*," etc., in sect. 47, is wide and somewhat vague, though perhaps necessarily so, and has caused some difficulty in several cases; but once a case is held to come within these words, the law seems plain enough.(8) The matter must be determined by an order under sect. 47, and not by separate suit, and such an order is a decree and as such appealable.

It was not, however, the intention of the Legislature to render all orders (irrespective of their nature), made in relation to the execution of a decree,

(1) Venkatarayadu *v.* Rangayya Appa Rau, 21 M. 152 (1897), dist. and dissented from in Mathura Mohan Pal *v.* Amiruddi Shilaloo, 8 C. W. N. 64 (1903), in which it was said that too narrow a construction had been put upon the term "decree."

(2) Secretary of State *v.* Narayan, 35 B. 448, 450 (1911).

(3) Prosunno Kumar Sanyal *v.* Kali Das Sanyal, 19 C. 683, 689 (1892).

(4) Hira Lal Ghose *v.* Chundra Kanto Ghose, 26 C. 539, 541 (1899).

(5) Mohendro Narain Chaturaj *v.* Gopal Mundal, 17 C. 769, 773 (1890).

(6) Prosunno Kumar Sanyal *v.* Kali Das Sanyal, 19 C. 683, 689 (1892).

(7) Krishnan *v.* Arunachalam, 16 M. 447, 449 (1892). See s. 47, *post*.

(8) Mohendro Narain Chaturaj *v.* Gopal Mundal, 17 C. 769, 773 (1890).

"decrees," and as such appealable.(1) In the first place the former definition excluded matters specified in sect. 588.(2) As regards others, whether it be expedient to generalize on the question may be doubtful, though the test laid down by Banerji, J.,(3) would probably be found sufficient in most if not in all cases.(4) Banerji, J., held, in the case referred to,(5) that it is not every order made in execution of a decree that comes within sect. 47 (formerly sect. 244). If that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses would be appealable; and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended. An order in execution proceedings can come under that section only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree; not when it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way. The language of sect. 47, which enacts that certain questions "*shall be determined by an order of the Court executing the decree and not by separate suit*" clearly indicates that the questions contemplated by the section must be of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit. But a question of an incidental character can never come under that description and an order determining such a question cannot therefore be a decree as defined in sect. 2. But however it may be as to the test suggested, when the effect of an order is to determine the rights of a party with respect to a matter material to the due execution of the decree, such order is a "decree," and there is an appeal.(6) Thus it has been held that an order for distribution by the Court is a decree under this section read with section 47.(7) Generally it may be said that all orders passed in execution proceedings relating to the right of a person to execute a decree or the liability of a person to satisfy the same, or to stay of execution, relate to the execution of the decree, and are "decrees" within this section. The matter is one which can be more conveniently dealt with under section 47, to the notes of which section reference should be made. No appeal lies from the order as distinguished from the decree of an Assistant Collector of the first class.(8)

(1) Rajah Ramessur Proshad Narain Singh *v.* Rai Sharu Krissir, 8 C. W. N. 257, 261 (1901).

(2) This section specifies a large number of orders from which appeals lie, including many made in execution proceedings, but not including other orders which are, however, decrees within the meaning of s. 2. See Bhup Indar *v.* Bijai Bahadur, 23 A. 152, 157 (1900); Lakhsmi *v.* Maru Devi (1914), 37 M. 29; Venkata Giri Ayyar *v.* Sadagopachariar (1904), 14 M. L. J. 359. Orders specified mean orders in terms referred to by s. 588 of the former Code: Gosto Behary Sardar *v.* Hari Mohan Adak, 8 C. W. N. 313, 315 (1903).

(3) In Jogodishury Debea *v.* Kailash Chundra Lahiry, 24 C. 725, 739 (1897), *vide post.*

(4) Rajah Ramessur Proshad *v.* Rai Sharu Krissir, *supra.*

(5) Jogodishury Debea *v.* Kailash Chundra Lahiry, 24 C. at pp. 739, 740 (1897)

(6) Rajah Ramessur Proshad *v.* Rai Sharu Krissir, 8 C. W. N. at pp. 261, 262 (1901).

(7) Benode *v.* Harish, 15 C. W. N. 783 (1910).

(8) Zohra *v.* Manga Lal, 28 A. 753 (1906) (Agra Tenancy Act); Karan Pal *v.* Bhima Mal, 32 A. 373 (1910).

Under the last Code it was held that the definition of "order," given in sub-clause 14, could not be used for the purpose of defining the word "order" in the previous part of the section, because it expressly excluded everything in that part.(1)

Preliminary decree.—See note on "*Conclusively determines.*"

"Dismissal for default."—See note on "*The rights of the parties.*"

"Decree-holder" and "judgment-debtor."—The second term means only any person against whom an order has been made, and there is now a reference in the definition to the order being capable of execution. The transfer of a judgment-debtor's liability is not recognized, except to a very limited extent, in case of his death, to his legal representative (see sect. 50, formerly sect. 231, *post*). On the other hand, a decree-holder may assign his right under the decree, or such transfer may be affected by operation of law. The words "and includes any person to whom such decree or order is transferred," have now been omitted. It was held with regard to the former definition that it must not be applied where it was repugnant to the context. The only rule, it was held, which would harmonize this section, and the provisions relating to the execution of assigned decrees, was that an assignee under an oral assignment has, as such, no *locus standi* at all to apply for execution, but that as regards an assignee in writing or by operation of law the Court has a discretion whether to recognize such assignment or not.(2) The definition was held to include a person to whom a share of a decree is transferred.(3) Notwithstanding the omission the law is now the same. The representative of a judgment-debtor was held to be a judgment-debtor within the meaning of sect. 258, now O. XXI. r. 2, *post*.(4)

Under the General Clauses Act.(5) the word "person," unless there is anything repugnant in the context, includes "any company or association or body of individuals, whether incorporated or not." In Admiralty proceedings *in rem* a vessel is deemed invested with a personality, and the expression "defendant" in O. I. rr. 3 and 4 (formerly sect. 28), *post*, includes a vessel.(6) And if a vessel can be a defendant, it may be a judgment-debtor.

"District Court."—This section is one of those which, by sect. 1, are excluded from consideration when dealing with a question in a Scheduled District (7) to which the Code has not been extended. In some of these districts the District Judge is designated Deputy-Commissioner, but in Chota Nagpur the Court of the Judicial Commissioner, and not that of a Deputy-Commissioner, is the Principal Civil Court of original jurisdiction, and therefore the District Court.(8) In the other provinces the Court of the

(1) Behary Lal Pundit *v.* Kedar Nath Mullick, 18 C at p. 72 (1891).

(2) Parvata *v.* Digambar, 15 B. 307 (1890). See O. XXI. r. 16, *post*.

(3) Gyamonee *v.* Radha Romon, 5 C. 592 (1879).

(4) Panduranga Mudaliar *v.* Vythilinga Reddi, 30 M. 537 (1907).

(5) X. of 1897, s. 3 (41).

(6) Bombay and Persia I. N. Co. *v.* Shepherd, 12 B. 237, 241 (1887).

(7) Ram Ratan *v.* Lalta Prasad, 17 A. 483 (1895).

(8) Joynarain Singh *v.* Mudhoo Sudun Singh, 16 C. 13 (1888).

District Judge is the principal Civil Court, except in the Presidency towns, in which the High Courts on their original side are such Courts. See as to the definition of "District Judge" and "High Court," Act X. of 1897 (General Clauses). The definitions apply, however, only "unless there is anything repugnant in the subject or context," so that in construing the term in any particular Act the particular provisions of that Act will have to be taken into consideration. The concluding words "every Court, etc.," of the former definition have been re-enacted in sect. 3. The words "every Court" refer to the Courts governed by this Code. Under sect. 8, *post*, this section does not apply to Presidency Small Cause Courts, and those Courts are not included in the words "every Court of Small Causes," but such Courts are subordinate to the High Court under the provisions of their Acts and the Charters of the High Court.(1)

"Foreign Court"—"Foreign judgment."—The words "*not having authority in British India*" were inserted to exclude the Judicial Committee of the Privy Council from the definition. The other English Courts are, with regard to the Courts in India, as much Foreign Courts as the Courts of France or of any other foreign country.(2) So also are the Courts in the Native States in India,(3) in Ceylon and the Colonies. As regards Courts situate beyond the limits of British India and established by the Governor-General in Council, see sect. 13, *post*. On account of the extension in the definition of "British India" the number of such Courts will not be so large as before, but the Courts in Residency Bazaars and in British cantonments in Native States will afford the most ordinary instances of Courts which though outside British India are not foreign Courts.(4) This definition of "Foreign Court" is for the purpose of this Code only, and does not avail to extend the jurisdiction of the High Court so as to enable it to restrain suits pending in Courts which are outside its jurisdiction under the Charter.(5) As to foreign judgments, see sects. 13, 14, *post*.

"Government pleader."—See O. XXXIII. rr. 6, 7, 9, and O. XXVII. rr. 4, 5, 6, 8, *post*, which deal with functions imposed by the Code on Government Pleaders. As to the definition of "Local Government," see sect. 3 (29), Act X. of 1897. The words italicized have been added to meet a practical difficulty said to have been experienced on occasions when it is necessary for the Government Pleader to appoint another pleader to conduct the case.

"Judge." This definition is different from that contained in sect. 19 of the Penal Code, as the requirements of the Civil and Criminal law are distinct. "Officer," of course, includes "officers," as in the case of two or more Judges constituting a Bench. The term "Court" is not defined.(6) Where a Court

(1) *In re* Pleaders of the High Court, 8 B. 105, at pp. 135, 147 (1883). As to appeals against orders in insolvency passed by a Court of Small Causes exercising the powers of a Subordinate Judge in connection with this section, see Debi Prasad *v.* Jamna Das, 23 A. 56 (1900); Manekshah *v.* Dadabhai, 27 B. 604, 606 (1903).

(2) Bowles *v.* Bowles, 8 B. 571, 574 (1884).

(3) Bikrama Singh *v.* Bir Singh (1888), P. R. No. 191, cited in Hukm Chand, 34.

(4) Hukm Chand, 34.

(5) The Vulcan Iron Works *v.* Bisshumber, 13 C. W. N. 346 (1909).

(6) The term has been defined in s. 3 of the Evidence Act [see *In re* Venkatachala Pillai, 10 M. 154 (1887)], but as pointed out by the Bombay High Court in R. *v.* Tulja,

is composed of more than one officer, each doing separate work allotted to him by the Chief Judge, each officer is individually a Judge, and must be deemed to be a presiding officer of a separate Court.(1) As regards the appointment, disqualification, and jurisdiction of Judges, see notes to sect. 9, *post*.

"**Judgment.**"—The term has here a different signification to that it possesses in English law, in which it is used in the sense attached to the term "decree" under the Code. Under the former practice it was restricted to a decision of the Common Law Courts, the term "decree" being used in the Court of Chancery. This distinction is, however, now abolished, the expression "judgment" being generally used, except in matrimonial causes, in which the term "decree" is still retained.(2) The judgment must be based on relevant facts duly proved before the Court, and a Judge should not therefore import into a case his own knowledge of particular facts: (3) and it must be founded on a case either to be found in the pleadings or involved in or consistent with the case thereby made.(4) A Judge may, however, consult other Judges before whom the trial is not held.(5)

Excessive elaboration tends to impair the value of a judgment by defeating its proper object, which is to support by the most cogent reasons that suggest themselves the final conclusions at which the Judge has conscientiously arrived. The Privy Council therefore on these grounds adversely criticized a judgment of a voluminous character recording the fluctuations of the Judge's mind from day to day in the course of an exceptionally long trial, and the effect (often temporary upon him) of a particular piece of evidence or argument of counsel: since from such a mass of often conflicting statements it is not easy for a Court of Appeal to extract the precise grounds on which the final conclusion rests.(6) Moreover it is a substantial objection to a judgment that it does not dispose of the question as it was presented by the parties, *e.g.*, where it finds a particular signature to be a forgery which both sides admit to be genuine.(7) For the provisions of the Code as to judgments, see sect. 33 and O. XX., *post*, and Index, *sub voc.*

Meaning of "judgment" under Letters Patent.—The term "*judg-*

12 B. 36 (1887), dissenting from the last-mentioned case, and distinguishing between a judicial and administrative inquiry, the definition in the Evidence Act is framed only for the purposes of the Act itself, and should not be extended beyond its legitimate scope. An Additional Judge was held to be a District Judge within the meaning of s. 112, Act VIII. of 1869: Brojo Misser *v.* Ahladee, 21 W. R. 320 (1874).

(1) Hukm Chand, *loc. cit.*

(2) See Hukm Chand, 11, 12.

(3) See Authors' Evidence Act, 5th ed., p. 115, and notes to s. 121 of that Act and cases there cited, and Jeswunt Singjee *v.* Jet Singjee, 3 M. I. A. 245, at p. 260 (1844); Bamundoss Mookerjee *v.* Musst Tarinee, 7 M. I. A. 169, at p. 203 (1858); Mahomed Buksh *v.* Hosseini Bibi, 15 I. A. 81, at p. 91 (1888); Lakshmaya *v.* Sri Raja Varadaraja, 36 M. 168 (but he may import his general knowledge).

(4) Eshan Chunder *v.* Shama Churn, 11 M. I. A. 7 (1866); Mylapore Iyasami *v.* Yeo Kay, 14 C. 802 (1887); Joytara Dassee *v.* Mahomed Mobaruck, 8 C. 975, 980 (1882).

(5) See Luckmidas *v.* Ebrahim, 2 B. 644, at p. 649 (1878); Parvata *v.* Degambar, 15 B. 307, at p. 308 (1890); Allcock *v.* Hall, 1 Q. B. D. (1891) 444.

(6) Sri Raghunada *v.* Sri Brojo Kishore, 3 I. A. 154, 175 (1876).

(7) Ib.

ment" is used in the Letters Patent of the High Courts, clauses 39 and 40, speaking respectively of appeals to the Privy Council from "*any final judgment, decree or order*," and from "*any preliminary or interlocutary judgment, decree or order.*" (1) Clause 15 (and clause 10 of the Allahabad Letters Patent) speak of a "judgment" (without any such qualification) providing that an appeal to the High Court shall lie from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court.(2) The meaning of this term in this clause has been the subject-matter of discussion in numerous cases. It is well settled that the term is not limited to the final judgment in the suit,(3) nor, indeed, to a judgment in a suit at all.(4) In, however, the first of the cases last cited, a very wide meaning was given to the term, which was held to mean any decision or determination affecting the rights or the interest of any suitor or applicant, it being said to be impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from, though, assuming that a party had the right to be heard in every case, it was obvious that the duty of the Appellate Court might vary considerably according to the nature of the order or decree complained of, and that the Appellate Court would rightly decline to interfere where the lower Court had been given a discretion.(5) This view has, however, been considered to be too broad,(6) and the definition commonly accepted is that of Couch, C.J.,(7) which has become classical,(8) having been approved in numerous cases.(9)

(1) As to ss. 39, 40, see Sonbai *v.* Ahmedbhai, 9 B. H. C. R. 398 (1872): Chundi Dutt Jha *v.* Padmanund Singh, 22 C. 928 (1895).

(2) See as to Allahabad [Umrao Chand *v.* Brindaban Chand, 17 A. 475, 477, 478 (1895)] and Calcutta [Kali *v.* Dhumunjoy, 3 C. 228 (1877)] letters patent, and see as to the words excepting criminal trials, In the matter of Horace Lyall, 29 C. 286 (1901); s. c., 6 C. W. N. 254; Srinivasa Ayyangar *v.* R., 17 M. 105 (1893).

(3) De Souza *v.* Coles, 3 M. H. C. R. 384, 387 (1868); Justices of the Peace for Calcutta *v.* Oriental Gas Co., 8 B. L. R. 433, 452 (1872); Sonbai *v.* Ahmedbhai, 9 B. H. C. R. 398, at p. 407 (1872); in Ebrahim *v.* Fuckhrunnissa, 4 C. 531, 534 (1878), Garth, C.J., took a more restricted view of the term.

(4) De Souza *v.* Coles, *supra*; Somasundaram Chetti *v.* Administrator-General, 1 M. 148, 151 (1876) [which was not an adjudication in a suit, but an order made under the Administrator-General's Act, allowing the A.-G. commission at a certain rate]; Kristo Kissor Neoghy *v.* Kadermoye Dossee, 2 C. L. R. 583 (1878); *In re* Narrondas Dhanji, 14 B. 555 (1890) [order appointing guardian]; *In re* Janokey Nath Roy, 2 C. 466 (1877) [order directing prosecution]; In the Goods of Indra Chandra Singh, 23 C. 580 (1896) [order under s. 90 of Probate and Administration Act].

(5) See De Souza *v.* Coles, *supra*; Sonbai *v.* Ahmedbhai, 9 B. H. C. R. 398, at p. 401 (1872); Mt. Brij Coomaree *v.* Ramrick Dass, 5 C. W. N. 781 (1901).

(6) It has, however, been pointed out that though passages in Bittleston's, J., judgment give a more extended meaning to the word "judgment," the case itself is not in conflict with the others: Somasundaram Chetti *v.* Administrator-General, 1 M. 148, at p. 151 (1876); and see Hadjee Ismail *v.* Hadjee Mahomed, 13 B. L. R. 91, at p. 101 (1874), where Couch, C.J., approved of the actual decision.

(7) The Justices of the Peace for Calcutta *v.* Oriental Gas Co., 8 B. L. R. 433, 452; s. c., 17 W. R. 364 (1872).

(8) *Per* Maclean, C.J., in Mt. Brij Coomaree *v.* Ramrick Das, 5 C. W. N. 781, at p. 794 (1901).

(9) See Sonbai *v.* Ahmedbhai, 9 B. H. C. R. 398, 406, 411 (1872); *In re* Janokey Nath Roy, 2 C. 466 (1877); Kally Soondery Dabia

"We think," said Couch, C.J., "that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." But the Calcutta High Court has held that a narrow construction should not be placed upon the term, and while concurring in the definition has held that it is not exhaustive.(1) It has been said that an appeal will lie under clause 15 only in those cases in which an appeal is allowed under the Code.(2) Whether this be so or not, as a question of jurisdiction, it may safely be said that an appeal should ordinarily lie where allowed by the Code, and will in most cases probably be not entertained where it is not.

Though the marginal note to clause 15 would make it appear that the section was intended to apply only to judgments of Courts of original jurisdiction, yet these notes form no part of the original, and it has been held that the words of the clause are sufficiently comprehensive to include judgments passed in the exercise of jurisdiction either original (3) or appellate. And therefore an appeal lies under this clause from the judgment of a Divisional Court in the exercise of its appellate jurisdiction when the Judges of the Court are equally decided in opinion; but under clause 36 the decision of the senior Judge prevails.(4) Clause 36 (or clause 27 of the Allahabad Letters Patent) was superseded by sect. 575 of the last Code; (5) but the latter section did not take away the right of appeal given by clause 15, and if the Judges differ, but did not refer under sect. 575, there was an appeal under the Letters Patent.(6)

v. Hurrish Chunder Chowdhry, 6 C. 594, 601 (1881); Toolsey Money Dassee *v.* Sudevi Dassee, 26 C. 361, 380 (1899); Mohabir Prosad Singh *v.* Adhikari Kunwar, 21 C. 473, at p. 475 (1894); Kishen Persad Panday *v.* Tilukdhari Lall, 18 C. 182 (1890); Chundi Dutt Jha *v.* Padmanund Singh Bahadur, 22 C. 928, 929 (1895); Mt. Brij Coomaree *v.* Ramrick Dass, 5 C. W. N. 781, 794 (1901); In the matter of Horace Lyall, 29 C. 286, 301 (1901).

(1) Mt. Brij Coomaree *v.* Ramrick Das, 5 C. W. N. 781, at pp. 794, 795 (1901).

(2) Sonbai *v.* Ahmedbhai, 9 B. H. C. R. 398 (1872); and see Justices of the Peace for Calcutta *v.* Oriental Gas Co., *supra*; Hirji Jina *v.* Narran Mulji, 12 B. H. C. R. 129, 136 (1875); as to whether s. 588 of the former Code interfered with the right of appeal under the Letters Patent, see notes to ss. 104–106, O. XLIII.

(3) The original side of the H. C. is not subordinate to any other side of the H. C., but an integral part of it. An appeal lies, under clause 15, from the decision of a single Judge or where there are two Judges if they disagree: Rai Benode *v.* Rai Pasupati, 13 C. W. N. 105 (1907); Gopi Nath *v.* Moheshwar, 35 C. 1096 (1908). But if they agree there is no appeal except to the Privy Council. A Divisional Bench has no power to stay proceedings pending on the original side for the removal of the guardian of a minor: Fakiruddin Mahomed *v.* Garth, 3 C. W. N. 91 (1898).

(4) Ranee Shurno Moyee *v.* Luchmeeput Doogur, 7 W. R. 52, 512 (1867); Ameer Ali *v.* Kassim Ali, 13 W. R. 402 (1870). As to appeal from order of English Committee dismissing a Munsif, see *In re* Hurrish Chunder Mitter, 18 W. R. 209 (1872); Nunduput Matta *v.* Urquhart, 13 W. R. 209 (1870); as to revisional jurisdiction, *vide post*.

(5) Appaje Bhivran *v.* Sheolal Khubchand, 3 B. 204 (1879); Sri Gridhariji *v.* Purushotam Gossami, 10 C. 814 (1884), F. B.

(6) Sri Gridhariji *v.* Purushotam Gossami, 10 C. 814 (1884) [see s. c., 17 C. 3, at p. 11 (1889)]; Raghunath Prasad *v.* Jurawan Rai, 8 A. 105 (1886); Devachand *v.* Hirachand,

Moreover, there were cases to which sect. 575 did not apply, and to these clause 36 (or clause 27) of the Letters Patent is still applicable.(1) There is an appeal from the decision of one of the Judges exercising Admiralty or Vice-admiralty jurisdiction.(2)

It often happens that Judges composing Divisional Benches, although they concur in the mode of deciding the appeal, either disagree as to some of the reasons or assign different reasons for their judgments. But in order that there be an appeal the difference of opinion must be as to the final and complete decision of the case and not a difference of opinion upon one or more of the points arising in it.(3) Points not raised before a Divisional Bench cannot be raised on appeal.(4) As to limitation, see below.(5)

The following orders have been held to be "judgments": an order rejecting a plaint; (6) orders made in execution; (7) an order passed allowing the Administrator-General commission at a certain rate; (8) an order referring it to the Commissioner to take accounts between the parties to a suit; (9) a decision refusing leave to institute a suit on the original side of the High Court; (10) an order appointing a guardian; (11) a judgment dismissing an appeal as barred by limitation; (12) an order in revision; (13) an order refusing stay of execution; (14) an order on an application for re-admission of an appeal; (15)

13 B. 449 (1889); Kashav Pandurang *v.* Vinayak Hari, 18 B. 355, 358 (1893); even if the difference be upon a question of costs only, Mohendro Chandra *v.* Ashutosh Ganguli, 20 C. 762 (1893).

(1) Husaini Begam *v.* Collector of Muzaffarnagar, 11 A. 176 (1889), in which it was held that where the Judges differed on a preliminary question, viz., as to whether the appeal was barred, the case was governed by the charter and not s. 575; dist. in Narayanasami Reddi *v.* Osurn Reddi, 25 M. 548 (1901), in which it was held that there was a hearing of the petition, there having been no hearing of the appeal in the former case.

(2) In the matter of the Ship Champion, 17 C. 66, 84 (1889).

(3) *In re* Omrao Begum, 13 W. R. 310 (1870); and see Chunder Kant *v.* Bindaban Chunder, 7 W. R. 277 (1867).

(4) Shahazadee Hazra Begum *v.* Khaja Hossein, 12 W. R. 498 (1869).

(5) *In re* Hurruck Singh, 11 W. R. 107 (1869); 12 W. R. 458 (1869).

(6) The Justices of the Peace for Calcutta *v.* Oriental Gas Co., 8 B. L. R. 433, at p. 452 (1872); Ebrahim *v.* Fuckhrunnissa, 4 C. 531, at pp. 534, 535 (1878).

(7) The Justices of the Peace for Calcutta *v.* Oriental Gas Co., 8 B. L. R. 433, at p. 452 (1872); Kally Soondery Dabia *v.* Hurrish Chunder Chowdhry, 6 C. 594 (1881) [order in P. C. Department rejecting application for execution]; this case was affirmed by P. C. in 9 C. 482; s. c., 10 I. A. 4, 10 (1882).

(8) Somasandaram Chetti *v.* Administrator-General, 1 M. 148 (1876).

(9) Hirji Jina *v.* Narran Mulji, 12 B. H. C. R. 129 (1875).

(10) De Souza *v.* Coles, 3 M. H. C. R. 384 (1868); Hadjee Ismail *v.* Hadjee Mahomed, 13 B. L. R. 91, 101 (1874).

(11) Kristo Kissor Neoghy *v.* Kadermoye Dossee, 2 C. L. R. 583 (1878); *In re* Narrondas Dhanji, 14 B. 555 (1890).

(12) Husaini Begam *v.* Collector of Muzaffarnagar, 9 A. 655 (1887).

(13) Chappan *v.* Moidin Kutti, 22 M. 68 (1898) (followed in Shaw Prosad Bungshidhur *v.* Ram Chunder Haribur (1913), 41 C. 323); Narayanasami Reddi *v.* Osurn Reddi, 25 M. 548 (1901); Venkata Reddi *v.* Taylor, 17 M. 100 (1893); *contra*, Hira Lal *v.* Bai Asi, 22 B. 891 (1897), on the ground that the Letters Patent apply only to the original and appellate jurisdictions.

(14) Mt. Brij Coomaree *v.* Ramrick Dass, 5 C. W. N. 781, 795 (1901) [order refusing to stay issue of probate and discharge of receiver]; *contra*, Srimantu Raja Yarlagadda *v.* Srimantu Raja Yarlagadda, 24 M. 358 (1901).

(15) Ramhari Sahu *v.* Madan Mohan, 23 C. 339 (1895); but it was subsequently held that the order could only be set aside under r. 626

an order on an application under sect. 90 of the Probate and Administration Act; (1) an order refusing an application to commit for contempt of Court; (2) an order refusing to set aside an award; (3) a judgment dismissing an appeal against an order of a lower appellate Court remanding a case for disposal on the merits; (4) a judgment of a Judge of the High Court sitting singly and remanding a case after dealing with the whole case and setting aside the judgment and decree of the lower Court; (5) an order discharging a rule to set aside a sale.(6)

The following orders have been held not to be "judgments:"—an order for mandamus, in that it concludes nothing but merely initiates further proceedings; (7) an order dismissing application for review of judgment; (8) an order for production and inspection of documents; (9) an order granting or refusing certificate of appeal to the Privy Council on the ground that such an order belongs rather to Privy Council proceedings than to those of the High Court; (10) an order dismissing an appeal for default; (11) an order directing a prosecution under the Presidency Magistrates Act; (12) an order determining a particular issue in a suit on the ground that there should not be partial appeals; (13) an order directing the addition of a party to the suit; (14) an order in the Privy Council Department refusing to extend time to furnish security for the costs of the respondent, and directing the appeal to be struck off; (15) a refusal to order security for costs under O. XLV. r. 13, *post*; (16) a refusal to send for the records under sect. 25 of the P. S. C. C. Act; (17) an order in second appeal directing the trial of certain issues of law and fact by the lower appellate Court.(18)

of the former Code, and that this decision was erroneous so far as it decided to the contrary: Fatimunnissa *v.* Deoki Pershad, F. B., 24 C. 350 (1896).

(1) In the Goods of Indra Chandra Singh, 23 C. 580 (1896).

(2) Mohendra Lall Mitter *v.* Anundo Coomar Mitter, 25 C. 236 (1897).

(3) Toolsey Money Dassee *v.* Sudevi Dassee, 26 C. 361; s. c., 3 C. W. N. 347 (1899).

(4) Vasudeva Upadyaya *v.* Visvaraja Thirthasami, 20 M. 407, at p. 417 (1897) [see Venganayyan *v.* Ramasami Ayyan, 19 M. 422 (1896); Sankaran *v.* Raman Kutti, 20 M. 152 (1896)]; it was held, however, that there was no appeal as s. 588 of the last Code prohibited it.

(5) Rai Benode *v.* Rai Pasupati, 13 C. W. N. 105 (1907); Gopi Nath *v.* Moheshwar, 35 C. 1096 (1908).

(6) Russick Lall Paul *v.* Roma Nath Sen, 1 C. W. N. xxvi. (1896).

(7) Justices of the Peace for Calcutta *v.* Oriental Gas Co., 8 B. L. R. 433 (1872).

(8) Raku Bibi *v.* Khaja Mahomed, 4 B. L. R., A. C. 10 (1869); 12 W. R. 459; S. C.

(9) Sonbai *v.* Ahmedbhai, 9 B. H. C. R. 398 (1872).

(10) Manly *v.* Patterson, 7 C. 339 (1881); Mt. Amirunnessa *v.* Baboo Behary Lall, 25 W. R. 529 (1875); Mowla Buksh *v.* Kishen Pertab Sahi, 1 C. 102 (1875); Lutf Ali Khan *v.* Asgar Reza, 17 C. 455 (1890).

(11) Mansab Ali *v.* Nihal Chand, 15 A. 395 (1893).

(12) *In re* Janokey Nath Roy, 2 C. 466 (1877).

(13) Ebrahim *v.* Fuckhrunnissa, 4 C. 531 (1878); Markby, J., was inclined to the contrary view.

(14) Kumara Upendra Krishna *v.* Nabin Krishna Bose, 3 B. L. R., O. C. 113 (1869). This was a decision under s. 363 of the Code of 1859 dealing with appeals from orders, but the principle of the decision is applicable.

(15) Kishen Pershad Panday *v.* Tiluckdhari Lall, 18 C. 182 (1890).

(16) Mohabir Prosad Singh *v.* Adhikari Kunwar, 21 C. 473 (1893); explained in Mt. Brij Coomaree *v.* Ramrick Dass, 5 C. W. N. 781, at p. 795 (1901).

(17) Venkatarama Ayyar *v.* Madalai Ammal, 23 M. 169 (1900).

(18) Kali Kristo Pal Chowdhry *v.* Ram Chunder Nag, 9 C. L. R. 461 (1881).

"**Legal Representative.**"—See notes to sect. 50, *post*.

"**Mesne profits.**"—See notes to O. XX. r. 12.

"**Moveable property.**"—"Growing crops" doubtless include crops of all sorts attached to the soil, and leaves, flowers and fruits upon and juice in trees and shrubs. See notes to sects. 4 and 16, *post*.

"**Order.**"—Reference should be made to the preceding cases in the commentary on the definition of "decree." Some others not there cited may be noticed. A suit having been instituted under the Religious Endowments Act, 1863, the plaintiff desired to withdraw the suit with liberty to sue again, and an order was made permitting him to do so, and directing that the costs be paid from the funds of the institution. It was held that the order as to costs was not a decree, and that no appeal lay.(1) Orders for payment of costs under the sections noted in the decision cited are not decrees.(2) The decision of a taxing officer is not an order.(3) An order under O. IX. r. 2 (formerly sect. 97), *post*, has been held not to be a decree; (4) as also orders under sect. 10, Act XX. of 1863 (Madras Pagoda Act); (5) under sect. 5, Religious Endowments Act (6) (XX. of 1863); under sect. 16, clause 7 of Madras Reg. III. of 1802; (7) an order under sect. 18, Act. XX. of 1863, refusing (8) or granting (9) leave to sue; an order under sect. 84 of the Bengal Tenancy Act; (10) under sect. 173 of the same Act; (11) the decision of a special Judge under sect. 104, clause 2 of the same Act; (12) an order under the Indian Trust Act refusing to remove a trustee; (13) an order rejecting an application to restore an application to set aside a sale; (14) an order awarding compensation under sect. 491 of the last Code,(15) and under sect. 206 of the same Code.(16)

"**Pleader.**"—The construction of the last clause presents some difficulty. The meaning, however, of the definition becomes obvious if the clauses of which the sentence is made up are inverted, and it is read thus: "*Pleader means every person, including an advocate, vakil, and an attorney of a High Court, entitled to appear and plead for another in Court.*" It is only the pleader

(1) Ramakissoor Dossji *v.* Sriranga Charlu, 21 M. 421 (1898).

(2) Shanks *v.* Secretary of State, 12 M. 120 (1889).

(3) Balkaran Rai *v.* Gobind Nath Tewari, 12 A. 129, 157 (1890).

(4) Bissessar Bhugut *v.* Murli Sahu, 9 C. 163 (1882).

(5) Meenakshi *v.* Subramaniya, 11 M. 26 (1887).

(6) Somasundara *v.* Vythilinga, 19 M. 285 (1896).

(7) Narasayya *v.* Collector of Anantapur, 24 M. 95 (1900).

(8) *In re* Venkateswara, 10 M. 98 (1886); Kazim Ali *v.* Azim Ali, 18 C. 382 (1891); Delroos Banoo *v.* Abdur Rahman, 21 W. R. 368 (1874).

(9) Protap *v.* Brojonath, 19 C. 275, 285 (1891).

(10) Goghun Mollah *v.* Ramessur, 18 C. 271, 281 (1891).

(11) Raghu Singh *v.* Misri Singh, 21 C. 825 (1894); see also Harabandhu *v.* Harish, 3 C. W. N. (1898).

(12) Lala Kirut Narain *v.* Palukdhari, 17 C. 326 (1889).

(13) Nathu Wilson *v.* McAfee, 19 A. 131 (1896).

(14) Suja-uddin *v.* Reazuddin, 27 C. 414 (1899).

(15) Narasinga *v.* Govinda, 24 M. 62, 64 (1900).

(16) Nalinakshya *v.* Mufakshar Hossain, 28 C. 177, 179 (1900).

duly qualified who is entitled to appear, the vakil where and as his qualification entitles him, the advocate where and as his qualification gives him the right, and the attorney where and as he too might be qualified.(1)

"Public officer."—This section is the same as that of the preceding Code, with the slight alterations italicized, and the definition of "public officer" has been taken from that of "public servant" in the Indian Penal Code, with some omissions.(2) For the definition of "Judge," see *ante*, and of "Court of Justice" the Penal Code,(3) which gives the general signification of the expression. The following persons have been held to be public officers under this section, or public servants under the Penal Code, under provisions of that Code which correspond with this:—convict warders; (4) a supernumerary person appointed by the Board of Revenue under sect. 6, Act V. of 1863, (B. C.); (5) Naib Nazir; (6) a Patwari; (7) the Official Trustee of Bengal; (8) the Official Assignee of the Insolvent Court,(9) a Collector appointed to take charge of the estate of a minor under Act XX. of 1864; (10) or as agent for the Court of Wards under sect. 204, Act XIV. of 1873; (11) an officer in the Indian Staff Corps; (12) the Administrator-General of Bengal since the passing of the Administrator-General's Act of 1902.(13) A person nominated by the Collector under sect. 69 of the Bengal Tenancy Act, for the purpose of making a division of crops between the landlord and tenant, is not a public servant; (14) though a surveyor employed by the Collector in the Khas Mehal Department is.(15) A Cantonment Committee constituted under the Indian Cantonments Act (XIII. of 1889) has been held to be a public officer within the meaning of this clause.(16)

"Signed." The word is here employed in a sense more comprehensive

(1) *In re* Pleaders of the High Court, 8 B. 105 (1883). As to the powers and duties of pleaders some cases will be found collected in O'Kinealy's Civil Procedure Code in the notes to this section. And as to Vakil's practising before the Privy Council, see *In re* Twidale, 16 C. 636.

(2) S. 21; therefore in certain cases a person may be a public servant, but not a public officer: *e.g.* a municipal commissioner and engineer: R. *v.* Nantamram Uttaram, 6 Bom. H. C. R. Cr. Ca. 64 (1869).

(3) S. 20.

(4) R. *v.* Kallachand Mortrie, 7 W. R. Cr. 99 (1867).

(5) R. *v.* Ram Krishna Das, 7 B. L. R. 446; 16 W. R. Cr. 27 (1871).

(6) R. *v.* Mahmood Hosscin, 2 N. W. P. 298 (1870).

(7) R. *v.* Muds-ood-deen, 2 N. W. P. 148 (1870).

(8) Shahebzadee Shahunsah Begum *v.* Fergusson, 7 C. 499 (1881); Adbul Lateef *v.* Doutre, 12 M. 250 (1889).

(9) Joosub Haji Alli *v.* Kemp, 4 Bom. L. R. 929; s. c., 26 B. 809 (1902).

(10) Bhau Balapa *v.* Nana, 13 B. 343, 346 (1888); Narsingrav *v.* Lakshmanrav, 1 B. 318 (1876); that is the collector appointed *as such*, but the nazir is not anywhere mentioned in Act XX. of 1864 as a person who may *in his official capacity* be appointed administrator, and is not a public officer: Mohan Ishwar *v.* Haku Rupa, 4 B. 638 (1880).

(11) Collector of Bynir *v.* Munuvar, 3 A. 20 (1880).

(12) Watson *v.* Lloyd, 25 M. 402 (1901).

(13) Bholaram Chowdhury *v.* Administrator-General, 8 C. W. N. 913 (1904).

(14) Chatter Lal *v.* Thacoor Pershad, 18 C. 518 (1891).

(15) Bajoo Singh *v.* Queen-Empress, 26 C. 158 (1898).

(16) Cecil Gray *v.* Cantonment Committee of Poona, 34 B. 583 (1910).

than that assigned to it in the General Clauses Act, 1897, which is substantially the same as the first clause of this definition of the last Code. The second clause of that Code was first added in the amending Bill II. of 1878, on the ground that the use of a seal capable of producing an impression of the name and title of the person using it is common amongst people of rank in this country. The definition in the last Code after the word "stamped" added "with the name of the person referred to." The expression "*person referred to*" meant the person referred to in the subsequent sections of the Code, as being required to sign or verify certain documents, and it is not a condition precedent to such person being able to use a stamp that he should be unable to write his name.(1) As regards initialling, assuming that the person signing should, if able to write, write his name in full—and certainly it is proper that this should be done in the case of a warrant—it does not follow that because the signature on the warrant is confined to the initials of the name it was not the duty of the officer to execute it or that the debtor may forcibly resist its execution.(2)

Subordination of Courts.

3. For the purposes of this Code, *the District Court is subordinate to the High Court; and* every *Civil* Court of grade inferior to that of a District Court and every Court of small Causes *is* subordinate to the High Court and District Court.

Subordination.—See notes to sect. 2, *ante*, *sub voc.* "District Court." This enumeration of Subordinate Courts is not intended to be exhaustive.(3)

Savings.

4. (*1*) *In the absence of any specific provision to the contrary nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.*

(*2*) *In particular and without prejudice to the generality of the proposition contained in sub-section* (*1*), *nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.*

Savings.—As originally drafted, the Civil Procedure Bill declared that nothing in the Code should affect (a) the Oudh Civil Courts Act (XIII. of 1879), the Oudh Courts Act (XIV. of 1891), the Punjab Courts Act (XVIII. of 1884), the Central Provinces Civil Courts Act (XVI. of 1885), the Lower Burma Courts Act (VI. of 1900), any law under the Indian Councils Acts (24 & 25 Vict

(1) Maharaja of Benares *v.* Debi Dayal Noma, 3 A. 575 (1881).

(2) R. *v.* Sanki Prasad, 8 A. 293 (1886).

(3) Purshottam *v.* Mahadu Pandu, 14 Bom. L. R. 947; s. c., 37 B. 114 (1912).

c. 67; 55 & 56 Vict. c. 14) prescribing a special procedure for suits between landholders and their tenants and agents, or for the partition of immoveable property; (b) the jurisdiction or procedure of village munsifs or panchayats in Madras, the Chief Court of Lower Burmah sitting as an Insolvent Court; (c) certain Bombay laws, viz. Reg. XIII. of 1830 (jurisdiction of jagirdars, etc.), Act XV. of 1840 (Agents of Foreign Sovereigns, etc.), and cases of the nature defined in the enactments specified in the third schedule of the draft. The Select Committee were, however, of opinion that those provisions, which were considered cumbrous, should be replaced by the following simpler and more comprehensive saving on the lines of that contained in sect. 1, sub-sect. 2 of the Criminal Procedure Code. "*Provided that the procedure in cases tried by any Court in the exercise of any jurisdiction conferred by or under any of the enactments specified in the third schedule, and in appeals to the Civil Courts allowed therein, shall be in accordance with the provisions of this Code, save in so far as those provisions are inconsistent with the specific provisions of any of the enactments as aforesaid.*" They also added in their report, "The revenue laws of several provinces contain special provisions for the more speedy recovery of agricultural rent, to which, indeed, the produce of the land is, in several instances, declared to be hypothecated. The more general terms of the saving clause, as now proposed by us, would, we think, suffice to save such rights and remedies. At the same time, for the sake of greater clearness, we have inserted an express saving which is likely to save mistakes in practice." The words italicized have now been omitted, the Special Committee being of opinion that the section, as it now stands, effects all the savings covered by sect. 4 of the last Code. The concluding paragraph of that section has not been reproduced as it is stated to be obsolete.

"**Affect.**"—The saving clause under the former Code was not meant to enact that the rules contained in the Code will not apply to the suits or other proceedings taken under the excepted enactments and laws, but that if there is anything in these Acts inconsistent with the Code, the latter does not prevail.(1) The suits between landholders and tenants referred to in this note are suits between landholders and their tenants, or between landholders and their tenants or agents, not between the tenants and agents. The Rent Recovery Act (Madras, Act VIII. of 1865) is such a law, and it follows that the special revisional powers given to the High Court by sect. 115, formerly 622, *post*, will not affect the provisions of that Act.(2) It was further held, in the case first mentioned, that although the Deputy Collector's proceedings were not strictly "*proceedings under the Act*," but rather "*proceedings taken under colour of the Act*," that circumstance alone would not give a jurisdiction which this section was designed to exclude. The Chota Nagpore Landlord and Tenant Procedure Act (Bengal, Act I. of 1879) is covered by this section, which having regard to the provisions of that Act bars the application of sect. 100 (formerly 584), *post*. No second appeal therefore lies in a suit for arrears of rent brought under the provisions of that Act.(3)

(1) Aga Mahomed Hamadani *v.* Cohen, 13 C. 221, 223 (1886).

(2) Velli Perija Mira *v.* Moidin Padsha, 9 M. 332 (1886); Appandai *v.* Srihari, 16 M. 451 (1892); Venkatanarasimha *v.* Suranna, 17 M. 298 (1893).

(3) Khedu Mahto *v.* Budhun Mahto, 27 C. 508, F. B.; s. c., 4 C. W. N. 333 (1900).

As already stated, the section saves suits under laws passed under the Indian Councils Acts, providing for the partition of immoveable property. The word "property" in its strict sense is a right, but is used also to denote the subject or rather the object of that right, and when so used may be looked upon as synonymous with "a thing." In ordinary language, that word has the widest extent, including every species of acquisition in which an individual may have an interest or right, as lands, goods, chattels and effects.(1) But where the right is common to all, it is not the subject of property, as in the case of the right of the public to fish in the open sea.(2) The distinction between moveable and immoveable property is not coincident with the English law division as to lands and chattels, or real and personal property. For property according to English law may be immoveable yet personal, as in the case of leaseholds, or moveable and real, as in the case of dignities and titles of honour. Further, things physically moveable may be considered immoveable in law.

In the Code as well as in the other Acts of the Indian Legislation, unless there be something repugnant in the subject or context, the term "immoveable property" includes "land (including land covered by water), benefits to arise out of land (such as rents, annuities, and other incorporeal hereditaments), and things 'attached to the earth,' which is defined in the Transfer of Property Act to mean: (a) rooted in the earth, as in the case of trees and shrubs (but as to growing crops, *vide ante*); (b) embedded in the earth, as in the case of walls or buildings; (c) attached to what is so embedded (for the permanent beneficial enjoyment of that to which it is attached), or permanently fastened to anything attached to the earth." (3) The term "moveable property" means property of every description except immoveable property,(4) and under sect. 2, clause 13, includes growing crops.

Application of the Code to Revenue Courts.

5. (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government, with the previous sanction of the Governor General in Council, may, by notification in the *local* official Gazette, declare that any portions of those provisions *which are not expressly made applicable by this Code* shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government, with the sanction aforesaid, may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits *or other proceedings* relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court

(1) See Hukm Chand, 46-48.

(2) Baban Mayacha *v.* Nagu Shravucha, 2 B. 19 (1876).

(3) Act X. of 1897, s. 3 (26) (General Clauses).

(4) Ib., s. 3 (35).

having original jurisdiction under this Code to try such suits *or proceedings* as being suits *or proceedings* of a civil nature.

Object of section.—This section was first added by sect. 3, Act VII. of 1888, and in presenting the report of the Select Committee on the final draft of the Bill, which was passed into that Act, Sir Andrew Scoble said, "The object is to preserve the summary character of rent litigation under local laws; and it is justified on the ground that holding the provisions of the Civil Procedure Code to be applicable to the proceedings of the Rent and Revenue Courts, in all points which are not provided for in the special Acts governing these classes of Courts, may be the source of considerable embarrassment to the Administration, both by throwing impediments in the way of the easy realization of the rents from which the land revenue is paid and imposing increased labour on the Rent Courts, whose time is already fully occupied." As to Revenue Courts generally, see notes to Preamble, *ante*.

Pecuniary jurisdiction.

6. *Save in so far as is otherwise expressly provided,* nothing *herein contained* shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

Jurisdiction.—In view of the extended scope of sect. 4 of the present Code the reproduction of sects. 6 and 7 of the last Code (except as to the final paragraph which is the present section) has been considered unnecessary. The original section was first introduced into the Code of 1877, and was held by the Calcutta and Bombay High Courts to operate to limit the jurisdiction conferred by sect. 223 of the former Code (see sects. 38, 39, 41, O. XXI. rr. 4, 5), relating to the Courts by which a decree may be executed, there being no provision in the Code which could, if uncontrolled by this clause, have operated to give a Court jurisdiction to try a suit (assuming such term to be limited to proceedings before and up to decree) in excess of the limits of its pecuniary jurisdiction. It was proposed to introduce the words "*or proceedings in suits*" to negative the view that a Court to which a decree is sent for execution has jurisdiction to execute the decree though the amount exceeds the limits of the previous jurisdiction of the Court, a point on which there was a conflict of opinion.(1) See note to sect. 36, O. XX. r. 12. But these words have been omitted.

Provincial Small Cause Courts.

7. The *following provisions shall not* extend to Courts constituted under *the Provincial Small Causes Courts Act, 1887, or* to Courts exercising the jurisdiction of a Court of Small Causes *under that Act, that is to say,*—

(1) See Shanmuga Pillai *v.* Ramanathan Chetti, 17 M. 309 (1893); Gokul Kristo Chunder *v.* Aukhil Chunder Chatterjee, 16 C. 457, 465 (1889).

(*a*) *so much of the body of the Code as relates to*—

(*i*) *suits excepted from the cognizance of a Court of Small Causes;*

(*ii*) *the execution of decrees in such suits;*

(*iii*) *the execution of decrees against immoveable property; and*

(*b*) *the following sections, that is to say,*—

section 9,

sections 91 and 92,

sections 94 and 95 so far as they relate to injunctions and interlocutory orders, and

sections 96 to 112 and 115.

Provincial Small Cause Courts.—Section 17 of the Provincial Small Cause Court Act provides that the procedure prescribed in the Chapters and sections of the former Code, specified in the schedule, should, so far as those Chapter and sections were applicable, be the procedure followed in a Court of Small Causes in all suits cognizable by it, and in all proceedings arising out of such suits: provided that an applicant for an order to set aside a decree passed *ex parte*, or for a review of judgment, shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct. And where a person has become liable as surety under this proviso the security may be realized in manner provided by sect. 253 (cf. now sect. 145), *post*. The provisions of the former section have been arranged in a more convenient form. The wording of the section makes it clear, that the Courts on which Small Cause jurisdiction has been conferred are to exercise that jurisdiction according to the procedure provided for Small Cause Courts. As to the rules, see O. L.

Presidency Small Cause Courts.

8. Save as provided in sections 24, *38 to 41, 75, clauses* (*a*), (*b*) *and* (*c*), *76, 77 and 155 to 158*, and by the Presidency Small Cause Courts Act, 1882, *the provisions in the body of* this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

Presidency Small Cause Courts.—This section provides that certain sections of the Code shall apply. Sect. 23 of Act XV. of 1882 extended certain portions of the Code specified in the second schedule to that Act to Presidency Small Cause Courts. That section and schedule were repealed by sect. 12 of the Amending Act I. of 1895. By sect. 5 of the latter Act the High Court may from time to time, by rules having the force of law, prescribe the procedure to be followed and the practice to be observed by the Small Cause Court either in supersession of or in addition to any provisions prescribed on or before December 31, 1894, and may cancel or vary any such

rules. The law and any rules and declarations made thereunder, with respect to procedure or practice in force on that date, is in force unless and until cancelled or varied by rules made by the High Court under sect. 5 of Act I. of 1895. The High Court has made certain rules under which portions of the Code mentioned in the schedule annexed to the rules, with such modifications as are indicated in that schedule, are extended to the Calcutta Court of Small Causes to be applied with due regard to the other rules prescribed. This section, as it formerly stood in the earlier Code, contained a second paragraph authorizing the Local Government, by notification published in the Official Gazette, to extend to the Presidency Small Cause Court certain portions of the Code. This was repealed by the Presidency Small Cause Courts Act.(1) As to the Rules, see O. LI.

(1) S. 2, Act XV. of 1882; see In the matter of T. P. Waller, 6 M. 430 (1883).

PART I.

SUITS IN GENERAL.

JURISDICTION OF THE COURTS AND RES JUDICATA.

9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is *either expressly or impliedly* barred.

Courts to try all civil suits unless barred.

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

"**The Courts.**"—The original side of the High Court is a Court within the meaning of sect. 9, and there is no enactment barring its jurisdiction to entertain a suit to set aside, on the ground of fraud, a decree passed by another Court of concurrent jurisdiction.(1)

"**Provisions herein contained.**"—Reference may be made to those contained in sects. 10, 11, 47; O. IX. r. 9, in which the bar of a suit is absolute, and to sects. 83, 84, 86, in which the bar is of a conditional or provisional character. As regards the Government, Minors, Lunatics, Charities, see sects. 79, 92, 93, and O. XXXII., *post*.

Suit.—As to the meaning of this term, see notes to sect. 2, *ante*, "Decree."

Jurisdiction generally.—To constitute jurisdiction there must be in the first place authority to judge at all. If a Judge is not legally appointed, all his judgments, decrees and orders, are *ultra vires* and illegal, and he (or the Bench of which he is one, if the proceeding cannot be heard by a single Judge) has no jurisdiction to entertain any judicial proceeding.(2) But if a person has in

(1) Nundo Lal Bose *v.* Nistarini Dossee, 7 C. W. N. 353 (1902); s. c., 30 C. 369 (1902).

(2) R. *v.* Ganga Ram, 16 A. 136, 156 (1894). The validity of the appointment, under the High Courts Act, 1861, of Burkitt, J., which was there in question, was again raised before the Privy Council in Bulwant Singh *v.* Rani Kishori, 20 A. 267, 293 (1897). See also Glyn *v.* Bonnaud, 2 Tayl. & Bell, 205, 224; as to appearance of Judge on rule to show cause for want of jurisdiction, see R. *v.* Judge Marylebone County Court, 50 L. T. 97. Where a rule was obtained upon a Judge who held that he had no jurisdiction, to show cause

all respects acted as Judge, that fact is presumptive proof, until the contrary be shown, of his due appointment to act as a Judge of the Court.(1) If a Judge is validly appointed but is disqualified from trying a suit by reason of his personal interest in it,(2) the judgment is erroneous and voidable but not void.(3)

Assuming the existence of official authority and the absence of any disqualification; the next question is as to the jurisdiction to deal with the various matters which, in the exercise of his general judicial authority, are brought before the Judge for his determination.

Jurisdiction, when used in its general sense with reference to a Court of Justice, means the power or authority of judging, and that Court is said to be of competent (4) jurisdiction with regard to a suit or other proceeding, when it has power to hear or determine it or to exercise any judicial power therein.(5) "Jurisdiction," said West, J.,(6) "according to the exact conception of it formed by the Roman lawyers, consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it, and in pronouncing upon them." The word, however, is commonly used in two different senses: an use which has led to much confusion. It is sometimes used to mean jurisdiction in the ordinary sense above mentioned, that is, when used with reference to local or pecuniary jurisdiction or with reference to the parties,(7) or jurisdiction with reference to the subject-matter (8) of a suit. It is also used to mean the legal authority of a Court to do certain things. Thus it has been said that if a Court has "jurisdiction" to

why he should not hear the case, it was stated that it was not usual for a Judge to be represented in a rule unless the whole jurisdiction of his Court was in question: R. *v.* Judge Marylebone County Court, 50 L. T. 97; as in the case of Mackonochie *v.* Penzance, 6 App. Cas. 424.

(1) R. *v.* Ganga Ram, *supra*, at pp. 156, 157.

(2) The principle *nemo debet esse judex in propria causa* is one of general application apart from legislative enactment; but this disqualification is expressly provided for by s. 38, Act XII. of 1887 (Bengal Civil Courts); s. 17, Act III. of 1873 (Madras Civil Courts); s. 23, Act XIII. of 1879 (Oudh Civil Courts). See Hukm Chand, Res Jud. 380. A Judge, however, is not disqualified from trying a suit to which his Government is a party: Bikrama Singh *v.* Bir Singh, 1888, P. R. No. 191; Aloo Nathu *v.* Gagubha Dipsangji, 19 B. 608 (1894). [No Judge can act in any matter in which he has any pecuniary interest, nor where he has any interest, though not a pecuniary one, sufficient to create a real bias.] Loburi Domini *v.* Assam Railway and Trading Co., Ld., 10 C. 915 (1884).

(3) Phillips *v.* Eyre, 6 Q. B. 22. In Aloo Nathu *v.* Gagubha Dipsangji, 19 B. 608 (1894), the decree was set aside upon an application made in revision.

(4) "I am of opinion that 'competent' means 'having jurisdiction,' that is with reference to the pecuniary value and nature of the suits which the Court has to try." *Per* Mahmood, J., in Nidhi Lal *v.* Mazhar Husain, 7 A. 239 (1884); see Authors' Evidence Act, 5th ed., notes to s. 44.

(5) See the question of jurisdiction discussed in Hukm Chand's Res Judicata, Ch. v. *et seq.*; and the same Author's Civil Procedure Code, 54.

(6) Amritrav *v.* Balkrishna, 11 B. 488, 490 (1887), and see definition given by Mahmood, J., in Har Prasad *v.* Jafar Ali, 7 A. 350 (1885).

(7) Har Prasad *v.* Jafar Ali, 7 A. 350 (1885). See Abdul Kadir *v.* Doolanbibi, 37 B. 563 (1913).

(8) It is used in this sense in Ledgard *v.* Bull, 9 A. 191, 203 (1886); Sadasiva *v.* Ramalinga, 2 I. A. 219, 233 (1875); Hurronath Roy *v.* Scott, B. L. R., F. B., 636 (1867).

make a remand, that term being used in the former sense, then it is only in the latter sense that an erroneous order of remand can be treated as an order made without jurisdiction.(1) Further difficulty has been introduced, it having been held that the same term may mean one thing in one section of the Code and another thing in another. So the term, it has been held,(2) is used in its former sense in sect. 99 (formerly 578), that is, in the sense of local and pecuniary jurisdiction and jurisdiction with reference to the subject-matter, while the same term in sect. 115 (formerly 622), may, it is said, well be taken to have been used in a more comprehensive sense.(3) The term in this section is used in the first of the senses above mentioned.

The judgment or order of a Court without jurisdiction in this last-mentioned sense is void and a mere nullity.(4) Jurisdiction derives from the Sovereign, and in British India has been conferred by the Charters and Letters Patent of the High Courts, and as regards other Courts by various Acts of the Legislature constituting those Courts, giving them powers and regulating their procedure.(5)

This jurisdiction may be of different kinds: (a) over the parties; (b) over the subject-matter; (c) local; (d) pecuniary. Peculiar powers may be given to particular Courts whilst other Courts may be of restricted jurisdiction. But no Court has power to give judgment respecting a matter not submitted to it for decision, even in a suit involving other matters which have been so submitted.(6)

The distinction must be kept between jurisdiction and errors in the exercise of jurisdiction. The proceedings of a Court having jurisdiction over the subject-matter and parties are not void, however erroneous they may be. A judgment is not void simply because it is erroneous. This is evident from the very notion of jurisdiction, which is the power to determine and not

(1) Mohesh Chunder Das *v.* Jahiruddi Mollah, 5 C. W. N. 509, 512 (1901). [So it has been said that the Judicial Committee in Amir Hasan Khan *v.* Sheo Baksh Singh, 11 C. 6 (1884), used the term "jurisdiction," not in the sense that the Judicial Commissioner had no jurisdiction in the first sense of the word to entertain an application for revision, for he had the same powers as the High Court, but that he had exceeded his legal authority and that the order was *ultra vires*: Har Prasad *v.* Jafar Ali, 7 A. 350 (1885). See Hukm Chand, Res Jud. 461 *et seq.*]

(2) Ib.

(3) Ib., 514; Har Prasad *v.* Jafar Ali, 7 A. 350 (1885); Dhan Singh *v.* Basant Singh, 8 A. 519 (1886), *per* Mahmood, J.

(4) See Authors' Evidence Act, 5th ed., note to s. 44, where the question of competency, fraud and collusion, as affecting judgments, is dealt with, and Hukm Chand, Res Jud. 397, 484. A Court may, however, always inquire as to whether jurisdiction exists. This is not an exercise of jurisdiction over the case itself, but an investigation of another question, that of whether the conditions of cognizance are satisfied: Amritrav *v.* Balkrishna, 11 B. 488 (1887); Huree Prosad *v.* Koonjo Behary, 1 Marsh, 99, 101 (1862); Nasrun *v.* Watson, 3 W. R. 215 (1865). As to the effect of evidence given in a Court without jurisdiction, see Authors' Evidence Act, 5th ed., note to s. 33. As to prohibition of inquiry into jurisdiction by executing Court under O. 21, r. 7, see Hari Govind Kalkundri *v.* Narsingrao Konherrao Desphande, 38 B. 149 (1913).

(5) *Vide post.* As to the presumptions affecting jurisdiction, see Authors' Evidence Act, 5th ed., notes to s. 114, ill. (*e*), and under heading "Regularity"; Hukm Chand, Res Judicata, 422.

(6) See *per* James, L.J., in Robinson *v.* Dhuleep Singh, 11 Ch. D. 798; Hukm Chand, Res Judicata, 451.

merely the power to determine rightly.(1) So in the under-mentioned case the Privy Council held that a judicial sale was not a nullity and could not be treated as invalid, notwithstanding irregularity even though a material one, for the jurisdiction of the Court to execute had been complete throughout. It had not been lost by reason of an error in treating a particular person as the legal representative of the judgment-debtor's estate, the Court having power to decide wrongly as well as rightly.(2)

It is a general principle, that whenever jurisdiction is given to a Court by an enactment, and such jurisdiction is only given on certain specified terms contained in the enactment itself, these terms must be complied with in order to create and raise the jurisdiction, for if they are not complied with the jurisdiction does not arise.(3)

Consent cannot give jurisdiction, which is absent as regards the subject-matter,(4) nor probably as regards local or pecuniary (5) jurisdiction. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him.(6)

(1) Hukm Chand, Res Judicata, 473, 482; so where the Court has power to grant relief of a particular kind, an error in giving too much or not enough is never void, so long as it does not exceed its possible power in any cause of the general class to which the one under consideration belongs, ib. 456. And see Amir Hasan Khan *v.* Sheo Baksh Singh, 11 C. 6 (1884); ref., Har Prasad *v.* Jafar Ali, 7 A. 345, 349 (1889); Badami Kuar *v.* Dinu Rai, 8 A. 111 (1886); Mahomed Suleman Khan *v.* Fatima, 9 A. 104 (1886); and next note and notes to s. 115; and see Bhupendra Nath Basu *v.* Ranjit Singh, 41 C. 384 (1913).

(2) Malkayun *v.* Nashan, 25 B. 337 (1900), P. C.; dist., Baswantapa *v.* Ranu, 9 B. 86 (1884), in which the Court had not the jurisdiction which it purported to exercise.

(3) Nusserwanjee *v.* Meer Mynoodeen, 6 M. I. A. 134, 155 (1855). So a Court could give judgment on an award unless under the provisions of s. 521 of the last Code: Raja Har Narain Singh *v.* Chaudhrain Bhagwant Kuar, 13 A. 300 (1891); or admit a review after ninety days without being satisfied that there is sufficient cause as directed by the Limitation Act: Luchman Singh *v.* Shumshere Singh, 2 I. A. 58 (1874); or in violation of s. 629 of that Code, prohibiting the review of an order passed in review: Muhammad Yusuf Khan *v.* Abdul Rahman Khan, 16 I. A. 104 (1889).

(4) See note 6, *post*, and Hukm Chand, Res Judicata, 409.

(5) See Hukm Chand, Res Judicata, 411, 412, where it is stated that the question as to the waiver of local jurisdiction has not yet received an authoritative decision in India. In Velayudam *v.* Arunachala, 13 M. 273 (1889), it was held that there was no waiver of pecuniary jurisdiction; but the matter was one really not of jurisdiction but procedure. See Gourachandra *v.* Vikrama, 23 M. 367 (1899). In Gurdeo Singh *v.* Chandrikah Singh, 5 C. L. J. 611, 623 (1907), the term "subject-matter" appears to have been used in contradistinction to the other elements analysed.

(6) Ledgard *v.* Bull, 9 A. 191, 203 (1886), P. C.; s. c., 13 I. A. 134; Minakshi Naidu *v.* Subramanya Sastri, 11 M. 26, P. C. (1887); s. c., 14 I. A. 160; Bibi Ladli Begam *v.* Bibi Raji Rabia, 13 B. 650 (1880) [suit cognizable by S. C. C. alone brought in Court of Joint Subordinate Judge]; Denonath *v.* Adhor Chunder, 4 C. N. W. 470, 473 (1900); Achha Mian *v.* Durga Churn Law, 25 C. 146, 151 (1897); Nasserwanjee *v.* Meer Mynoodeen, 6 M. I. A. 134, 161 (1855); Luchman Singh *v.* Shumshere, 2 I. A. 58 (1874); Government of Bombay *v.* Ranmalsingji, 9 B. H. C. R. 242 (1872) [property situate in territory of independent chief]; Lalmonee *v.* Juddoonath, 1 Ind. Jur. N. S. 319 (1866); Keshav *v.* Venayak, 23 B. 22, 26 (1897);

Where, however, the Court has jurisdiction over the subject-matter and over the person, and a defendant has some privilege which exempts him from the jurisdiction, such privilege may, it has been said, be waived.(1) So where the objection to the jurisdiction was based on the ground of the defendant being a Sirdar of the Dekhan, who as such was not subject to the jurisdiction of the Munsif's Court which passed the decree, it was held that the defendant must be taken to have waived the want of jurisdiction and that it was too late to raise it when the decree was sought to be executed.(2) And there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties, without objection, join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there are irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.(3)

Under the former Codes it was held that an objection to jurisdiction might be raised at any stage of a suit, even after remand by the High Court in second appeal,(4) and that the Court would receive and adjudicate a point of

Vishnu Sakharam *v.* Krishnarao, 11 B. 153 (1886); Roy Bhoopendro Nath Chowdhry *v.* Kalee Prosunno Ghose, 24 W. R. 205 (1875) [consent cannot give jurisdiction nor alter the nature of the decree. An agreement introducing fresh parties cannot be substituted for the decree or become capable of execution as if it was the original decree]; Ramasamy Chettiar *v.* Orr, 26 M. 176, 178 (1902); Aklemannessa Bibi *v.* Mahomed Hatem, 31 C. 849 (1904); Kumasasami Reddiar *v.* Sabbaraya, 23 M. 314 (1899) [transfer of appeal, but absence of notice of transfer may be waived: Sankumani *v.* Koran, 13 M. 211 (1889)]; Krishnan Chetti *v.* Muthu Palandi, 22 M. 172 (1898) [appeal]; Aukhil Chunder *v.* Baboo Moheenee Mohun, 4 C. L. R. 491 (1879) [id.].

(1) See Hukm Chand, Res Judicata, 412.

(2) *Ex parte* Manohar Bhivrav, 2 B. H. C. R. 374 (1865); ref., Moru *v.* Gopal, 2 B. 132 (1877). It is to be observed, however, that the objection in the former case was taken in execution proceedings, and a Court executing the decree has no power to go into the merits of the decree.

(3) Ledgard *v.* Bull, 9 A. 191, 203 (1886), P. C.; Pisani *v.* Att.-Gen. for Gibraltar, 5 P. C. 515 (1874) [departures from ordinary practice by consent are of everyday occurrence]; Sadasiva *v.* Ramalinga, 2 I. A. 219 (1875); s. c., 15 B. L. R. 383 [Court had general jurisdiction though exercise of that jurisdiction was irregular. The P. C. at p. 403, 15 B. L. R., stated that they were not impressed by the observations of Markby, J., in Ekowri Singh *v.* Bijaynath, 4 B. L. R., A. C. 111, in which it was held that the conduct of the parties was immaterial]; Minakshi *v.* Subramanya, 14 I. A. 160 (1887); Sankumani *v.* Ikoran, 13 M. 213 (1889); Vishnu Sakharam *v.* Krishnarao, 11 B. 153 (1886); Puna Bibee *v.* Khoda Buksh, 22 W. R. 396 (1874); Khemna Gowala *v.* Budoloo Khan, 6 C. 251 (1880) [reference to arbitration]. See Hukm Chand, Res Judicata, 468-473.

(4) Keshav *v.* Vinayak, 23 B. 22 (1897); and see Sayad Nyambula *v.* Nana, 13 B. 424 (1888) [objection taken for first time in second appeal]; Velayudam *v.* Arunachala, 13 M. 273 (1889); Mohan Ishwar *v.* Haku Rupa, 4 B. 638, 639 (1880), and cases there cited; Bipin Behary Chowdhry *v.* Ram Chunder Roy, 14 W. R. 12, 15 (1870); Macdonald *v.* Riddell, 16 W. R. Cr. 79 (1871); Shri Sidheswar Pandit *v.* Shri Harihar Pandit, 12 B. 155 (1887); Chundee Churn Dutt *v.* Eduljee Cowasjee, 8 C. 678 (1882) [Small Cause Court reference—new trial—though no objection at the original hearing]. In Har Narain Singh *v.* Chaudhrain Bhagwant Kuar, 13 A. 300 (1891), the Privy Council, holding that a Judge had acted without jurisdiction, set aside the decree, although the point was not raised either in the first Court or the Court of Appeal in India: Nidhi Lal *v.* Mazhar Hossein, 7 A. 230 (1884) [provided there is on the record sufficient material to substantiate the objection].

jurisdiction though not taken in the lower Court, because acts done without jurisdiction are acts of no legal effect at all and might be set aside.(1) At the same time it was said that though the question of jurisdiction might be taken for the first time on appeal, yet if the want of jurisdiction did not appear upon the pleadings, evidence or admissions of the parties, the Court would not, upon a mere suggestion, remand the case to ascertain further facts in order that the question of jurisdiction might be considered.(2) The objection should be raised in the course of the proceedings. He who having an appeal and a special appeal on a question of jurisdiction, has not availed himself of those remedies, *renunciavit juri pro se introducto*. An omission to urge objections there is to be treated when the proceedings have been completed as conclusive.(3) When no objection to the jurisdiction of the first Court was raised in the grounds of a regular appeal and the first Appellate Court declined to hear the question argued, it was held that the objection should have been considered and decided.(4) The present Code, however, enacts that no objection to jurisdiction ("place of suing") shall be allowed in any appeal or revision unless taken in the Court of first instance before settlement of issues (sect. 21, *post*).

If a party protest against jurisdiction he is not bound to retire; he can go through the case subject to protest.(5) If an objection to jurisdiction is first taken at a late stage of the suit, and the jurisdiction is doubtful, the proper course is to proceed to determine the suit.(6) As to the form of the order where an objection to jurisdiction is raised and allowed, see notes to O. VII. r. 10. In some cases a party has been held to be estopped from proving want of jurisdiction in a subsequent suit (7) or in further proceedings.(8)

Subject-matter.—Jurisdiction over the subject-matter primarily depends on the nature of the cause of action alleged and of the relief asked. It is not however the existence of a cause of action which constitutes the subject-matter, but the allegation of such existence.(9) Nor is the subject-matter of

(1) Gooroo Persad Roy *v.* Juggobundhoo Mozoomdar, W. R. Sp. No., p. 15, F. B. (1862); Ramayya *v.* Subbasayadu, 13 M. 25 (1889); Rajnarain *v.* Ananga Mohun, 26 C. 598, 600 (1899). As regards estoppel against pleading want of jurisdiction, see Authors' Evidence Act, 5th ed., Introduction to Ch. VIII.

(2) Naimudda Jowardar *v.* Scott, 3 B. L. R. 283 (1869).

(3) Naro Hari *v.* Anpurnabai, 11 B. 160 *n.*, 171, 172 (1874), *vide post*, "Estoppel."

(4) Motilal Ramdas *v.* Jamnadas, 2 B. H. C. R. 40 (1865). Otherwise if it were only an irregularity: Ram Kishen Upadhia *v.* Dipa Upadhia, 13 A. 580 (1891).

(5) Hamlyn *v.* Bettely, 6 Q. B. D. 63 (1870); *cf.* Ledgard *v.* Bull, 9 A. 191 (1886); as to costs where the plea of want of jurisdiction is raised and allowed, but the party raising it is responsible for the prior proceedings, see Aftabooddeen Ahmed *v.* Mohinee Mohun Doss, 15 W. R. 48 (1871).

(6) Bagram *v.* Moses, 1 Hyde, 284 (1864).

(7) See Hukm Chand, *op. cit.* 416; Naro Hari *v.* Anpurnabai, 11 B. 160, *n.* (1874), *ante*; Drobo Moyee *v.* Bipin Mundul, 10 W. R. 6 (1868); Gopo Nath *v.* Bhagwat Pershad, 10 C. 707 (1884); Ooma Soondaree *v.* Bepin Beharee, 13 W. R. 229 (1870); Nehora Roy *v.* Radha Pershad Singh, 4 C. L. R. 353 (1879).

(8) Hukm Chand, *op. cit.* 420; Mohammed Hossein *v.* Akayya Narain, 2 B. L. R. Ap. 42 (1869); Naimudda *v.* Scott, 3 B. L. R. 283 (1869), *supra*; Koylash Chunder *v.* Ashrup Ali, 22 W. R. 101 (1874). As to s. 11 of the Suits Valuation Act, 1887, *vide post*, "Pecuniary Jurisdiction."

(9) See Hukm Chand, Res Judicata, 240 *et seq.*

a suit necessarily identical with the property to which the suit relates. The subject-matter of a suit is generally the specific thing sought in it. In a suit for damages for injuring a carriage the subject-matter would in one sense be the carriage, but the object of the suit would be the amount demanded. Where there is no material property concerned, as in a suit for slander, the subject-matter cannot be identified with a tangible thing. Where, on the other hand, the claim is for a particular field, that field as a material object is sought and is regarded as the subject-matter of the suit. These meanings of the term are not inconsistent. They are reconciled by saying that the field is the subject-matter in so far as it is conceived as embraced in the command or adjudication sought. Hence what is sought is the true measure of the subject-matter, not what the suit is about in a wider and vaguer sense.(1) It has been recently held by a Full Bench of the Bombay High Court, that where the main purpose of a suit was to determine a right to immoveable property, a Small Cause Court had nevertheless jurisdiction to entertain it if the relief asked was not for immoveable property, but for payment of a sum of money.(2)

In every suit the plaintiff advances two matters for determination:—whether ground exists for resorting to the Court for aid, and if it does, the relief claimed as due. Neither of these matters alone is the subject-matter of the suit, to the exclusion of the other, since each alike is matter necessary to be determined in the suit before a decree can be granted to the plaintiff.(3) Nor can the nature of the defendant's plea affect the jurisdiction acquired by a Court over the plaintiff's claim.(4) Even an equitable claim of set-off, to which O. VIII. r. 6, *post*, does not apply, will not be taken cognizance of by a Court if it is in excess of its pecuniary jurisdiction, though that circumstance will not affect the jurisdiction of the Court over the suit itself.(5) Jurisdiction over the subject-matter must exist throughout the proceedings in the suit. Jurisdiction must exist at the time of its institution as well as at that of its disposal.(6) The decision in Shamrav *v.* Niloji (7) is not against this view, as the decision is grounded on the circumstance that jurisdiction in proceedings taken for the execution of a decree is by law not made to depend on the amount in respect of which the execution is taken, but on the amount claimed in the suit in which the decree was given.(8)

The late Supreme Court possessed no Appellate Jurisdiction but a general

(1) *Per* West, J., in Lakshman Bhatkar *v.* Babaji Bhatkar, 8 B. 31, 34 (1883); Hukm Chand, *op. cit.* 29).

(2) Puttangowda *v.* Nilkanth Kalo Desphande, 37 B. 675 (F. B.) (1913); and see Vinayak *v.* Krishnarao, 25 B. 625 (1901).

(3) Harnam Singh *v.* Kirpa Ram, 1887, P. R. No. 1, cited in Hukm Chand, *op. cit.* 299, 300.

(4) Gobind Singh *v.* Kallu, 2 A. 778 (1880); Bahadar *v.* Nawab Jan, 3 A. 822 (1881); Chandu *v.* Kombi, 9 M. 208 (1885); Bhaj Mal *v.* Inhora, 1888, P. R. No. 169, cited in Hukm Chand, *op. cit.* 294, where other similar cases from the Punjab Chief Court are cited. The value of the suit is not altered by the plea of the defendant, whether that plea be true or false: Jag Lal *v.* Har Narian, 10 A. 524 (1888); Shumbhoo *v.* Prankristo, 13 W. R. 105 (1870) [jurisdiction depends upon the way the suit is framed].

(5) Brojendra Nath *v.* Budge Budge Jute Mill, 20 C. 527 (1893).

(6) See Hukm Chand, *op. cit.* 405; Chandu *v.* Kombi, 9 M. 212 (1886).

(7) 10 B. 202 (1886).

(8) Hukm Chand, *op. cit.* 405, 406.

as well as a local original jurisdiction embracing matters civil as well as criminal. It executed its own writs and processes throughout the provinces and districts annexed to and made subject to the Presidency of Fort William, such provinces and districts being within the limits of its general jurisdiction.

The jurisdiction of the High Court is, in some respects, analogous to that of the Supreme Court; but is, in other respects, wholly dissimilar. It has an Appellate Jurisdiction, as extensive as that possessed by the late Sudder Court, which it never exercises for the purpose of enforcing its decrees or orders, the same being enforced through the subordinate Courts: and it has an Extraordinary Original Civil Jurisdiction, and also an Extraordinary Original Criminal Jurisdiction, peculiar to itself. It has, besides, a Civil Jurisdiction, a Criminal Jurisdiction, an Admiralty and Vice-admiralty Jurisdiction, a Testamentary and Intestate Jurisdiction, and a Matrimonial Jurisdiction. Sects. 11 and 12 of the Letters Patent, constituting the High Court, relate to its Original Civil Jurisdiction; sect. 13 to its Extraordinary Original Civil Jurisdiction; sects. 21 and 22 to its Ordinary Original Criminal Jurisdiction; sect. 23 to its Extraordinary Original Criminal Jurisdiction; sects. 31 and 32 to its Admiralty and Vice-admiralty Jurisdiction; sects. 33 and 34 to its Testamentary and Intestate Jurisdiction; sect. 35 to its Matrimonial Jurisdiction; and sects. 24, 15, and 16 to its Appellate Jurisdiction. Its Ordinary Civil Jurisdiction, unlike the Jurisdiction of the Supreme Court, is merely local; as is also its Matrimonial Jurisdiction. Its Extraordinary Original Civil Jurisdiction is to try and determine any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when it shall think proper to do so, either on the agreement of the parties to that effect, or for the purposes of justice. Its Ordinary Original Criminal Jurisdiction is both local and general, and is in all respects the same as that exercised by the Supreme Court on its Crown side. Its Extraordinary Original Criminal Jurisdiction is over all persons residing in places within the jurisdiction of any Court, formerly subject to the superintendence of the Sudder Nizamut Adawlut at Calcutta, whether within or without the Bengal Division of the Presidency of Fort William; and, in the exercise of this jurisdiction, it has authority to try, at its discretion, any such persons brought before it on charges preferred by the Advocate-General, or by any Magistrate, or other officer, specially appointed by the Government in that behalf. Its Admiralty and Vice-admiralty Jurisdiction is the same as that exercised by the Supreme Court on its Admiralty side, and by the late Vice-admiralty Court. Its Testamentary and Intestate Jurisdiction is the same as that exercised by the Supreme Court on its Ecclesiastical side. As regards the Original Civil Jurisdiction of the Court, sect. 2 of the Letters Patent provides that "the High Court of Judicature at Fort William in Bengal, shall have, and exercise, Ordinary Original Civil Jurisdiction, within such local limits as may, from time to time, be declared and prescribed by any law or regulation, made by the Governor-General in Council, and, until some local limits shall be so declared, and prescribed, within the limits declared and prescribed by the Proclamation fixing the limits of Calcutta issued by the Governor-General

in Council, on the 10th day of September, 1794, and the Ordinary Original Civil Jurisdiction of the said High Court shall not extend beyond the limits, for the time being declared and prescribed, as the local limits of such jurisdiction." As no law or regulation has been made by the Governor-General in Council, declaring and prescribing local limits, within which the Ordinary Original Civil Jurisdiction of the Court is to be exercised, the limits of the town of Calcutta are the present limits within which jurisdiction is to be exercised.(1)

Certain Courts are of limited but exclusive jurisdiction, such as the Presidency and Provincial (Act IX. of 1887) Small Cause Courts, which have limited jurisdiction of an exclusive character over certain classes of suits for money or moveable property, which may be tried summarily and which on that ground are excluded from the jurisdiction of the ordinary Civil Courts. There are, however, numerous rulings to the effect that the nature of a suit is not changed because a question of title is incidentally raised in it.(2) As to other Courts of exclusive jurisdiction, see *post*, "*Either expressly or impliedly barred.*" As regards the valuation of the subject-matter as giving jurisdiction, see "*Pecuniary Jurisdiction*," *post*.

Just as sect. 9 of the last Code enacted that no *person* should be exempted from the jurisdiction, so as regards *subject-matter* sect. 10 enacted that, subject to the provisions of the Code and other enactments to which reference will be made, no civil cause is exempted from the jurisdiction of the Civil Courts (*vide post*). Generally speaking, with the exception of Small Cause Courts (3) and Revenue Courts (4) the jurisdiction (subject to the conditions mentioned in sect. 10) as regards the subject-matter is not limited, though the power to take cognizance of a particular suit may be affected by its value. So though a Munsif in Bengal may try all suits cognizable by Civil Courts, he can only do so in the case of suits the value of which usually does not exceed 1000 rupees.

(*a*) **Local jurisdiction.**—The jurisdiction of a Court, apart from statutory power, can only be exercised over persons who are within its territorial limits.(5) For the exercise of judicial power this country is divided and subdivided into small local areas, varying for different grades of Courts and generally liable to a change by the Executive Government.(6)

(1) Sagore Dutt *v.* Ram Chunder Mitter, 1 Hyde's Reports, 136 (1863), *per* Wells, J.

(2) Alagirisami *v.* Innasi, 3 M. 127, F. B. (1881); Manappa *v.* McCarthy, 3 M. 192, F. B. (1881); Bapuji *v.* Krishaji, 15 B. 400, 403, 404 (1890); Mohesh Mahto *v.* Sheikh Piru, 2 C. 470 (1877), F. B. [no special appeal lies, though a question of title may have been incidentally raised]; Radha *v.* Gudadhur, 15 W. R. 166 (1871) [the decision on title is not conclusive, except as regards the claim in that suit]. It is the nature of the suit as described in the plaint, and not the nature of the defence which determines jurisdiction, *vide post*, p. 78. As regards the jurisdiction in particular cases of Presidency and Provincial Small Cause Courts, as also of Courts of Cantonment Magistrates and Courts of Request, see cases cited in O'Kinealy's Civil Procedure Code, notes to s. 15.

(3) *Vide ante*.

(4) See as to these Hukm Chand, Res Judicata, 268; O'Kinealy's Civil Procedure Code, notes to s. 15, and *post*.

(5) Hadjee Kaseem *v.* Hadjee Isupf, 6 C. W. N. 829 (1902).

(6) See Hukm Chand, Res Judicata, 318 *et seq.* In England local venue in respect to local matters continued down to 1873, when local venues were abolished, but Courts of

The limits of these areas determine the local limits of the Courts' jurisdiction for the trial of original suits and appeals. Personal jurisdiction depends on the place of residence or business of the defendant. The former for transitory actions, that is, actions which are brought on occurrences which happen anywhere, depends on whether the cause of action or part of the cause of action arose within the local limits of the jurisdiction, and for local actions or actions relating to immoveable property or for the recovery of moveable property actually under distraint or attachment, depends on the situation of the property within the local jurisdiction. The case of moveable property attached or under distraint is an exception to the general rule that personal property has no locality, by which it is not meant that it has no visible locality, but that it follows the person and is governed by the law which governs him.(1) The exception in the Code (2) is probably founded on the fact that in the case given the *situs* of the moveable property is fixed and cannot be altered by any person at his pleasure, and, perhaps, also for the convenience of judicial administration. The limits of these different areas determine the local limits of the Courts' jurisdiction for the trial of suits and appeals. The difficulty exists in what has been fitly described as the localization of suits, and rules have therefore been enacted by the Legislature for determining the circumstances in which a suit may be taken cognizance of by the Courts having jurisdiction in any particular area.

Clause 12 of the Letters Patent determine the ordinary original jurisdiction of the Presidency High Courts, the High Court at Allahabad having no ordinary original civil jurisdiction.(3) There has, however, been considerable conflict of opinion as to the several essentials of jurisdiction for which provision has been made by these Charters,(4) chiefly as to the nature of "suits for land." To avoid such differences of opinion in the Provincial Courts, the Code, in sects. 16–20, *post*, makes detailed provisions as regards jurisdiction, and in any case governed by those sections there can hardly be any difference as to the character of the local suits, to which the principle of territorial jurisdiction must be held to apply. These provisions, as also those contained in the Charters, are dealt with in the Notes to those sections.

It has been held that a Court has no jurisdiction to hear and decide a suit or appeal within its jurisdiction and cognizable by it, if it is instituted in a Court not having such jurisdiction,(5) even though it may be transferred to it by higher judicial authority. The Calcutta Court has held (6) that it

Equity, which were always unfettered by local venue, entertained suits affecting lands abroad. See Companhia de Mocambique *v.* British South Africa Company, 1892, 2 Q. B. 58. The local limits of the Calcutta High Court were fixed by proclamation of the Governor-General on 10th Sept., 1794, and are given at p. 461 of Belchamber's Rules and Orders, ed. 1900.

(1) Companhia de Mocambique *v.* British South Africa Co., 1892, 2 Q. B. 397, *per* Lord Esher.

(2) S. 16, cl. (*f*).

(3) As to the distinction between ordinary and extraordinary jurisdiction, see Navivahoo *v.* Turner, 16 I. A. 162 (1889).

(4) See notes to ss. 17, 18, *post*.

(5) Pachaoni Awasthe *v.* Ilahi Baksh, 4 A. 478 (1882).

(6) Peary Lall Mozoomdar *v.* Komal Kishore Dassia, 6 C. 30 (1880); Ram Narain Joshy *v.* Parmeswar Narain Mahta, 25 C. 39 (1897); R. *v.* Mangal Tekchand, 10 B. 274 (1886) [Cr. P. C., s. 526].

could direct the transfer of an appeal only from a Court having jurisdictio to receive and try it, and that decision was approved of by the Judicia Committee.(1)

As to the jurisdiction over proceedings in execution of a decree, see sect 38, *post*.

An appeal cannot be heard upon the merits unless the decree from whic the appeal was preferred was passed by a Judge having jurisdiction over th matter in dispute. The Appellate Court is only a Court of Error, and th trial by an Appellate Court cannot be accepted in place of a trial b the Court of first instance.(2) But though the Appellate Court canno entertain the appeal on the merits where a Subordinate Court has no juris diction over the trial of a suit or appeal, the Appellate Court authorized t hear appeals from that Subordinate Court has power as such to set aside it proceedings on an appeal.(3) So where a defendant appealed from th Deputy Collector to the District Judge and the plaintiff then appealed to th High Court, upon an objection to the hearing of the appeal, on the groun that as no appeal lay to the District Judge *à fortiori* no appeal lay to the Higl Court, the objection was overruled and the High Court reversed the decree o the District Judge and restored that of the first Court.(4) As to the effect o absence of objection to jurisdiction, see sect. 21, *post*.

(*b*) **Personal jurisdiction.**—As already stated, jurisdiction is conferrec by the various Charters and Letters Patent and Acts of the Legislature, t which recourse must be had, to determine the extent of jurisdiction in th case of any particular suit and Court. And such jurisdiction may be con sidered with reference to the (a) parties, (b) subject-matter, (c) local, and (d) pecuniary limits.

In the first place this section and sect. 10 of the last Code enact genera rules which are applicable to all Civil Courts.

Their effect may be generally, though succinctly, expressed in the language of Garth, C.J., in a case in which the defendant was master of an Italian vessel: (5) "There is no doubt whatever that by the law of this country, which is the same in that respect as the law of England, Civil Courts as a general rule, have jurisdiction to try *all civil suits* against *all persons* of any nationality within the local limits of their jurisdiction."

Sect. 10 of the last Code dealt with jurisdiction over persons. Prior to 1850, Courts presided over by native officers were not competent to take cognizance of suits to which Europeans or Americans were parties. The Code of 1859 enacted the same rule as that contained in sect. 10 of the last Code. The

(1) Ledgard *v.* Bull, 9 A. 191 (1886). But see Hukm Chand, Res Judicata, 458.

(2) Velayudam *v.* Arunachala, 13 M. 273, 274 (1889).

(3) Jwala Prasad *v.* Salig Ram, 13 A. 575 (1891).

(4) Ib. In the case cited in the last note, as it was held that neither of the lower Courts had jurisdiction, the High Court set aside the decrees of both Courts, dismissed the suit, and directed that the plaint be returned for presentation in the proper Court. In these cases there is merely an inquiry as to whether jurisdiction exists. As it is open to the first Court to make such inquiry, so can the Appeal Court if the former errs. See Hukm Chand, Res Judicata, 460.

(5) Olner *v.* Lavezzo, 10 C. 878, 882 (1884).

provisions contained in that section were first enacted by Act XI. of 1836, and were reproduced in the Code of 1859, and in subsequent Codes. Their retention has been considered no longer necessary, the principle of law which it embodied having been sufficiently established.

The repeal of sect. 151 of the Army Act by 51 & 52 Vict. c. 4, s. 6, has removed the limitation on the general jurisdiction of Civil Courts in regard to suits for debt against officers holding the King's Commission.(1) There are particular enactments (2) exempting from the ordinary jurisdiction particular persons or classes of persons, and sect. 86, *post*, contains special provisions relating to princes, chiefs, ambassadors and envoys. There was nothing, however, in sect. 10 which affected such personal exemptions, as they were not on the ground of descent or place of birth, but by virtue of special enactments.

The exemption of independent foreign Sovereigns from the jurisdiction of all Civil Courts is, as a general rule, universally admitted.(3) As to the conditions in which protected independent native princes may be sued, see sect. 86, *post*. "It is an attribute of sovereignty and an universal law that a State cannot be sued in its own Courts without its consent." (4) A Sovereign State may, however, bring and maintain a suit as any other suitor. As to suits by foreign States, see sects. 84, 87, *post*. In India, however, the Government, unlike the Crown, can be and is often sued. And this is so on account of the original trading character of the East India Company, who in course of time acquired the Government of India, and from whom the late Queen took over the Government. The statute 21 & 22 Vict. c. 106, which transferred to the Crown the possession and government of the British territories in India, expressly provided for a continuance of both the nature and the extent of liabilities with which the revenues of India in the Company's hands were chargeable. As the Crown could, however, not be sued as the East India Company could have been, in her own Courts, it was enacted by sect. 65 that the Secretary of State in Council should and might sue and be sued as a Body Corporate and that all persons might have the same remedies against the Secretary of State as they could have done against the East India

(1) Pike *v.* Carey, 1897, All. W. N. 203.

(2) These exemptions generally have reference to the head or members of certain families which ruled tracts of country since conquered by the British Government. Reference, for instance, may be made to s. 2, Act XIII. of 1868; s. 11, Act XVII. of 1863, relating to the consent of the Governor-General to suits against the ex-King of Oudh and the Nawab Nazim of Bengal; to s. 2, Act XX. of 1873; s. 1, Act XXXVII. of 1858, which enact the same with reference to the Prince of Arcot and certain members of the family of the late Nawab of the Carnatic named in the Act, the consent required being that of the Governor of Madras; to Act XVIII. of 1848, which enacts the same with respect to certain members and servants of the family of the late Nawab of Surat named in the Act, the consent required being that of the Governor of Bombay.

(3) See Hukm Chand, Res Jud'cata, 372 *et seq.*; Mighell *v.* Sultan of Johore, 1894, 1 Q. B. 149; but a foreign sovereign may submit to the jurisdiction by a submission in the face of the Court, as, for example, by appearance to a writ, ib., *per* Lopes, L.J.

(4) *Per* Sir Barnes Peacock, C.J., in P. & O. S. N. Co. *v.* Secretary of State for India, 5 B. H. C. R. App. 1 (1861); Nobin Chunder Dey *v.* Secretary of State, 1 C. 11 (1875); The Secretary of State *v.* Hari Bhanji, 5 M. 277 (1882).

Company, and that the property and effects thereby vested in the Crown for the purposes of the Government of India, or acquired for the said purposes, should be subject and liable to the same judgments and executions as they would, while vested in the Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the Company. It may therefore be generally said that the liability of the Secretary of State to be sued depends on that of the East India Company, and the liability alleged must be one incurred on account of the Government of India.(1) But as the latter could not be, therefore the Secretary of State cannot be, sued for all its acts. The Company, though established originally for purposes of trade, acquired in time sovereign powers.(2) Therefore acts done in the execution of these sovereign powers were not subject to the control of the Municipal Courts.(3) Though the principle is well established, there is some conflict of opinion as to what acts are to be deemed acts of State, and therefore beyond the cognizance of the Civil Courts.(4) The meaning of an "act of State" has been defined by the Privy Council to be "something which appertains to the functions of Government." (5)

Several Indian Acts exempt from the jurisdiction of Civil Courts various acts of executive and revenue officers done in discharge of the work of administration. See, for instance, Act IX. of 1859, relating to the claims to property seized as forfeited, and *post*, "*Subject-matter*." The exemption in some cases only extends to certain Courts or classes of Courts.(6)

As a general rule, the Court has jurisdiction over all persons, whether subjects or foreigners,(7) present in the State at the time of the institution of

(1) Shivabhajan *v.* Secretary of State, 28 B. 314 (1904).

(2) See Gibson *v.* East India Co., 5 Bing. N. C. 273.

(3) Secretary of State *v.* Kamachei Boyee Sahiba (Tanjore Case), 7 M. I A. 476 (1859); East India Company *v.* Syed Ally, 7 M. I A. 578 (1827); Elphinstone *v.* Bedreehund, I Knapp, P. C. C. 316 (1830); Jehangir *v.* Secretary of State, 27 B. 189 (1902).

(4) See Hukm Chand, *op. cit.* pp. 372 *et seq.*; Salig Ram *v.* Secretary of State for India, 1 A. Sup. 119 (1872); Bhagwan Singh *v.* Secretary of State, 2 I. A. 38 (1872); Forester *v.* Secretary of State, I. A. Sup. 10 (1871-72); Hari Sadashiv *v.* Shaikh Ajmudin, 11 B. 235 (1886); Moodeley *v.* East India Co., Bro. C. C. 469; Sheo Lall Bohra *v.* Shaikh Mahomed, 13 W. R. P. C. 4 (1869); P. & O. Co. *v.* Secretary of State, 5 B. H. C. R. App. 9 (1861); Nobin Chunder Dutt *v.* Secretary of State, 1 C. 26 (1875); Secretary of State *v.* Hari Bhanjee, 5 M. 279 (1882); Vijaya Ragava *v.* Secretary of State, 7 M. 466 (1884); Goswami *v.* Madhowdas, 17 B. 600 (1893); Shirman *v.* Goswami, 7 B. 620 (1878) [Act of State of Foreign power]; Jehangir *v.* Secretary of State, 27 B. 189 (1902); Shivabhajan *v.* Secretary of State, 28 B. 314 (1904).

(5) Sheo Lall Bohra *v.* Shaik Mahomed, 13 W. R. P. C. 4 (1869).

(6) *E.g.* s. 32, Bombay Civil Courts Act as amended by s. 15 of Bombay Revenue Jurisdiction Act, 1876. An attempt was made some years ago by the Executive to limit the judicial power of the Courts in India, it being proposed that the Courts should be prohibited from questioning the legality of the Acts of the Governor-General in Council, and a further proposal was made for the purpose of regulating the High Courts without Parliament being consulted. See *per* Edge, C.J., R. *v.* Ganga Ram, 16 A. 151 (1894). As regards the protection afforded to judicial officers, see Act XVIII. of 1850, and Sinclair *v.* Broughton, 9 C. 341 (1882).

(7) See Olmer *v.* Lavezzo, 10 C. 878, 882 (1884).

the suit, whether their presence is temporary or permanent. As regards non-resident foreigners, Plowden, J., in Bikrama Singh *v.* Bir Singh,(1) said: "There is certainly, so far as I can ascertain, no rule of international jurisprudence universally recognized that a Municipal Court is absolutely incompetent to exercise jurisdiction over a non-resident foreigner, and it is certain that in many, if not in most, countries the Municipal law authorizes the exercise of jurisdiction in such cases by its own Courts, subject, generally speaking, to the condition that notice, actual or constructive, be given to the absent defendant. For instance, the Code of Civil Procedure (sect. 10 of the last Code) enacted that no person should, by reason of his descent or place of birth, be, in any civil proceeding, exempt from the jurisdiction of any of the Courts, and in sect. 89 (now O. V. r. 25) the Code provides for service of summons out of the jurisdiction, while sect. 17 (now sect. 20) authorizes the Court to take cognizance of certain suits when the cause of action has arisen within the jurisdiction." It appears, however, to be generally agreed upon, that even the personal service of a summons on a non-resident foreigner at his foreign domicile can create no jurisdiction so as to render the judgment enforceable in the Courts of any other State,(2) inasmuch as no Sovereignty can extend its powers beyond its own territorial limits to subject either persons or property to its judicial decision. And there is no principle for holding that the mere possession of property in the foreign country would, by reason of the protection enjoyed, confer on the Courts of that country jurisdiction over a foreigner neither domiciled nor resident therein, in respect of matters unconnected with the property.(3) Whilst every tribunal may execute process against property within its jurisdiction, existence of such property affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment.(4) See, further, as to personal jurisdiction and residence, sects. 19 and 20, *post*, and notes thereon.

No sort of jurisdiction can be obtained against one who was dead when the suit was commenced against him as a defendant or in his name as plaintiff, and a judgment for or against him must necessarily be void.(5) If a suit is once validly commenced in any Court, jurisdiction is not taken away by the change of residence or country by the defendant, and the weight of authority is in favour of the view that jurisdiction is not divested by death of either party after the institution of the suit, and a judgment rendered after a party's death, though erroneous, is voidable and not void.(6)

The general provision of law enacted by sect. 10 of the last Code was held

(1) 1888, P. R. No. 191, p. 509, cited in Hukm Chand, *op. cit.* 373, where the subject is generally treated.

(2) See Hukm Chand, *op. cit.* 373; the case of foreigners domiciled here but temporarily absent is different.

(3) Nallatambi Mudaliar *v.* Ponnusami, 2 M. 400, 404 (1879).

(4) Schibsby *v.* Westenholz, L. R. 6 Q. B. 155 (1870); see Pigott on Foreign Judgments, 137.

(5) Freeman on Jurisdiction, cited in Hukm Chand, *op. cit.* 408, 409.

(6) Pigott on Foreign Judgments, 130; Hukm Chand, *op cit.* 406, 407, who points out that in Bepin Behari *v.* Brojo Nath, 8 C. 357 (1882), a judgment against a person deceased was not treated as void, but denied the effect of *res judicata* on the ground that neither the deceased nor the representatives were parties to the suit in which that judgment was pronounced.

not to affect special legislation, such as that which has been provided for the care of the persons and property of minors.(1)

(c) **Pecuniary jurisdiction.**—Throughout the country there are Courts of different grades having jurisdiction in suits of different amounts in certain prescribed local areas. In determining, therefore, whether any Court has jurisdiction over any particular suit, regard must be had not only to the nature of the suit but also to the pecuniary extent of the Court's jurisdiction, which are to be found in the various Acts under which the Courts are constituted.

The only limit upon the original jurisdiction of the Presidency High Courts is the exclusion of cases falling within the jurisdiction of the Presidency Small Cause Courts, in which the debt or damage or value of the property sued for does not exceed 100 rupees.

In the case of the Courts governed by the Bengal, N. W. P. and Assam Civil Courts Act (XII. of 1887), the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of sect. 15 of the Code (which provisions have been held not to affect jurisdiction but to be matter of procedure only (2)), to all original suits for the time being cognizable by Civil Courts. The jurisdiction of a Munsif, unless extended by notification, is limited to like suits, the value of which does not exceed 1000 rupees.(3) The Bombay Civil Courts Act (XIV. of 1869) provides for District, Joint, Assistant, and Subordinate Judges, the latter of whom are of two classes. The jurisdiction of the first class extends to all suits, and of the second to suits and proceedings of which the subject-matter does not exceed in amount or value 5000 rupees.(4)

The Oudh Civil Courts are governed by Act XIII. of 1879. There are four grades of Courts: The Judicial Commissioner and District Judge, who have appellate jurisdiction, and the latter original jurisdiction also, and Subordinate Judges and Munsifs, whose jurisdiction, subject to notification, is 10,000 rupees and 1000 rupees respectively.(5)

Every suit must be instituted in the Court of the lowest grade competent to try it.(6) What *primâ facie* determines the jurisdiction is the claim or subject-matter of the claim, as estimated by the plaintiff, and this determination having given the jurisdiction, the jurisdiction itself continues whatever the event of the suit, unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive.(7)

(1) *In re* Shannon, 2 N.W. P. 79, 82 (1870).

(2) See notes to s. 15, *post*.

(3) Act XII. of 1887, ss. 18, 19. Under the former, but not the present, Act, the District Judge could assign local limits to the jurisdiction of subordinate officers. See Dukhina Churn Chattopadhya *v.* Bilash Chunder Roy, 18 C. 526 (1891). Similar rules exist under the Madras Civil Courts (Act III. of 1873), ss. 12, 13, except that the limit for a Munsif is Rs. 2500. A Munsif has jurisdiction in a suit land, although the value of the land is greater, such land lying within the local limits of his jurisdiction: Janki Das *v.* Badri Nath, 2 A. 698 (1880); Bahadur *v.* Nawabjan, 3 A. 822 (1881); Modhusudun *v.* Rakhal, 15 C. 104 (1887); but see Krishnama *v.* Srinivasa, 4 M. 339 (1881).

(4) Act XIV. of 1869, s. 24.

(5) See s. 17, Act XIII. of 1879. *Vide ante*, s. 4.

(6) S. 15, *post*.

The subject-matter and value of a suit is determined by the plaintiff's statement of demand. Jurisdiction is not affected by the defendant's plea, it being a fundamental principle that competence is determined by the plaintiff's demand and not by the defendant's answer, which only impugns the existence of the demand but does not alter or affect its nature.(1) It is the claim therefore and not the defence which is to be looked at for the purpose of determining jurisdiction.(2)

As regards the mode of valuation, the value need not on general principles be always the same as that for the purpose of levy of court-fees. Formerly questions frequently arose as to the distinction between the valuation of a suit for the purposes of stamp duty and the valuation of the subject-matter of the suit for the purpose of determining the jurisdiction of the Court.(3) Since, however, the passing of the Suits Valuation Act of 1887, these questions do not generally arise, for that Act (4) provides that where in suits other than those referred to in the Court Fees Act, 1870, s. 7, sub-ss. v., vi., ix., x., cl. (*d*), court-fees are payable *ad valorem* under the Court Fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. This provision applies to Appellate Courts as well as to Courts of first instance.(5) The effect therefore of the Suits Valuation Act has been to assimilate the value for court fees and for jurisdiction and thus to avoid an independent inquiry to determine the jurisdiction of Courts.(6) Where, however, the value determin-

(1) Hukm Chand, C. P. C. 252.

(2) Jag Lall *v.* Har Narain Singh, 10 A. 524 (1888). See as to the application of this general principle, Gobind Singh *v.* Kallu, 2 A. 778 (1880); Bapuji Raghunath *v.* Kuvarji, 15 B. 400 (1890); Chandu *v.* Kombi, 9 M. 208 (1886); Bahadur *v.* Nawabjan, 3 A. 822 (1881); Amrita *v.* Naru, 13 B. 489 (1888); Hukm Chand, *op. cit.* 242, 252-257.

(3) See Hukm Chand, Res Jud. 309, 310; Dayachand *v.* Hemchand, 4 B. 515 (1880); Kirty Churn Mitter *v.* Annath Nath Deb, 8 C. 757 (1882); Aukhil Chunder *v.* Mobeence Mohun Das, 4 C. L. R. 491 (1879); Manohan Ganesh *v.* Bera Ram Charan, 2 B. 219 (1877); Khusal Chand *v.* Nagendas, 12 B. 675, 677 (1888).

(4) S. 8, Act VII. of 1887; and see also Madras Civil Courts Act, s. 14, and Hukm Chand, Civil Procedure Code, 267, 268.

(5) Bai Varunda *v.* Bai Manegavu, 18 B. 807 (1893); and see Bhagvantrai *v.* Mehta, 21 B. 40 (1892); Gulabsingji *v.* Lakshman Singji, 18 B. 100 (1893); Ibrahimji *v.* Bejonji, 20 B. 265 (1895). As to the valuation in particular cases, such as account [Kushal Chand *v.* Nagendas, 12 B. 675, 677 (1888)], adoption, administration, partition, possession, mesne profits [Mohini Mohun Das *v.* Satis Chandra Roy, 17 C. 704, 706 (1890)]; Wajih-ud-din *v.* Waliullah (1902), 24 A. 381], pre-emption [Mahabir *v.* Behari Lal, 13 A. 320 (1891)], partnership, mortgage, set off (Ramjiwan Mal *v.* Chand Mal, 10 A. 587 (1888)], declaratory suits, and suits to set aside alienations by a Hindu widow, an instrument in respect of attached property or sale, or suits to enforce registration and suits of no value or undervalued, or of a composite character, see notes to Hukm Chand, Civil Procedure Code, pp. 257-270, and O'Kinealy's Civil Procedure Code, s. 15. As to the stamp in cases of alternative relief: Kashinath *v.* Guruda, 15 B. 82 (1890); additional Court Fee: Chunni Lal *v.* Ajudhia, 19 A. 240 (1896); appeal against decision as to class to which a suit belongs: Dada *v.* Nagesh, 23 B. 486 (1898); Shiva *v.* Mahto Mahto, 28 C. 334 (1901); as to subsidiary relief asked not affecting subject-matter, see Hukm Chand, *op. cit.* 243.

(6) See Harihar Prasad Singh *v.* Shyam Lal Singh, 40 C. 615 (1913); a plaint rejected for insufficient Court-fee: held that plaintiff could not value his case differently for the purposes of Court-fee and jurisdiction.

able for the computation of court-fees and the value for purposes of jurisdiction is not the same, and it is alleged that the suit has either by mistake (1) or intentionally (2) been overvalued, the Court enters upon a preliminary inquiry before going into the merits to determine this question, and if the suit be found to be overvalued it will return the plaint for presentation to the lowest Court of competent jurisdiction. If the claim is amended so as to increase the original value, jurisdiction may be taken away.(3) But while the subject-matter of a suit is determined by the plaintiff's allegations in the plaint, the valuation of the subject-matter, which directly determines the jurisdiction in its pecuniary aspect, does not depend absolutely on them. The plaintiff can demand anything he likes, and the demand will determine the jurisdiction, which will further depend upon a proper valuation of it. But the plaintiff's valuation of that demand will not always be conclusive for that purpose.(4) No person can value his suit at a figure higher than what his own statement of facts shows that the subject-matter of it is worth.(5) If, however, during the trial, or at the conclusion of the suit, it be ascertained that the claim has been overvalued, it is necessary to see whether the overvaluation has been *bonâ fide* or not. The value of property depends in large measure upon opinion, and the Court will therefore not declare want of jurisdiction if in good faith the plaintiff has alleged the value to be within the jurisdiction.

The approximate amount stated in the plaint may be taken, it being a general principle that, even where jurisdiction depends on particular facts stated, the proceedings will not be null through a mere error in stating the facts so as to found the jurisdiction; though they will be voided probably by fraud, or, at any rate, will be voidable against him who has practised it.(6)

It is the *bonâ fide* nature of the claim and not the amount actually recovered which determines the jurisdiction, otherwise the Court would in many cases find itself in this anomalous position; it would have had full jurisdiction over the case from its inception up to the very moment of giving judgment, and would then find that the conclusion at which it had arrived had the effect of depriving it of jurisdiction. So where a person sued *bonâ fide* in the High Court to recover Rs. 843.12.0 as damages, but through defective proof failed to attain a larger amount than Rs. 75, it was held that the High Court had jurisdiction under clause 12 of the Charter.(7) The

(1) Krishnan *v.* Ravi Varma, 8 M. 384 (1885).

(2) Hamidunnissa Bibi *v.* Gopal Chandra Malakar, 24 C. 661 (1897).

(3) Chandu *v.* Kombi, 9 M. 208 (1885).

(4) Hukm Chand, Civil Procedure Code, 266.

(5) Mootoo *v.* Verapah Chetty, 17 W. R. 243 (1872); the subject-matter in Mahabir Singh v. Behari Lal, 13 A. 320 (1891), was not capable of exact valuation, in which case the value put by the plaintiff if *bonâ fide* may be adopted. With regard to estoppel as to valuation against a defendant, see Brohmo Moyee *v.* Anund Chander, 22 W. R. 120 (1873).

(6) Kondaji Bagaji *v.* Anan, 7 B. 448, 451 (1883), *per* West, J.

(7) Sikur Chand *v.* Sorringmull, 1 Hyde, 272 (1863); ref. Bonomally Nawn *v.* Campbell, 19 W. R. 20 (1872); Joy Doorga *v.* Manick Chand, 16 W. R. 248 (1871); Mahabir Singh *v.* Behari Lal, 13 A. 320 (1891); Rameshwar *v.* Dilu, 21 C. 553 (1894); as to appeals, see Nilmony Singh *v.* Jagabandhu Roy, 23 C. 536 (1896); the same rule has

chief reason why the amount which is proved and claimed in a suit does not determine or affect the jurisdiction over it is that the Court has to consider and inquire in the suit, not only as to that amount, but as to the total amount asked for in the plaint, and discussed in the proceedings; the claim for the portion dismissed being adjudicated upon not less than that for the portion decreed. Nor is the other course practicable, as the amount proved cannot be known at the commencement of the suit, and jurisdiction must be fixed before proceedings are commenced and evidence entered upon.(1) The pecuniary jurisdiction of a Civil Court on its original or appellate side is, ordinarily speaking, governed by the value stated by the plaintiff in his plaint; but if a suit having regard to the valuation in the plaint is within the jurisdiction it is not ousted by the Court finding that a decree for a sum exceeding the limits of its pecuniary jurisdiction should be given to the plaintiff.(2)

It is a well-known principle that the merits of a demand are immaterial as affecting jurisdiction. It is a mistaken conception that jurisdiction depends on facts or the actual existence of matters or things instead of upon the allegations concerning them.(3) The question of jurisdiction does not depend upon the truth or falsehood of the claim, but upon its nature; it is determinable at the commencement, not at the conclusion, of the inquiry.(4) It has, however, been held in this country that a plaintiff cannot give jurisdiction to or take away jurisdiction from a Court by adding to his claim something to which he was not entitled upon any view of the case, and such unwarrantable addition to his claim must be struck out and the jurisdiction of the Court determined with reference to the rest of his claim.(5)

But the cases referred to in the first of the last-mentioned decisions appear, it has been pointed out,(6) to proceed upon a misconception of the nature of jurisdiction as stated above, unless they may be justified on the ground that an "exaggerated claim thus brought for the purpose of getting a trial in a different Court is substantially a fraud upon the law, and must be rejected,

been applied in other cases where the suit has been *bonâ fide* overvalued, the nature of the demand determining jurisdiction: Rajendro Lall Gossami *v.* Shama Churn Lahori, 5 C. 188 (1879); Kondaji *v.* Anan, 7 B. 448 (1883); Mahabir Singh *v.* Behari Lal, 13 A. 320 (1891); Mohee Lall *v.* Khetaram Marwary, 25 W. R. 76 (1876); Damodhar *v.* Trimbak, 10 B. 370 (1885); dist., Lakshman Bhatkar *v.* Babaji Bhatkar, 8 B. 31 (1883); Nilmony Singh *v.* Jagabandhu Roy, 23 C. 536 (1896); Ibrahimji *v.* Bejonji, 20 B. 265 (1895). As to the application of the rule when plaintiff's demand is coupled with a general prayer for relief, see Madho Das *v.* Ramji, 16 A. 286 (1894).

(1) Hukm Chand, Civil Procedure Code, 250.

(2) Madho Das *v.* Ramji Patak, 16 A. 286 (1894).

(3) See Hukm Chand, C. P. C. 244.

(4) R. *v.* Bolton, 1 A. & E. N. S. 74, *per* Denman, C.J.

(5) Hamidunnissa Bibi *v.* Gopal Chandra Malakar, 24 C. at p. 666 (1897), referring to Nanda Kumar Bannerjee *v.* Ishan Chandra Bannerjee, 1 B. L. R. 91, A. S. C. (1868), in which it was held that the S. C. C. could not be ousted of its jurisdiction merely by asking for an alternative relief to which the plaintiff was not entitled. Lakshman Bhatkar *v.* Babaji Bhatkar, 8 B. 31 (1883); Bonomally Nawn *v.* Campbell, 10 B. L. R. 193 (1872), and distinguishing the case where the claim is not absolutely untenable, but has to be dismissed only because the evidence is insufficient.

(6) Hukm Chand, *op. cit.* 245.

whether it arises from mere recklessness or from an artful design to get the adjudication of one Judge instead of that of another;" (1) a principle which may apply when the intention of evading the competency of jurisdiction is certain.(2) In practice, however, the establishment of fraud, which should not be presumed, involves considerable difficulties. To every case in which the demand is evidently exaggerated there will be many which will be really doubtful and where the Judge might act according to his own peculiar views in declaring himself incompetent to take cognizance of a demand beyond the pecuniary limits of his jurisdiction, as he finds it too excessive.(3)

The general effect, however, of the Suits Valuation Act is, as already stated, to avoid an independent inquiry to determine the jurisdiction of Courts, and this question, in respect of simple overvaluation, as distinguished from other additions to the claim,(4) is not so likely to arise as formerly. And in the case of appeals the matter is now regulated by sect. 11 of the Suits Valuation Act. Since the passing of that Act it has been held that while it is no doubt a sound rule that Courts should not allow parties to evade the law relating to matters of jurisdiction and that where it is found that a party has intentionally exaggerated his claim in order to bring his suit in a Court which otherwise would not have jurisdiction to try it, before the merits of the claim have been gone into the plaint should be returned to be presented to the proper Court; yet this rule must be taken with qualifications; and one important qualification is that embodied in sect. 11 of the Suits Valuation Act, namely that where the suit has been tried on its merits by the first Court, and the overvaluation of the suit is not found to have prejudicially affected the disposal of the suit on the merits, there the objection as to jurisdiction should not be given effect to. A plaintiff who alters the valuation of his suit for the purpose of evading jurisdiction may be punished by having no costs allowed to him; but it does not conduce to promote the ends of justice if an Appellate Court were to set aside a decision which is found to be correct on the merits, simply because the value of the suit had been designedly increased or diminished to evade jurisdiction.(5)

The proper valuation of the subject-matter of a suit determines the

(1) *Per* West, J., Lakshman *v.* Babaji, 8 B. 31 (1883), and see Dwarka Das *v.* Kameshwar Prosad, 17 A. 76 (1894).

(2) The dictum, or portions of it, however, seems not to have been approved in Koti Pujari *v.* Manjaya, 21 M. at p. 274 (1897); Hamidunnissa Bibi *v.* Gopal Chandra, 24 C. 661 (1897).

(3) Hukm Chand, *op. cit.* 245, 246. In Koti Pujari *v.* Manjaya, 21 M. 271 (1897), the H. C. pointed out the distinction between the question whether the plaintiff could recover the whole or only part of the sums claimed by him, and the question of the overvaluation of the subject-matter.

(4) *E.g.* a claim for alternative relief as in Nanda Kumar Bannerjee *v.* Ishan Chandra Bannerjee, 1 B. L. R. 91, A. S. C. (1868), *ante*.

(5) Hamidunnissa Bibi *v.* Gopal Chandra Malakar, 24 C. 661 (1897). See Raghunath Charan Singh *v.* Sharno Koeri, 31 C. 344 (1903). See as to Suits Valuation Act, Hukm Chand, Res Judicata, 420. Even where the valuation has been arbitrary and no objection to jurisdiction has been taken, s. 11 of that Act will apply: Aklemannessa Bibi *v.* Mahomed Hatem, 31 C. 849 (1904); but see also Boidya Nath Adya *v.* Makhan Lal Adhya, 17 C. 680 (1890). The section applies to the revisional jurisdiction under s. 115, and is enacted, notwithstanding anything in s. 99, *post*.

question of essential jurisdiction throughout the suit. The jurisdiction in appeals and execution is determined primarily by the amount or value of the subject-matter of the original suit. Appeals from decrees of original Courts, when allowed, lie "to the Courts authorized to hear appeals" from these Courts.(1) Appeals from orders lie to the Court to which an appeal lies from a decree.(2) In the case of appeals to the Privy Council, the value of the subject-matter must be Rs. 10,000 and upwards, and the amount or value of the matter in dispute on appeal must not be less than that amount.(3) But, in the case of all other appeals, the valuation of the dispute on appeal is not considered even in determining whether an appeal is to lie. It was formerly contended that the appeal should be held to lie to the Court having jurisdiction over the amount in dispute in the appeal, but it is now settled that the value of the original suit, and not of the matter in dispute in the appeal, is the criterion by which to determine appellate jurisdiction. It is thus the money value of the original suits that fixes the jurisdiction of the Courts throughout the subsequent litigation in its several stages, and not the value of what has been left in dispute.(4) Not only does the jurisdiction continue throughout the suit, but whatever may be the result of the suit, in all such proceedings also, such as execution, as by the Code are brought within its cognizance as incidental to the suit. Jurisdiction is not lost in execution, because the interest accrued after decree has raised the amount due above the money limit.(5) See generally as to execution, sect. 38, *post*.

"**Civil nature.**"—This will exclude all criminal proceedings, but the term "civil" cannot be considered as merely the opposite of criminal, for there are suits which, though not relating to matters of a criminal, are yet not of a civil nature. Thus the explanation, which merely declares and enacts the law as it has always been administered by the Court, shows that suits as to religious rites or ceremonies, which involve no question of right to property

(1) S. 96, *post*. As to the Courts so authorized, see Bengal Civil Courts Act (XII. of 1887), ss. 20, 21; Madras Civil Courts Act (III. of 1873), s. 13; Bombay Civil Courts Act (XIV. of 1869), ss. 8, 17, 26, 27; Punjab Courts Act (XVIII. of 1884), ss. 39, 40.

(2) S. 106, *post*.

(3) S. 110, *post*.

(4) Muthusami Pillai *v.* Muthu Chidumbara, 7 M. H. C. R. 356 (1874); Dooly Chand *v.* Nirban Singh, 18 W. R. 262 (1872); Jug Lal *v.* Har Narain Singh, 10 A. 524 (1888); Mahibir Singh *v.* Behari Lal, 13 A. 320 (1891); nor conversely can a plaintiff value his appeal at a greater amount than the original suit: Radha Prasad Singh *v.* Pathan Ojah, 15 A. 363 (1893). Mesne profits, if demanded by the plaint, must be admitted into the calculation of the appealable value, the measure for determining a plaintiff's right of appeal being the amount for which the defendant has resisted the decree. As a natural result, however, of the principle in which jurisdiction in appeal is taken, interest or costs subsequently accruing cannot be included for the determination of the jurisdiction. Hukm Chand, Res Jud. 315, 316.

(5) Shamrav Pandoji *v.* Niloji Ramaji, 10 B. 200 (1885); Hukm Chand, C. P. C. 250, and see as to execution, Purshotam *v.* Dhondu, 6 B. 582 (1800); but as to a claim under s. 331 of the former Code, and O. XXI. r. 99 of this, see Mattammal *v.* Chinnana, 4 M. 220 (1881). See the subject of the continuance of jurisdiction throughout suit once acquired, discussed in Hukm Chand, Civ. Pr. Code, 246-249.

or to an office, are not suits of a civil nature,(1) and as such cognizable by the Courts, which have also in some cases refused to interfere in matters of a purely social nature. Rights of a civil nature mean such rights as are vested in the citizen and fall within the domain of private and not of public law.(2) These rights relate both to property and to the person, and suits may be for the recovery of possession, or damages, or for specific relief. Wherever a right is recognized by law, a suit will lie to enforce it unless it is barred by any enactment on the principle *ubi jus ibi remedium*. What are such rights is the subject-matter of substantive law and not of procedure, and therefore need not be discussed here.(3) The question whether a suit is of a civil nature is not necessarily the same as that whether it is cognizable, as the cognizability depends not only on the nature of the suit, but on the recognition by positive law of the existence of the rights stated and of the right to the redress sought. So suits for enforcement of rights relating to caste are suits of a civil nature, though they are not always cognizable by the Courts as such. In the Bengal Presidency, suits for restoration to caste were made expressly so cognizable by Bengal Reg. III. of 1793, and have been often taken cognizance of by the Courts. Whilst, on the other hand, Bombay Reg. II. of 1827, in giving Civil Courts a cognizance "generally of all suits and complaints of a civil nature," expressly provided that "no interference on the part of the Court in caste questions is hereby warranted beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party."(4)

(1) See Loke Nath Misra *v.* Dasarathi Tewari, 32 C. 1072 (1905); Subbaraya Mudaliar *v.* Vedantachariar, 28 M. 23 (1904); Kooni Meera Sahib *v.* Mahomed Meera Sahib, 30 M. 15 (1906); Krishnasami Ayyangar *v.* Samaram Singrachariar, 30 M. 158 (1906), and cases there cited.

(2) Kodiyalam *v.* Sudessana, 11 M. J. 422. See Hukm Chand, Civ. Pr. Code, 57.

(3) A large number of cases will be found cited in the notes to s. 11 of O'Kinealy's Civ. Pr. Code, under the following heads:—Abusive Language, Adoption, Account, Agreement, Assam Regulations, Assignment, Bottomry Bond, Caste, Compensation, Contribution, Co-sharers, Decrees, Defamation, Embankments, False Imprisonment, False Charge, Ferry, Foreign State, Fraud, Haut, Hereditary Office and Pension; Karnams, Land Registration, Land Revenue, Legal Representation, Mahommedan Law, Maintenance, Mortgage; Municipality; Office Dignity; Partition; Party Wall; Partnerships; Penalty; Possession; Pre-emption; Privacy; Privilege; Registration; Religious Ceremonies; Restitution of Conjugal Rights; Revenue; Revenue Court; Reversioner, alienation; Settlement; Specific Remedy; Stamp; Right to Sue; User; Voluntary Associations; Voluntary Payments; Water, use. The subject is dealt with in Hukm Chand's Civ. Pr. Code, pp. 59–76, where it is more appropriately confined to some rights in regard to suits in which questions have arisen in Courts as to their *not* being of a civil nature, viz. those relating to marriage, caste, caste offices, ritual and offices. As to these, see *post*. The same subject is also dealt with in the same Author's book on Res Judicata, pp. 243–268. Cases decided on the section subsequently to the editions here referred, are cited in their appropriate places. As to the Public Demands Recovery Act, see Ram Tarak Hazra *v.* Mosahebali Khan, 6 C. W. N. 246 (1901).

(4) Hukm Chand, C. P. C. 61–63. It has been held that s. 21, Reg. II. of 1827, has no application to suits between Mahommedans: Sayad Hashim Sahib *v.* Huseinsha, 13 B. 429 (1888), though in Abdul Kadir *v.* Dharma, 20 B. at p. 192 (1895), the Court expressed the

Again, a suit for violation of a right of privacy is not generally allowed, because the suit is not recognized by the general law of India, and not because such a suit is not of a civil nature, a suit of that character being allowed in Gujarat and various districts of the N. W. P., where the right is recognized under local custom. In addition to suits relating to caste, reference may be made to certain others in regard to which questions have arisen from time to time. Suits relating to marriage have long been held cognizable by Civil Courts, having been made expressly so in the Bengal Presidency by Bengal Reg. III. of 1793—such as suits to declare the validity or invalidity or jactitation of marriage; for damages for breach of, though not for specific performance of, marriage; and restitution of conjugal rights.

As already stated, and as appears from the section, suits merely relating to religious rights and ceremonies will not be entertained unless they involve a right to property or to an office. The latter may be either of a personal character, such as that of a family priest, or may be a local office. Personal offices are gradually losing their legal character as such, and the law now appears generally to recognize only local offices—that is, offices connected with a certain temple, ghat, or locality which are essentially distinct from personal offices.(1)

"Either expressly or impliedly barred."—The words in the former Code, "*barred by any enactment for the time being in force*," were held to mean expressly barred, and therefore the giving of a concurrent remedy did not bar a suit.(2) As to whether the matter would now fall within the implied bar, *vide post*. Enactments affecting the jurisdiction of Courts will be construed so far as possible to avoid the effect of transferring the determination of rights and liabilities from the ordinary Courts to executive officers.(3) The jurisdiction of a Civil Court is not excluded unless the cognizance of the entire suit as brought is barred.(4) The most important restrictions on the jurisdiction of the ordinary Civil Courts over civil suits are enacted by the Acts relating to the revenue or the rent of the agricultural or other lands assessed with the Government demand. The provisions of these Acts are different for different provinces, but they all appear to be based on the principle that matters likely to affect the liability for, or the amount of, the Government Land Revenue,

opinion that the term "caste" in that regulation was not necessarily confined to Hindus. Nor are suits allowed to lie in Bombay relating to caste offices when they involve any caste question. See Hukm Chand, *op. cit.* 65. In the Madras Presidency the same view is taken of the autonomy of caste as in Bombay. See Hukm Chand, *op. cit.* 67.

(1) Hukm Chand, C. P. C. 70–76. The Courts, however, ought not to be involved in the determination of trivial questions of mere dignity and privilege, although connected with an office, Narayan *v.* Krishnaji, 10 B. 233, 237 (1885); in Dina Nath Chuckerbutty *v.* Protap Chunder Goswami, 4 C. W. N. 79 (1899), the Court recognized the right of a Shebait of the presiding deity of a certain tree; S. C., 27 C. 30 (1899); Sayad Nuruddin *v.* Abas Bavasaheb, 14 Bom. L. R. 573 (1912) (suit for Refai and Kadrihaks); see also Madhusudan *v.* Shri Shankaracharya, 33 B. 278 (1908); Trimbak Gopal *v.* Krishnarao, 33 B. 387 (1909); Chunnu Dat *v.* Babu Nandan, 32 A. 527 (1910).

(2) Kishori Mohun Roy Chowdhry *v.* Chundra Nath Pal, 14 C. 644, 648 (1887).

(3) See Winter *v.* Attorney-General, 6 P. C. 380 (1875).

(4) Antu *v.* Ghulam Muhammad Khan, 6 A. 110 (1883), and see Hukm Chand, C. P. C. 76.

should be adjudicated upon by Revenue Officers, who have better acquaintance with such matters and with a procedure more elastic and summary than that of the ordinary Civil Courts.(1) As instances of the particular matters falling within the cognizance of Revenue Courts, and of which the Civil Courts can, therefore, not take cognizance, reference may be made to sects. 93, 95, and 241 of the North-Western Provinces Rent Act (XII. of 1901); (2) sect. 158 of the Punjab Land Revenue Act (XVII. of 1887); (3) sects. 76 and 77 of the Punjab Tenancy Act (XVI. of 1887); (4) sects. 4 and 5 of the Bombay Revenue Jurisdiction Act (X. of 1876).(5) It has, however, been recently held by the Bombay High Court that sect. 4 (c) of the last-named Act is not a bar to a suit in which there is a claim arising out of the alleged illegality of proceedings taken for the realization of land revenue.(6)

In the Madras Presidency (7) and in Lower Bengal, the jurisdiction of the Civil Courts in rent and tenancy cases has not, as a general rule, been excluded. By Act VIII. (B. C.) of 1869, Revenue Courts were abolished over the greater part of Bengal, and the trial of rent suits was made over to the ordinary Civil Courts.(8) The bar is in some cases due to administrative requirements and practical convenience. Thus the Municipal Acts of some of the provinces contain special provisions barring the cognizance of suits by Civil Courts chiefly in matters relating to taxation.(9)

Somewhat on a similar principle, sect. 133 of the Criminal Procedure Code provides that no order made by a Magistrate under that section "shall be called in question in any Civil Court;" though this provision has been held not to bar a suit for a declaration of a person's exclusive right to any land which the Magistrate may have declared or assumed to be public highway.(10) And it has been held that under this section the fact that a criminal trial has not resulted in a conviction is no bar to a civil suit against the accused.(11) In some cases the bar

(1) See Hukm Chand, Res Jud. 268 *et seq.*, Civ. Pr. Code, 77 *et seq.*, where the various Acts referred to in the text are discussed; Jamla Singh *v.* Kingsley, 17 C. W. N. 1201 (1913).

(2) See cases cited, ib. [and see also O'Kinealy's Civ. Pr. Code, notes to s. 11].

(3) See ib.

(4) Ib.

(5) Ib., and notes to s. 11 in O'Kinealy's Civ. Pr. Code, in which also cases relating to the Khoti Settlement Act are also cited, Bom., Act I. of 1889. As to special Acts for the relief of Taluqdars or Agriculturists, see s. 9, Sindh Encumbered Estates Act, 1881, and the Broach and Kaira Encumbered Estates Act, 1881.

(6) Gangaram Hatiram Gujar *v.* Dinkar Ganesh, 37 B. 542 (1913); and for Agra Tenancy Act, see Ram Charitra Rai *v.* Jinsi Ahirin, 36 A. 48 (1913).

(7) S. 87, Mad., Act VIII. of 1865; and see s. 2, Mad., Reg. VI. of 1831, and s. 52, Act XI. of 1864.

(8) See now Act (Beng.) VIII. of 1885, ss. 144 (2), 158; as to suits to settle disputes prior to completion of record of rights, see Troylokhyanath Bose *v.* McLeod, 28 C. 28 (1899); Durga Mohan Gango Padhya *v.* Sukumar Das, 17 C. W. N. cclxxii (1913); Lalla Saligram Singh *v.* Mohunt Ramgir, 3 C. W. N. 311.

(9) See Hukm Chand, C. P. C. 95; Punjab Municipal Act, 1891; ss. 101, 262, Madras District Municipalities Act, 1884. Cf. as regards election petitions, Bhaishankar *v.* Municipal Corporation, Bombay, 31 B. 604 (1907).

(10) Chuni Lall *v.* Ram Kishen Sahu, 15 C. 460, F. B. (1888), overruling Khodabuksh Mundal *v.* Monglu Mundal, 14 C. 60 (1886).

(11) Keshab *v.* Maniruddin (1908), 13 C. W. N. 501.

against civil jurisdiction is merely of a provisional character, as in the case of the Pensions Act of 1871.(1) The Civil Courts are bound to respect an order passed by a Magistrate when he is acting within his jurisdiction; (2) but a suit has been held to lie declaring that the order of a Magistrate passed under sect. 518, Act X. of 1872, was without jurisdiction, and giving relief by declaring the plaintiff's right.(3) As also one for maintenance of a child notwithstanding the order of a magistrate refusing maintenance.(4)

A judgment and decree vitiated by fraud or collusion is a nullity, and a suit will lie to set it aside.(5) There is no enactment barring the Court's jurisdiction to entertain a suit to set aside, on the ground of fraud, a decree passed by another Court of concurrent jurisdiction.(6) While the question whether a decree sought to be executed was obtained by fraud is not within the scope of sect. 47, *post*, and can only be raised by a separate suit, if, however, the decree is not impeached for fraud, but only the execution proceedings thereunder, the question must be raised in those proceedings, and not by separate suit.(7) A grant of probate is not in the nature of a summary proceeding to be contested by a regular suit in the Civil Court. The grant must be contested by an application to revoke in the Court of Probate.(8) The grant of probate is the decree of a Court which no other Court can set aside except for fraud or want of jurisdiction.(9)

The former section dealt only with bar by special enactment, but there are other cases in which a suit is not allowed to lie, on general principles of law. The amended section includes an implied bar. In some cases a suit is not allowed as there is no substantive right giving rise to a cause of action by reason of the non-recognition of the right, on account of some rule of statutory or common law or of some principle of public policy or morality. So a special procedure having been provided in the Criminal Procedure Code in regard to public roads, a suit will not lie for obstructing a public road unless the plaintiff has suffered special damage. As regards, however, nuisances, see now sect. 91, *post*. Certain suits are barred in the interest of public morality. These cases proceed on the ground that a Court ought not to enforce contracts injurious to and against the public good, and not on the ground that the suit is not of a civil nature or there is a defect in the jurisdiction of the Civil Courts over it.(10) Again, a suit does not lie to recover a voluntary payment because there is no right to recover.(11) Where a statute enacts a right or an obligation, and provides a method of

(1) See ss. 4, 6, 7, and 9.

(2) Kedarnath *v.* Rughoonath, 6 N. W. P. 104 (1874); Ujalamayi *v.* Chandra, 4 B. L. R., F. B., 24 (1869).

(3) Gopi Mohun Mullick *v.* Taramoni Chowdhrani, 5 C. 7 (1879), F. B.

(4) Ghana Kanta *v.* Goreli, 32 C. 479 (1904).

(5) See Authors' Evidence Act, notes to s. 44, cases there cited, and in O'Kinealy's Civ. Pr. Code, notes to s. 11, *sub voc.* "Fraud."

(6) Nundolal Bose *v.* Nistarini Dassee, 30 C. 369 (1902).

(7) See notes to s. 47, *post*.

(8) Mayho *v.* Williams, 2 N. W. P. 268 (1870).

(9) Komolochun Dutt *v.* Nilruttun Mundle, 4 C. 360 (1878).

(10) See Hukm Chand, C. P. C. 103–105; as to the necessity to enforce obligations in a specific manner, see cases cited in O'Kinealy's Civ. Pr. Code, s. 11, "Specific Remedy."

(11) But see ss. 69, 72, Contract Act.

enforcing it, that method and not the remedy at Common Law must be followed. Where, however, a statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative or alternative unless an intention to the contrary appears from some other part of the statute.(1) The Madras High Court has recognized that principle in disallowing suits brought to enforce registration otherwise than in accordance with the provisions of sect. 77 of the Indian Registration Act. The Calcutta, Madras, and Allahabad High Courts hold that a suit will not lie to compel the registration of a document after a refusal by the sub-registrar to register the same except in accordance with these provisions.(2) Again, when by an Act of the Legislature powers are given to any person, for a public purpose, from which an individual may receive an injury, if the mode of redressing the injury is pointed out by the Act, the jurisdiction of the ordinary Courts is ousted, and in case of injury the party cannot proceed by ordinary action.(3) So, the Code providing a special method of paying the necessary expenses of a witness, the latter cannot sue for them.(4) Every Court is competent to award costs in any proceedings, and a separate suit will therefore not lie for their recovery.(5)

No bar to a suit will be implied, however, from the provision of a summary and special remedy in a special Act for a right existing under common law. Thus a suit for compensation for wrongful seizure of cattle will lie in a Civil Court, the provisions of Act I. of 1871 being no bar to it.(6) A suit may be brought for confirmation of an execution sale which has been set aside by the Court,(7) or, if the execution should have been transferred to the Collector, by the Collector,(8) ordering the sale. So also under the last Code it was held that, notwithstanding sects. 318, 319, 328, and 331 of that Code, under which action might be taken by a purchaser at an execution-sale to recover possession of the property purchased, a regular suit might also be brought by

(1) Beckford *v.* Hood, 7 T. R. 620; Vallance *v.* Falle, 13 Q. B. D. 109 (1884); Ramayya *v.* Vedachalla, 14 M. 441 (1890); Satappa Pillai *v.* Raman Chetti, 17 M. 1 (1892); and see next note.

(2) Edun *v.* Mahommed Siddik, 9 C. 150 (1882); Kunhimmu *v.* Viyyathamma, 7 M. 535 (1884); Bhugwan Singh *v.* Khoda Buksh, 3 A. 397 (1881); Abdullah Khan *v.* Janki, 16 A. 303 (1894); Venkatasami *v.* Kistayya, 16 M. 341 (1893); nor in Bombay in the absence of an agreement to that effect. *In re* Shaik Abdul Aziz, 11 B. 691, 695 (1887).

(3) Governor *v.* Meredith, 4 T. R. 294; Stevens *v.* Peacock, 11 Q. B. 731 (1848); West *v.* Dowman, 14 Ch. D. 111. Hukm Chand, C. P. C. 99.

(4) De Saran *v.* Hurrish Chunder Biswas, 5 W. R. S. C. C. Ref. 6 (1866); a Commissioner to take accounts may sue: Gopalarat-namayyar *v.* Bupala Narasimha, 4 M. 399 (1882).

(5) Mahram Das *v.* Ajudhia, 8 A. 452 (1886); Kadir Baksh *v.* Salig Ram, 9 A. 474 (1887). Costs incurred in criminal proceedings may be recovered only as damages for malicious prosecution: Mahomed Ali *v.* Bayama, 14 B. 100 (1889); Fazal Imam *v.* Fazal, 12 A. 166 (1889). And see generally as to suits for costs, Jalam Panja *v.* Khoda Javra, 8 B. H. C. R. 29 (1871); Ref. Case, 3 M. H. C. R. 341 (1867); Subbaraya *v.* Vaithilingam, 20 M. 91 (1896).

(6) Shuttrughon Dass *v.* Hokna, 16 C. 159 (1889). Similarly as to Act IX. of 1861; Krishna *v.* Reade, 9 M. 31 (1885); Act VIII. of 1890, s. 25; Bombay Akbari Act, 1878; Narayan Venku *v.* Sakharam, 11 B. 519 (1887). See Hukm Chand, C. P. C. 100.

(7) Azimuddin *v.* Baldeo, 3 A. 554 (1881)

(8) Bando Bibi *v.* Kalka, 9 A. 602 (1887)

him for the recovery of the same,(1) the two remedies being concurrent. And notwithstanding the procedure under sect. 152, O. XX. r. 6; sect. 114, O. XLVII. r. 1, *post*, may be available, there is nothing to prevent a suit to rectify a mistake in a decree.(2)

Generally, where a decree-holder can proceed under the execution sections, he cannot bring a regular suit. So where, having obtained a decree for money, A. sued to recover the unsatisfied balance thereof from B., alleging that the property of the deceased judgment-debtor was in his possession, it was held that he should have enforced his decree by execution and sale, or by execution and attachment and appointment of a receiver, and no regular suit would lie.(3) A suit does not lie for damages for non-compliance with a mandatory injunction to compel the performance of which the plaintiff had his remedy in execution.(4) Nor will a suit lie for the costs of a receiver which were deducted in execution of a decree for mesne profits from the amount of such mesne profits, inasmuch as the objection to such deduction should have been urged in the execution proceedings.(5) So, in the case of an ordinary action in ejectment in which a plaintiff gets a decree for possession of the property, if he takes no steps to execute that decree within the time allowed by law, he cannot by a fresh suit, based either on the decree or on his title as it stood at the time that the first suit was brought, evade the law of limitation.(6) A person suing on his proprietary title to recover possession of mortgaged property on the ground that the mortgage had been satisfied, and obtaining an unconditional decree for possession, is in the same position.(7) The principle is that once any right has been enforced by a suit in which a decree has been obtained, the decree becomes the embodiment of that right, and that right in its inchoate state is merged in the decree,(8) the enforcement of which, if not barred by limitation, must be by proceedings taken to execute it. As regards suits for redemption, considerable conflict exists. In some cases the existence of a prior decree for redemption unexecuted has been held to bar a subsequent decree for the same relief. The question has been variously viewed from the standpoint of the general principles referred to, and the applicability of sect. 11 (formerly sect. 13) and sect. 47 (formerly sect. 244) of the Code. It appears to be agreed that in some cases sect. 13 would have barred the subsequent suit. A Full Bench of the

(1) Kishori Mohun Roy *v.* Chunder Nath Pal, 14 C. 644 (1887); Sevu *v.* Muttusami, 10 M. 53 (1886); Seru Mohun Banea *v.* Bhagoban, 9 C. 602 (1883); Balvant Santaram *v.* Babaji, 8 B. 602 (1884); as to symbolical possession, see Jaggobundu Mitter *v.* Purnanund, 16 C. 530, F. B. (1889); Gossain Dalmar Puri *v.* Bepin Behary Mitter, 18 C. 520 (1891); Mahadeo *v.* Janu, F. B., 36 B. 376 (1912); 14 Bom. L. R. 115.

(2) Jogeswar Attia *v.* Ganga Bishnu, 8 C. W. N. 473 (1904). But in a recent case, Bhandi Singh *v.* Dowlat Roy, 17 C. W. N. 82 (1912), it has been held that generally such a suit is not maintainable, though it may be so in particular circumstances.

(3) Mirza Mahomed *v.* Widow of Balmakund, 3 I. A. 241 (1871).

(4) Jawatri *v.* Emile, 13 A. 98 (1890).

(5) Kazee Mahomed *v.* Lallah Jassodal, 1864, W. R. 247 (1864).

(6) Sita Ram *v.* Madho Lall, 24 A. F. B. 44, at p. 60 (1901); Vedapuratti *v.* Vallabha, 25 M. at pp. 327, 328 (1901).

(7) Sita Ram *v.* Madho Lall, *supra*.

(8) Vedapuratti *v.* Vallabha, 25 M. F. B. 300, 312 (1901).

Allahabad High Court has held that the nature of redemption decrees makes sect. 244 (now 47) inapplicable, and that the operation of the rule of *res judicata* depends upon the nature of the decree made in the previous suits in each instance. Where a Court has once adjudicated upon a mortgagor's right to redeem, so many of the issues as bore upon that, and are heard and determined, become *res judicata* and cannot be re-opened; but unless there has been a determination that the mortgagor has no right to redeem, there would still remain one other issue in a subsequent suit, which would not be *res judicata*. Until a mortgagee has applied for an order of sale under sect. 93 of the Transfer of Property Act (see now O. XXXIV. r. 8), the plaintiff's *right* to redeem exists, and can be at any time *enforced*. If, therefore, a mortgagor has obtained a decree for redemption, which does not contain a provision foreclosing the right of redemption on default, and has not enforced that decree and has not paid in the decretal amount within time, he can subsequently bring a second suit for redemption of the mortgage in respect of which such first decree was obtained.(1) On the other hand, a Full Bench of the Madras High Court has held that where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage. The equity of redemption no doubt remains unforeclosed, and the relation of mortgagor and mortgagee continues until an order absolute under sect. 93 (see now O. XXXIV. r. 8) is made; and having regard to the continuance of the relation of mortgagor and mortgagee, earlier decisions of the same High Court held that as such jural relation had not been put an end to, a second suit would lie. The Full Bench, however, held that though the *right* might exist, the *remedy* was barred by sect. 11 (formerly sect. 13) of the Code. A decree for redemption passed under sect. 92 of the Transfer of Property Act (see now O. XXXIV. r. 7) is a final judgment within the meaning of sect. 11, *post*; but if the order absolute for foreclosure or sale under sect. 93 is the final judgment, and the decree under sect. 92 (see now O. XXXIV. r. 7) is interlocutory, then, if no order is passed under sect. 93, the suit is pending, and sect. 10 (formerly sect. 12), *post*, bars a second trial. The fact, therefore, that no order absolute has been made under sect. 93 (see now O. XXXIV. r. 8), extinguishing the right to redeem, will not allow of a second suit being brought, though it will entitle the mortgagor to exercise his right of redemption under the decree if he be not barred by limitation by obtaining a postponement of the day fixed for payment.(2) The Bombay High Court has held that a decree for redemption, on the default of the decree-holder to pay the money declared to be due within the time fixed by the decree, or, if none be fixed, within the time allowed by law for the execution of the decree, operates as a judgment of foreclosure and debars the mortgagor from afterwards bringing a second suit to redeem the same property.(3) As regards the Calcutta High Court, the only two reported decisions

(1) Sita Ram *v.* Madho Lal, 24 A. F. B. 44 (1901); overruling Hay *v.* Razi-ud-din, 19 A. 202 (1897).

(2) Vedapuratti *v.* Vallabha, 25 M. 300 (1901), F. B.

(3) Gan Savant *v.* Narayan, 7 B. 467 (1883); Hari Ravji *v.* Shapurji, 10 B. 461 (1886) [the execution of the first decree was

appear to be in conflict.(1) In the under-mentioned case,(2) a second suit was allowed on the ground that the first suit did not in default foreclose the right to redeem, and that the cause of action in the two suits was not the same, thus excluding the doctrine of *res judicata*. In, however, a subsequent case (3) it was contended that until an order absolute for sale was made the right to redeem existed, and that the suit should be regarded as a suit to redeem. In overruling this contention, the Court observed as follows: "Even if there is no order absolute, the *decree nisi* directing the sale is in existence, and if the right to redeem be still alive, it cannot be enforced by a separate suit."

When a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect, suits for declaration of right to partition differ from most other suits.(4) In this case there was no decree actually making partition, while in the under-mentioned case,(5) in which there was a decree directing partition, it was held that such decree operated as *res judicata*, and the subsequent suit was barred.

A second suit will lie if the first suit is for money against A., and the second to realize the decree from the property of a stranger thereto.(6)

Primâ facie an action lies on the judgment of every Court of competent jurisdiction unless the right to sue be taken away expressly or by implication.(7)

barred, the appellant then attempted to fall back on his mortgage and the right to redeem, which was not barred; the Privy Council, without deciding whether this could ordinarily be done, held that this course was not open to the appellant as it was a new case]; Maloji *v.* Sagaji, 13 B. 567 (1888) [Decree for redemption—subsequent suit by mortgagee for sale]. See as to these cases Vedapuratti *v.* Vallabha, 25 M. 300 (1901). See also Chudasama *v.* Ishwargar, 16 B. at p. 248 (1891). As to execution of decree after three years: Narayan *v.* Anandra, 16 B. 480 (1891); Maruti *v.* Krishna, 23 B. 592 (1899); as to the necessity to sue having regard to the doctrine of *res judicata* that the decree covers all rights: Vinayak *v.* Dattatraya, 26 B. at p. 668 (1902).

(1) Vedapuratti *v.* Vallabha, 25 M. at p. 311 (1902).

(2) Roy Dinkur Doyal *v.* Shoo Golam Singh, 22 W. R. 172 (1873); ref., Dhond Bahadur *v.* Tek Narain, 21 A. 252, 261 (1899); Sita Ram *v.* Madho Lal, 24 A. at p. 63 (1901).

(3) Siva Pershad Maity *v.* Nando Lal Kar, 18 C. 139, 142 (1890); dist.; Tara Prosad Roy *v.* Bhobodeb Roy, 22 C. 931 (1895); ref., Vedapuratti *v.* Vallabha, 25 M. at p. 334 (1901).

(4) Nasratullah *v.* Mujiballah, 13 A. 309, 313 (1891). This case, but only in so far as it was a decision on Act XIX. of 1873 (N. W. P. Land Revenue Act), was overruled by Muhammad Sadiq *v.* Laute Ram, 23 A. 291 (1901); Jagu Babaji *v.* Balu Laxman, 14 Bom. L. R. 1198 (1912); s. c., 37 B. 307.

(5) Soni Majanlal *v.* Munshi Himatbhai, 3 Bom. L. R. 94 (1900); distinguished in Jagu Babaji *v.* Balu Laxman, *supra*.

(6) Gooroo Das Pyne *v.* Ram Narain Sahoo, 11 I. A. 59 (1884).

(7) Berkley *v.* Elderskin, 1 Q. B. 805, cited in Moonshi Golam Arab *v.* Curreembux, 5 C. at p. 296 (1879); Mancharam *v.* Bakshi, 6 B. H. C. R., A. C. 234 (1869); Attermoney Dossee *v.* Hurry Doss Dutt, 7 C. 74, 75 (1881).

Upon the judgment arises a legal obligation to discharge it, on which an action is maintainable.(1) It is by such an action that the judgments of foreign and colonial Courts are supported and enforced, and suits on foreign judgments are not infrequent in this country. A suit will lie on a judgment of a Court in a Native State.(2) Where an action on a judgment or decree will not give to the plaintiff a higher or better remedy than he already has, there is no advantage in allowing it to be brought; and it would be contrary to the spirit of the Code to do so. Where it will give a higher or better remedy the case is different, and there are cases in which an action may be the only mode of enforcing a judgment or decree.(3) In the case of a domestic judgment, ample provisions exist for the execution of the decree not only within the jurisdiction of the Court by which it was passed, but within any part of the British territories in India. And on the principles already adverted to, where provisions have been made in regard to execution, and the decree-holder can proceed under them, he cannot bring a regular suit. In such cases the qualification to the general rule comes into operation, the right to sue being taken away by implication.

A suit will not lie in a Small Cause Court on a decree of a Subordinate Judge's Court,(4) or on a decree of its own,(5) as the law makes full provision as to the mode of obtaining satisfaction of such decrees. Nor will a suit lie on a rent decree of the Revenue Court,(6) nor in the High Court on a decree of the Small Cause Court,(7) otherwise in Bombay, in order that the judgment-creditor may have execution against the immovable estate of the debtor.(8)

In the under-mentioned undefended case (9) under the preceding Code, Wilson, J., held that a suit on a decree of the High Court would lie in that Court, as the decree had remained unsatisfied, and it was too late to revive it in the usual way. But this decision has been dissented from by the Bombay High Court.(10) A suit has also been held to lie on a declaratory decree of which no execution can be taken.(11) But a person who has obtained a

(1) *Transit in rem judicatam.* So where a reference is made to arbitration and an award is given, the parties to the reference cannot sue upon the original cause of action: Hassan Ali *v.* Hoshdar Ali, 1890, P. R. No. 113, cited in Hukm Chand, C. P. C. 101.

(2) Mayaram *v.* Ravji, 24 B. 86 (1899) [the earlier decisions to the contrary were before the passing of Act VII. of 1888, which made an addition to s. 14 of the former Code, corresponding in part with s. 13, *post*]; Kaliyugam Chetti *v.* Chokalinga Pillai, 7 M. 105 (1883); Sama Rayar *v.* Annamalar Chetti, 7 M. 164 (1883).

(3) Mancharam *v.* Bakshi, 6 B. H. C. R. 231, 235 (1869), *per* Couch, C.J.

(4) Ib.

(5) Merwanji *v.* Ashabai, 8 B. 1 (1883).

(6) Ananda Moyi *v.* Patel Pabani, B. L. R., F. B., 18 (1863).

(7) Moonshi Golam Arab *v.* Curreembux, 5 C. 294 (1879), overruling prior decisions in same Court. See Presidency Small Cause Courts Act (XV. of 1882).

(8) Fakirapa *v.* Pandurangapa, 6 B. 7 (1881); Merwanji *v.* Ashabai, 8 B. at p. 12 (1883); but the decree may be transferred to another Court for execution in respect of the immovable property.

(9) Attermoney Dossee *v.* Hurry Doss Dutt, 7 C. 74 (1881).

(10) Merwanji *v.* Ashabai, 8 B. 1, 13 (1883).

(11) Vinayak *v.* Abaji, 12 B. 416 (1887); Jagar Nath *v.* Balgobind, 1 N. W. P. 154 (1869). Sri Krishna Tata *v.* Singara, 4 M. 219 (1881), if it is partly declaratory a suit will lie on that part, Sabhanatha *v.* Lakshmi, 7 M. 80 (1883); Yusuf Khan *v.* Sirdar Khan,

decree establishing his right and entitling him to consequential relief cannot again sue for the same, but can only work out his right and obtain the relief by executing the decree. And sect. 47, *post*, expressly prohibits a separate suit for the purpose.(1) No suit will lie where the decree orders a certain amount to be paid for maintenance at certain intervals, as execution may be taken of such a decree for amounts accruing due under it subsequent to its date.(2) A suit has also been held to lie in the Civil Court on a decree obtained in the Court of the Agent for Sirdars against the defendant's father, the decree, which was for payment of a sum of money by instalments, having become incapable of execution on the death of the defendant's father, the defendant himself not being a sirdar.(3)

A suit has been held to lie for the amount of an unsatisfied claim adjudged by a decree which was destroyed during the Mutiny pending an appeal taken by the defendant, the cause of action to date from the lost decree.(4) This was distinguished in a subsequent case in which the records were not destroyed before a decision on appeal, it being held that where the records of a case are destroyed, the plaintiff may prove his decree and get the execution of it, but, on his inability to do so, he cannot bring a second suit for the same subject-matter.(5) A suit, however, should not be allowed, whether the record is destroyed before or after the decision of the appeal.(6) A suit does not lie on a decree of which execution is barred by limitation.(7) And where a plaintiff has obtained a decree, and has by his own neglect lost his right to execute it, he will not be permitted to revert to the position which he held before the institution of the suit, and to bring a fresh suit.(8)

A decree or judgment must be considered valid until reversed or superseded. Therefore, a suit does not lie to recover back money recovered in

7 M. 83 (1883) [these two cases dist. in Lakshmibai *v.* Madhavrav, 12 B. 65 (1887)]; Kaveri *v.* Venkamma, 14 M. 396 (1890).

(1) Vedapuratti *v.* Vallabha, 25 M. 326 (1901).

(2) Jouthayee *v.* Thanakapudayen, 4 M. H. C. R. 183 (1868); if a decree is not merely declaratory a second suit will not lie even though it is so vague as to be incapable of execution: Venkanna *v.* Artamma, 12 M. 183 (1888); and see Ashutosh Bannerjee *v.* Lukhimoni Debya, 19 C. 139 (1891).

(3) Sakharam Dikshit *v.* Ganesh Sathi, 3 B. 193 (1879).

(4) Ranee Emamum *v.* Hurdyal Singh, 1864, W. R. 301.

(5) Must. Nazur Banoo *v.* Hossein Ali Khan, 1864, W. R. 378.

(6) See Ranee Imamum *v.* Hurdyal Singh, 5 W. R. 276 (1866).

(7) Fakirapa *v.* Pandurangapa, 6 B. 7 (1881); Sandes *v.* Jomir, 9 W. R. 399 (1868); Sanjee Viyah *v.* Ranjiyah, 4 M. H. C. R. 454 (1869); even if the decree be for possession of land: Gopi Mohun Das *v.* Tincouri Gupta, 1 C. L. R. 254 (1877); Nursinghdoss *v.* Kumrooddeen, 20 W. R. 412 (1873); Ramjus *v.* Ram Narain, 2 N. W. P. H. C. R. 382 (1870); Golam Hossein *v.* Alla Rukhee, 3 N. W. P. H. C. R. 62, F. B. (1871); and followed by delivery of symbolical possession: Nabo Doorga *v.* Seetamonee, 23 W. R. 407 (1875). But see Attermoney Dossee *v.* Hurry Das, 7 C. 74 (1881); and Mahadeo *v.* Janu, F. B., 36 B. 376; 14 Bom. L. R. 115 (1912).

(8) Anrudh Singh *v.* Sheo Prasad, 4 A. 481 (1882). In Muhammad *v.* Mannu Lal, 11 A. 386, the Court thought that this principle as regards mortgages was affected by the Transfer of Property Act, but it has been held that this is not so, Vedapuratti *v.* Vallabha, 25 M. at p. 330 (1901); but see also Sita Ram *v.* Madho Lal, 24 A. at p. 66 (1901).

execution of a decree while that decree subsists; (1) and if more is recovered under a decree than is really due, the excess can be recovered back by the judgment-debtor only in execution proceedings and not by a separate suit.(2) When, however, the decree is reversed or superseded, the amount recovered under it may be recovered back not only by a summary process, but also by a suit.(3) And sect. 47 of the Code being applicable only to a subsisting decree, is not a bar to such a suit,(4) the operation of that section coming to an end as soon as the decree is discharged by payment.(5) The interest of the money (6) and the mesne profits of the land (7) realized in execution and recovered back can be recovered for the period for which the person entitled was kept out of the money or land.

Stay of suit.

10. No Court shall *proceed with the trial of* any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim *litigating under the same title where such suit is* pending in the same or any other Court in British India having jurisdiction to grant *the* relief *claimed*, or in any Court beyond the limits of British India established *or continued* by the Governor General in Council and having like jurisdiction, or before *His* Majesty in Council.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

"**Lis pendens.**"—"The object of the rule contained in sect. 12 (the present section) of the Code is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter, and the same relief. The policy of the law is to confine the plaintiff to one litigation, thus obviating the possibility of contradictory verdicts by two or more Courts in respect of '*the same relief.*'" (8)

The same learned Judge added: "It is scarcely necessary to say that the rule contained in sect. 12 of the Code of Civil Procedure forms no part of the

(1) Marriot *v.* Hampton, 7 T. R. 269; Saudamini Dasi *v.* Thakomani Debi, 3 B. L. R. App. 114 (1869).

(2) Mahomed Elahee Buksh *v.* Kally Mohun, 5 C. 589 (1879); Partab Singh *v.* Beni Ram, 2 A. 61 (1878), F. B.

(3) Shama Parshad *v.* Hurro Parshad, 10 Moo. I. A. 203 (1865); Jogesh Chunder *v.* Kali Churn, 3 C. 30 (1877); as to relief given by review, see Waghela *v.* Shaik Masludin, 13 B. 330 (1888).

(4) Narayana *v.* Narayana, 13 M. 437 (1889); Ram Ghulam *v.* Dwarka Rai, 7 A. 170 (1884), F. B.

(5) Rashbehary *v.* Rakhal Churn, 1 C. W. N. 708 (1897).

(6) Ayyavayyar *v.* Shastram, 9 M. 506 (1886); Jaswant Singh *v.* Dip Singh, 7 A. 432 (1885).

(7) Mokoond Lal *v.* Mahomed Sami, 14 C. 484 (1887); Kalianasundram *v.* Egnavedeswara, 11 M. 261 (1887).

(8) Balkishen *v.* Kishan Lal, 11 A. 148, at p. 155 (1888), *per* Mahmood, J.

rule of *res judicata*, though the reason upon which it is based is in some respects similar in principle to the doctrine of *res judicata*. The distinction between the two rules, however, is vast. The rule in sect. 12 (the present section) relates to matters *sub judice*, whilst the rule in sect. 13 (now sect. 11) relates to matters which have passed into *rem judicatam*. The one bars only a '*suit*'; the other bars both the trial of a '*suit*' and of an '*issue*' subject to their respective conditions. Those conditions are not all the same in sect. 12 (the present section) as they are in sect. 13 (now sect. 11), and the wording of the two sections as to the distinction is so clear that it is not easy to confound the two rules. Now, in sect. 12 (the present section), before the plea can operate as a bar, the second suit must not only raise the same issue as that in the former suit still pending, but it must be for 'the same relief.'"(1) As to this last now, *vide post*, "*Relief*." It may be added that if a plaintiff were not confined to one litigation, but were allowed to conduct a number of parallel litigations at the same time, they would result in as many judgments, which, if to the same effect, would be useless and a cause of unnecessary expense. If, on the other hand, they were to a different effect, all would not admit of execution, and it would not be possible to decide which should be executed. Moreover, contradictory judgments would tend to discredit the administration of justice. The rule, therefore, should be such as to receive application only when the various incidents of the suits are so far identical that they may, and if rightly decided should, lead to the same judgment.(2) Though the conditions of the two rules relating to *lis pendens* and *res judicata* are different, the expressions used in enumerating them are generally used in the same sense, and reference therefore may be made to the cases cited in the next section. The rule of *lis pendens* not only affects a suit brought while another suit is pending, but also alienations of rights or interests in any property made during the pendency of a suit concerning that property.(3)

Stay.—The words "Except where a suit has been stayed under sect. 20" have been omitted. Sect. 20 of the last Code dealt with the power of the Court to stay proceedings; but, apart from this, the Court had a general jurisdiction to stay proceedings on the ground of inconvenience attending the trial of different suits in different Courts at the same time. So the High Court has stayed a suit instituted before it until after the decree in a suit previously instituted at Calicut, observing that the two suits to a very great extent covered the same ground, and that it was impossible that they should proceed together, as many inconveniences might arise—amongst others, difficulties in connection with the filing of documents and taking of accounts, and the possibility of a conflict of decisions; adding that it was necessary to follow the general rule that the plaintiff who first brings his suit, claiming an account in respect of any particular transactions, has a right to have that

(1) Balkishen *v.* Kishan Lal, 11 A. 148, at p. 154, *per* Mahmood, J.

(2) Hukm Chand, C. P. C. 106, citing 1 Garson. Trait. Proc. 757.

(3) See Hukm Chand, Res. Jud. 682, where the subject, which is not within the scope of the present work, is fully discussed; also s. 52, Transfer of Property Act.

account taken in the Court in which he has chosen to bring his suit.(1) Sect. 20 has now been omitted.

"**Proceed with the trial.**"—This section in the last Code only provided that no suit shall be *tried* if the same issues were involved in a previously instituted suit in a competent Court. The present Code substitutes the words at the head of the paragraph to explain more clearly the action to be taken by the Court, which is in the nature of a stay of proceedings. The section, however, is merely intended to secure general convenience. It does not bar the *institution* of a suit, and therefore cannot be construed as dispensing with the institution of a suit within the proper time when the law expressly requires such institution.(2)

"**Suit.**"—In the under-mentioned case,(3) the Court, without expressing a decided opinion on the point, thought that a proceeding in execution being not a suit, but only a proceeding in a suit, it would be more correct to hold that a proceeding under sect. 47 is not a suit within the meaning of this section.

"**Matter in issue.**"—The matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit. The subject-matter in respect of which the relief is claimed must be the same in the two suits, the principle of *lis pendens* having no application if the subject-matter of the subsequent suit is not in any sense the subject-matter of the previous suit.(4) Where the question of title was the same, but the issues were different, relating to another plot of land and to another period of time, the section was held to have no application.(5)

"**Previously instituted (pending) suit.**"—Priority in time is the proper guide in determining which suit should be allowed to proceed; (6) and, in accordance with the general principle that the Court which first acquires jurisdiction should retain it, this rule is formulated. The section says "instituted"; that is, mere institution of a suit will give priority without any proceedings having been taken thereunder. A suit ceases to be *lis pendens* when it has been withdrawn, and the rule has been held not to apply when the former suit has been withdrawn since the institution of the second suit.(7) A suit, of

(1) Meckjee *v.* Kasowjee, 4 C. L. R. 282, 284 (1879), and as to stay of simultaneous executions, see Fakuruddin* *v.* Official Trustee, 7 C. at p. 84 (1881).

(2) Nemagauda *v.* Paresha, 22 B. 640, 645 (1897). See also Ramalinga *v.* Raghunatha, 20 M. 418 (1897), in which the Court, while holding that there was no bar to institution, pointed out that the suit, if instituted, would not have been for the same relief; Mahadeo *v.* Gagadhar, 16 C. W. N. 897 (1912).

(3) Venkata Chandrappa *v.* Venkatarama, 22 M. 256 (1898).

(4) Niazullah Khan *v.* Nazir Begam, 15 A. 108, at p. 110 (1892), where the Court said, "There is no doubt that if the subject-matter of this suit had been any part of the subject-matter of the former suit the doctrine of *lis pendens* would apply."

(5) Bissessur Singh *v.* Gunput, 8 C. L. R. 113 (1880); nor in Nainappa *v.* Chidambaran, 21 M. 18, 22, 26 (1897).

(6) Meckjee *v.* Kasowjee, 4 C. L. R. 282, 283 (1879), in which case, however, the suit was stayed, not on the ground of *lis pendens*, but general convenience.

(7) Hukm Chand, C. P. C. 108, citing Rush *v.* Frost, 49 Iowa, 183 (Amer.).

course, comes to an end when a decree is passed in it. It is not, however, material whether the suit is pending as an original suit or an appeal. A pending appeal will bar the trial of a subsequent suit.(1) The mere applying however for, or obtaining, leave to appeal to the Privy Council cannot of itself amount to the pending of an appeal till such appeal is actually filed, for it may happen that the parties who obtain such leave may never appeal at all against such decree or order.(2) It has been held that the appeal is not "to be deemed to relate to the entry of the judgment appealed from so as to defeat the plaintiff's action properly brought intermediate the judgment and appeal."(3) In a recent case where there had been a decree for maintenance, followed two years later by a decree for the sale of the property charged by it, but three more years elapsed before the application for execution, it was held that owing to this delay the doctrine of *lis pendens* did not apply, for the sale had not been during the active prosecution of a contentious suit or proceeding.(4)

"**Relief.**"—The last Code enacted that not merely must the matter in issue be the same, but the previous suit must claim the same relief. The cause of action is essentially different from the relief claimed. While the identity, or even similarity, of the relief claimed is not material for the rule of *res judicata*, the identity of the relief was held essential to the application of the rule of *lis pendens*. So the section was held not to apply where, though the issue may be the same as that in the other suit, the relief was not the same.(5) And it has been held not to apply to suits between principals and agents for accounts.(6) Where the plaintiff in the first instance sued the defendant for cancellation of a *putni* lease and for mesne profits, and then brought a second suit against the defendant to recover arrears of rent for the same period, it was held that sect. 12 of the last Code did not apply, as it could not be said that the former suit was for the same relief as that claimed in the second suit.(7) So, again, suits for the same dues in respect of different years are not for the same relief. If a suit for a demand for one year should bar the trial of a suit for the same demand for a subsequent year, the prolongation of the earlier litigation might result in barring the later suit by lapse of the limitation period (8) If the

(1) In Raja Ransgit *v.* Bhagabutty, 7 C. W. W. 720, 721 (1900); Bissessur Singh *v.* Gunput Singh, 8 C. L. R. 113, 114 (1880), the former suits were pending in appeal, but no objection was taken to the application of the rule on this ground. And see next case.

(2) Namappa *v.* Chedambaram, 21 M. 18, 22, 26 (1897).

(3) Hukm Chand, C. P. C. 108, citing Porter *v.* Kingsbury, 77 N. Y. 164 (Amer.), where the author also points out that cases which have (with regard to the rule of *lis pendens* as affecting alienations) held an appeal to be a continuation of the original suit, do not apply, as the basis of that rule is different from the one under consideration.

(4) Bhoja Mahadev Parab *v.* Gangabai, 37 B. 621 (1913).

(5) Ramalinga *v.* Raghunatha, 20 M. 418, at p. 420 (1897); Balkishen *v.* Kishan Lal, 11 A. at p. 155 (1888). In the last cases, however, the cause of action was different.

(6) Chandra *v.* Pramatho, 15 C. W. N. 930 (1911).

(7) Raja Ransgit *v.* Bhagabutty, 7 C. W. N. 720, 722 (1900). See also Troylokhyanath Bose *v.* Macleod, 28 C. 28, 34 (1900); Balkishen *v.* Kishan Lal, 11 A 148 (1888), in which also it was held that there was no identity in the relief.

(8) Balkishen *v.* Kishan Lal, 11 A. 148, 155 (1888). So also there is, of course, no bar where the matter complained of has

subsequent suit is, however, for a part of the relief claimed in the first suit, its trial was held to be barred by that of the first suit.(1) It will, however, be observed that this section omits the words formerly appearing "*for the same relief.*" This was stated to have been done because the Select Committee were of opinion that the application of the provision should depend not upon the mere prayer of the parties, but upon the matter in issue. Probably in a large number of cases where the matter in issue is the same, the relief deriving as a consequence therefrom will be, or should be, the same. But however this may be, the section apparently substitutes as a test the identity of the matter in issue irrespective of the relief sought upon the proof of the facts alleged in such issue.

"**Same parties.**"—Not only must the persons be the same, but they must be suing or sued in the same capacity. Where the same person sues in different capacities it is the same as if there were different persons.(2) The section has been amended to show that the litigation must be under the same title.

"**Jurisdiction.**"—The Court must have had jurisdiction to grant relief in the previous suit. So in the under-mentioned case (3) the Court observed: "It is clear that in this case the proceedings pending before the Revenue Officer were not for the same relief (that is, for ejectment of the defendants and for mesne profits) as was sought in the present suit, nor had the Revenue Officer jurisdiction to grant such relief."

Foreign Court.—Referring to this explanation, the Court observed: (4) "That it seems to follow, as a necessary consequence, that the existence of a decree in a foreign Court is no bar to the execution of a decree of a Court in British India, even though the cause of action in both suits be the same."

Res judicata.

11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. [s.

Explanation I.—The expression "former suit" shall denote

arisen since the institution of the other suit: Bissessur Singh *v.* Gunput Singh, 8 C. L. R. 113 (1880).

(1) See Niazullah Khan *v.* Nazir Begam, 15 A. 100, *supra*; Govind *v.* Jijibai, 36 B. 189 (1911); s. c., 14 Bom. L. R. 9.

(2) Neve *v.* Weston, 3 Atk. 557; Law *v.* Rigby, 4 Bro. Ch. 60; Gage *v.* Stafford, 1 Ves. Sr. 544.

(3) Troylokhyanath Bose *v.* Macleod, 28 C. 28, at p. 34 (1900).

(4) Fakuruddeen *v.* Official Trustee, 7 C 82 (1881), *per* Morris, J.

a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate *bonâ fide* in respect of a *public right or of a* private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Bar to further suit.

12. *Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.*

When foreign judgment not conclusive.

13. *A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except—*

(*a*) *where it has not been pronounced by a Court of competent jurisdiction;*

(*b*) *where* it has not been given on the merits of the case;

(*c*) *where* it appears on the face of the proceedings to be founded on an incorrect view of international law or *a refusal to recognize the law of British India in cases in which such law is applicable;*

(*d*) *where the proceedings in which the judgment was obtained are opposed* to natural justice;

(*e*) *where* it has been obtained by fraud;

(*f*) *where* it sustains a claim founded on a breach of any law in force in British India.

14. *The Court shall presume, upon the production of any* [s. 1 Exp
document purporting to be a certified copy of a
Presumption as to foreign judgments. *foreign judgment, that such judgment was pronounced by a Court of* competent jurisdiction, unless the contrary appears on the record; but such presumption may be *displaced* by proving want of jurisdiction.

Res judicata generally considered.—These sections embody the doctrine of *res judicata*, which, though it has sometimes been treated in English law as a branch of the doctrine of estoppel, is yet essentially distinct from it. Estoppel, which is dealt with by sect. 115 of the Evidence Act, proceeds upon the equitable principle of altered situation, whilst the doctrine of *res judicata* proceeds on the principle that there should be a determination to litigation, and that a defendant should not in respect of the same matter be harassed by several suits. Estoppel is a part of the law of evidence, whilst *res judicata* belongs to the province of procedure strictly so-called.(1) Perhaps the shortest way to describe the difference between the two is to say that whilst the plea of *res judicata* prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon, an estoppel prohibits a party, after the inquiry has already been entered upon, from proving anything which would contradict his own previous declarations or acts to the prejudice of another party, who, relying upon those declarations or acts, altered his position. In other words, *res judicata* prohibits an inquiry *in limine*, whilst an estoppel is only a piece of evidence.(2)

The English doctrine of *res judicata* was adopted in this country before the promulgation of the first Code of 1859. As the Judicial Committee observed,(3) upon the statement of the rule in the Duchess of Kingston's case, there is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the civil law, and was consistent with sect. 2 of the Code of 1859. Though, however, consistent with it, sect. 2 of that Code was not identical with and fell considerably short of it.(4) It only provided for bar by judgment, and did not deal with the remaining portion of the rule relating to the bar of the trial of an issue by judgment on that issue, which has sometimes been called bar by verdict. The gist of this latter rule is that an actual decision on any matter directly in issue in a suit is conclusive of that issue in every subsequent suit brought on any cause and for any purpose or object. Notwithstanding this defect in the rule, the Courts, acting

(1) *Res judicata* precludes a man from avowing the same thing in successive litigations, while estoppel prevents his saying one thing at one time and the opposite at another: Cassamally *v.* Currimbhoy, 36 B. 214 (1911); Bhaishanker *v.* Morarji, 36 B. 283 (1911); Baleshwar Bagarti *v.* Bhagirathi Das, 35 C. 701 (1908); Bhagirathi Das *v.* Baleshwar Bagarti, 41 C. 69 (1913). For case where no estoppel when there has been a change of law before the final decree, see Lakshmi Bibi Kujrani *v.* Atal Bihary Aldar, 40 C. 534 (1913).

(2) Sitaram *v.* Amir Begum, 8 A. 332 (1886), *per* Mahmood, J.

(3) In Khugowlie Singh *v.* Hussein Bux, 7 B. L. R. 673 (1871).

(4) See Hukm Chand, Res. Jud. 7, where the subject of the above statement is more fully treated.

on general principles, recognized the conclusiveness of judgments as to issues, also, the principle of *res judicata*, whether specially enacted or not, being an essential part of the law of procedure in all countries.(1) Other difficulties also arose with reference to the meaning to be attached to the words "*cause of action*," in sect. 2 of the Code of 1859. This section was therefore very considerably modified in the Code of 1877, *res judicata* being made applicable to issues, and the identity of the cause of action being replaced by that of matter in issue. The effect of this was to provide for an estoppel against defendants, the words "suit or issue" being effective to estop a defendant from defence as well as a plaintiff from attack.(2) Another material alteration made was the express extension of the doctrine of *res judicata*, with certain limitations to foreign judgments, the limitations being enacted by sect. 14.(3)

In the rule of *res judicata*, as enacted in 1877, only two alterations were, prior to the present Code, made, which were to a great extent of a verbal character. One of such alterations was to make that clear which had been previously decided, namely, that the competency of jurisdiction in regard to the Court trying the former suit was as to the subsequent suit also. The section even in its final form under the last Code was not complete or exhaustive of the effect of *res judicata*;(4) which, as a principle, exists independently of the Statute enacting it.(5) It did not, for instance, deal with judgments *in rem*, nor with that of parties represented by, though not claiming under, the parties to the former suit.(6) In fact, as observed by Sir Whitley Stokes, the question of *res judicata* is a subject of which the importance in a country inhabited by a litigious population is only equalled by the difficulty of dealing with it clearly, concisely, and accurately in a legislative enactment.(7) The same remarks apply to the present Code.(8) In the Bill as first drafted an attempt was made to elaborately and exhaustively formulate the rule. This arrangement was simplified by the Select Committee which considered that draft. The framers of the present draft considered that even this modified attempt to make a complete statement of the rule of *res judicata* was

(1) Jamaitunnissa *v.* Lutfunissa, 7 A. 615 (1885).

(2) Rung Rav *v.* Sidhi Mahomed, 6 B. 484 (1882).

(3) *Vide post*, p. 143.

(4) Ram Lall *v.* Chhabnath, 12 A. 578 (1890); Padayachi *v.* Vetheilinga, 15 M. 119 (1891).

(5) In Sitaram *v.* Amir Begum, 8 A. 334 (1886), Mahmood, J., said, "In interpreting the language of that section, we cannot ignore the fundamental principles of the rule to which that section gives expression, unless indeed the express word of the Statute contradict these principles;" and see Balkishen *v.* Kishanlal, 11 A. 153 (1888). In Bholabhai *v.* Adesang, 9 B. 81 (1884), West, J., said that s. 13 could not be applied quite literally; as, if it could, the Court trying a second suit would be bound by the decision of a point in a first suit treated by the Court in appeal as irrelevant for that case though not formally set aside. Nor does the section expressly provide that a Court which has no jurisdiction finally to decide a question should follow a decision of a Court which had exclusive jurisdiction to decide it. But the rules laid down in the Duchess of Kingston's case, and declared by the Privy Council to be applicable, meet such a case.

(6) Ahmedbhoy *v.* Vulleebhoy, 6 B. 715 (1882). See, however, as to domestic judgments *in rem*, s. 41 of the Evidence Act.

(7) 2 Anglo-Indian Codes, 393.

(8) Ramamurthi *v.* Secretary of State for India, 24 M. L. J. 469 (1911); s. c., 36 M. 141 (this section does not cover all cases of estoppel by judgment).

likely to lead to increased litigation, and that it was not possible to adequately expound a subject so complex within the limits of a section of an Act. It was thought better therefore to re-enact the section as it stood in the last Code, with such few modifications only as experience had shown to be necessary. The amendments consist of the added first Explanation, and Explanation II., the elimination of Explanation IV. of the last Code, and the insertion of the words "*public right or of a*" in the present Explanation VI. to give due effect to suits relating to public nuisances (sect. 91). The former Explanation VI. has been removed and made into a separate section (14). The subject of foreign judgments is dealt with *post*. Sect. 12 is new, and is necessitated by the transfer of certain of the provisions of the existing Code to Rules. The original draft contained the provisions that nothing in this section should be deemed to limit or otherwise affect any remedy which is open to any person against any judgment, order or decree in a suit or other proceeding to which such person was a party whilst suing or being sued as a minor represented by a next friend or guardian for the suit. This, however, was omitted, as the Select Committee considered that such a saving was necessarily implied, and that therefore no special provision was required for the case-law (1) which it was thus sought to settle. Similarly, words excepting judgments, orders, and decrees obtained by fraud or collusion were omitted, because sect. 44 of the Evidence Act, which it was intended to save, is confined to judgments proved by the adverse party, and the Committee considered that a provision relating to procedure was, of necessity, subject to the general law of evidence. Further, the words, "and not collaterally, incidentally, or inferentially" qualifying the adjudication were expunged, as they added nothing to the words "directly and substantially." The draft Bill contained the following explanation: "*Where several issues are put in issue and tried and decided in any suit and the decision of each of such issues is material to the disposal of the suit, each such issue shall be deemed to have been directly and substantially in issue in each suit.*" This *Explanation*, it was suggested, should be added to make it clear that where in a former case several points have been involved, the finding on each of which is independently sufficient to dispose of the case, each of such findings is *res judicata*. It adopted the decision of the Calcutta High Court in Peary Mohun Mukerjee *v.* Ambica Churn Bandopadhya.(2) It has, however, been omitted.

The bar is absolute against all parties, the test of *res judicata* being mutuality.(3) Where it exists, the original cause of action is gone, and can only be restored by getting rid of the *res judicata*.(4) Therefore in such case a decree-holder must obtain satisfaction of his decree by execution, and not by another suit, which cannot be brought either on the original cause of action, or, save in special cases, on the decree in which that cause has become merged. The object of the Legislature has been to prevent continued litigation on the

(1) See Cursandas Natha *v.* Ladkavahu, 19 B. 571 (1895); Lalla Sheo Churn *v.* Ramnandar Dobey, 22 C. 8 (1894).

(2) 24 C. 900 (1897).

(3) Surrendernath *v.* Brojonath, 13 C. 356 (1886); Gnanambae *v.* Parvathi, 15 M. 477 (1892); Jamaitunnissa *v.* Lutfunnissa, 7 A. 619 (1885).

(4) Lockyer *v.* Ferryman, L. R. 2 App. Cas. 528.

same grounds; and this would obviously be defeated by allowing a decree-holder to abstain from putting his decree in force, and proceed again on the same cause as before.(1) A plea of *res judicata* must be based on the grounds of the decision actually stated in the judgment.(2) If a judgment be improperly obtained, so that it never ought to have been signed, when set aside it ought to be treated as never having existed. So judgment obtained against a dead man cannot operate as *res judicata* in a subsequent suit.(3)

"**Court.**"—The term, in so far as it is used in connection with the subsequent suit, means a Court governed by the Code. From the provisions of sect. 14 it is shown that the operation of the section is not confined to decrees passed by British Indian Courts.(4) The word "Court," therefore, as used in connection with the previous suit, includes a foreign Court, and the Court of competent jurisdiction, which is referred to in the first paragraph, includes a foreign competent Court,(5) the recognition of a foreign judgment as *res judicata* being a portion of the positive law of British India.(6) Upon an issue whether the defendant in possession of a *taluqa* had lost title by inheritance thereto by reason of having been validly adopted out of his own family: held that an award to that effect of a committee of taluqdars was not a decision by a "Court" within the meaning of this section.(7)

"**Try.**"—This word, which means the formal method of examining and adjudicating on a matter in dispute, shows that the rule in question has nothing to do with the admissibility of a judgment in evidence, and which judgment may be admissible under sects. 40–44 of the Evidence Act, even where it does not fulfil the requirements of this section.(8) There is a conflict as to whether the doctrine of *res judicata* applies only to a trial by a Court of original jurisdiction, or also to a disposal by an appellate Court. The Calcutta High Court has, in the under-mentioned case,(9) held in effect that a trial by an original Court only is contemplated and that the section has no application to the disposal of an appeal, and that when there is no *res judicata* at the time of the trial of the original suit the appellate Court is bound to decide the appeal on the merits. The contrary view, however, is taken by the Allahabad (10) and Madras (11) High Courts, which have held that the rule contained

(1) Gan Savant *v.* Narayan Dhond, 7 B. 469 (1883).

(2) Jalasutram *v.* Bommadevara, 29 M. 42 (1905).

(3) Haji Noor Mahomed *v.* Macleod, 9 Bom. L. R. 274 (1907).

(4) Prithesingji *v.* Umedsingji, 6 B. L. R. 98, 102 (1903).

(5) Babubhat *v.* Narharbhat, 13 B. 224 (1888).

(6) *Vide post*, pp. 142-144.

(7) Har Shankar Partab Singh *v.* Lal Raghuraj Singh, 34 I. A. 125 (1907); 29 A. 519; 11 C. W. N. 841; 9 Bom. L. R. 757; 17 M. L. J. 354; 4 A. L. J. 497; 6 C. L. J. 13.

(8) See Hukm Chand, Civ. P. Code, 114; and see Beni Madho *v.* Indar Sahai, 32 A. 67 (1909).

(9) Abdul Majid *v.* Jew Narain Mahto, 16 C. 233 (1888). But see Chandra *v.* Pramatho, 15 C. W. N. 930 (1911).

(10) Balkishen *v.* Kishan Lal, 11 A. 148 (1888); Chajju *v.* Sheo Sahai, 10 A. 123 (1887). In the first case a decision of the High Court in a suit for rent for 1292 F. was held to be *res judicata* in a second appeal presented prior to that decision in a suit for rent for 1293 F.

(11) Gururajammah *v.* Venkatakrishnama, 24 M. 350 (1901).

in this section is not limited to the Courts of first instance but applies equally to the procedure of the first and second appellate Courts by reason of sects. 107 (formerly sect. 582) and 108 (formerly sect. 587) respectively, and, indeed, even to miscellaneous proceedings by reason of sect. 139 (formerly sect. 647); and that the doctrin , so far as it relates to prohibiting the retrial of an issue, must refer, not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. The Panjab Chief Court appear to have taken the same view.(1) Similarly when there were cross appeals in a suit a decision in one appeal was held to be *res judicata* in the other, though as the suit was the same, this section could not apply.(2) The correct view is that the date, not of institution but of decision, determines the application of the principle of *res judicata*. See Explanation I.

Suit.—It would hardly be necessary to say, unless the contrary had been maintained, that criminal proceedings are not a suit,(3) and therefore no finding of a Criminal Court can be *res judicata* in a civil suit, both the parties to and character of the two proceedings being entirely different. Similarly it has often been held that the proceedings in the Criminal Court are not in general evidence in the Civil Court, and that a Civil Court is not bound to adopt the view taken by the Criminal Court as to the oral or documentary evidence.(4) The term "suit" has not been defined.(5) At the same time it has been said that sect. 647 (now sect. 141) shows that the law does not necessarily consider every proceeding in which there are parties, evidence, argument, and decision, to be a suit, there being proceedings other than suits and appeals.(6) Proceedings therefore under the insolvency sections of the Panjab Laws Act have been held not to be a suit.(7) Nor are proceedings under the Land Acquisition Act, the object and nature of which differ considerably from an ordinarily civil suit, a suit.(8) Nor is an application to amend clerical or arithmetical or accidental

(1) Nur Muhammad *v.* Jamnu (1830), P. R. No. 158. Cited in Hukm Chand, Res. Jud. p. 26.

(2) Ram Lal *v.* Chhab Nath, 12 A. 578 (1890).

(3) Ram Lal *v.* Tula Ram, 4 A. 97 (1881); Gholam Husen *v.* Mahomed Khan (1877), P. R. No. 56. In the first case cited, the lower appellate Court held that as the Criminal Court had decided that the defendant had abducted the plaintiff's daughter, the question whether he had or had not done so was *res judicata*; a judgment which was reversed on appeal to the High Court. See also Doorga Das *v.* Doorga Churn, 6 W. R., Civ. Ref., 26; and Keshab *v.* Maniruddin, 13 C. W. N. 501 (1908), in which it was held that an acquittal is no bar to a civil suit.

(4) See cases cited in O'Kinealy's Civil Procedure Code, notes to s. 13, and Hukm Chand, C. P. C. 123.

(5) See notes to s. 2, *ante*.

(6) In the matter of Chirangi Mut (1884), P. R. No. 445.

(7) Ib. See *In re* Victoria (1894), 2 Q. B. 387.

(8) Nobodeep Chunder *v.* Brojendra Lal Ray, 7 C. 406 (1881); Mahadevi *v.* Neelamani, 20 M. 269 (1896). The decision in Ram Chunder Singh *v.* Madho Kumari, 12 C. 484 (1885), is not against this view, as in that case the former suit was not a proceeding on a reference under any section of the Act, but a suit instituted by the plaintiff independently of the Act. No appeal lies to the Privy Council from a High Court decision on appeal under this Act, for such a decision is an ultimate arbitration: Special Officer Salsette Building Sites *v.* Dossabhai Bezonji, 37 B. 50 (1912).

errors in a decree, a suit,(1) nor is an application for review.(2) Miscellaneous civil proceedings will be a suit when they are treated as a suit by the Legislature.(3) In a proceeding upon an application for probate, the only question to be determined is whether the will is true or not. It is not the province of the Court to determine any question of title with reference to the property covered by the will.(4) In the last-mentioned case the Court further observed: "And it is noteworthy that a proceeding under the Probate and Administration Act is not a suit properly so called, but takes the form of a suit according to the provisions of the Civil Procedure Code (see sect. 83). That being so, we do not see how the judgment of the Allahabad High Court could be regarded as concluding the plaintiff as to the title to the estate either under sect. 13 of the Civil Procedure Code or under the general principles of *res judicata*." But in a recent Full Bench decision of the Bombay High Court where in a contentious proceeding for Probate a will had been held not proved and Probate refused, and the widow then brought a suit for recovery of the property of the deceased from the defendants, who held it as executors under that will, it was held that since contentious proceedings for Probate must take the form (as nearly as possible) of a suit, they constitute a suit within the meaning of this section, and therefore the Probate judgment operated as *res judicata*.(5) In considering upon the question of competency whether the word "suit" should be construed as including an appeal, it is held that the powers of the Court in which the suit was instituted must be looked at, and not those of the Court by which the suit was decided on appeal.(6) The draft Bill made the section applicable to a suit "*or other proceeding;*" but this suggestion has not been adopted. As to this, the Special Committee in their report say, "The Committee recognized that a proceeding does not come within the language of that section, but they think it better not to deal with this point in express terms, for the reason that the applicability of the doctrine of *res judicata* to certain proceedings is not open to doubt; and they foresee that any express reference to proceedings in a crystallised definition might only lead to difficulties (L. R. 11 I. A. 37; I. L. R. 29 C. 707)."

As regards the question of the identity of the suit it has been held that where separate causes of action were joined in one suit, the suit as regards each

(1) Langat Singh *v.* Janki Koer, 39 C. 265 (1911); Langat *v.* Janaki, 14 C. L. J. 481 (1911).

(2) Srish Chandra Pal Chowdry *v.* Triguna Prasad Pal Chowdry, 40 C. 541 (1913); following Gulab Koer *v.* Badshah Bahadur, 10 C. L. J. 420 (1909).

(3) Harsahai *v.* Maharaj Singh, 2 A. 294 (1879); Syud Imam *v.* Haran Chunder, 14 B. L. R. 408 (1875); Smith *v.* Secretary of State, 3 C. 340 (1878); Acha Mian *v.* Durga Churn, 25 C. 146 (1898).

(4) Arun Moyi Dasi *v.* Mohendra Nath Wadadar, 20 C. 888, 895 (1893). As to the Succession Certificate Act, see Mancharam *v.* Kalidas, 19 B. 821 (1894); and see as to Probate proceedings, Kurrutulain *v.* Nuzbutud Dowla, 33 C. 116, 127 (1905); and see Lalit *v.* Radharaman, 13 C. L. J. 547, 552 (1911); 15 C. W. N. 1021; distinguishing Ramnandan *v.* Sheoparsan, 11 C. L. J. 623 (1910).

(5) Kalyanchand Lalchand *v.* Sitabai, 38 B. 309, F. B. (1913). Cf. Ramani Debi *v.* Kumud Bandhu, 14 C. W. N. 924 (1910). Judgments refusing Probate are as much judgments *in rem* as those granting it.

(6) Malubhai *v.* Sursangji, 30 B. 220 (1904).

cause of action was a separate suit. So if a suit for the recovery of one bond has been dismissed, on the ground that the bond was not repaid, the decision would be *res judicata* so far as the claim for that bond is concerned in a subsequent suit brought for the recovery of that and other bonds on the ground of the same repayment.(1)

As regards appeals, *vide ante*, p. 35, note to sect. 2, *sub voc.*, "Decree."

It was sometimes held, before 1892, and was enacted in that year by an addition to sect. 647 (now sect. 141), that execution proceedings are not miscellaneous proceedings but proceedings in suits. But though the word "suit" includes all proceedings in execution of the decree passed in the suit, the section does not apply where the proceedings, both earlier and subsequent, are in the same suit. For the section requires that the matter should have been in issue in another separate suit, and each separate application for execution of a decree in a suit is not a separate suit.(2) But though in such a case this section will not apply, a prior decision in the same suit may have binding force, depending not upon this section but upon general principles of law, otherwise there would be no end to litigation. So in the last-mentioned case, which was reversed on appeal to the Privy Council, the latter held that though the matter decided was not decided in a former suit but in a proceeding, of which the application in which the orders reversed by the High Court were made was merely a continuation, yet it was as binding upon the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. It could not, in short, be held that because the prior order was made in the same suit, what it decided remained open to contest afterwards between the parties, although if it had been made in another suit it would have been final under the former sect. 13.(3) As a fact, the bar in such cases is due to the principle which has been designated the "*judgment of the case*," (4) the principle which is distinct from *res judicata* but which in the absence of any specific name has sometimes been spoken of as *res judicata* as falling within the literal signification of that expression, under which a decision in a prior stage of the same civil suit or proceeding operates as a bar to a fresh decision on the same point in the subsequent stages of the same suit or proceeding.(5) Thus it has been held that though an application

(1) Sheoraj *v.* Kashinath, 7 A. 252 (1884).

(2) Rup Kuari *v.* Ramkirpal Skukul, 3 A. 141, 142, 143, F. B. (1880).

(3) S. C. in appeal, 6 A. 269 (1883). See Mungal Pershad Dichit *v.* Grija Kant Lahiri, 8 C. 51 (1881). In Behari Lal *v.* Majid Ali (1897), A. W. N. 29, the Court observed that "s. 13 of the Code, of course in terms, does not apply to a case of this kind, but as has been pointed out by their Lordships of the Privy Council in the case of Ram Kirpal *v.* Rupkuari, the principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue which, in that suit or in the execution proceedings in the suit, had been previously determined." As, however, is pointed out, *post*, the principle is really a different one from *res judicata*, though sometimes spoken of by that name. See Gulab Koer *v.* Badshah Bahadur, 13 C. W. N. 1197 (1909).

(4) Hukm Chand, C. P. C. 116.

(5) See Ram Narain *v.* Parameswar Narain, 25 C. 39 (1897) [decision refusing an application to file an appeal; application to another Division Bench barred]; Secretary of State *v.* Vydia Pillai, 17 M. 193 (1893) [remand:

for amendment of a decree (under sect. 152) is not a suit within the meaning of these sections, yet (when it has been disposed of) a subsequent application will be barred upon general principles of Law.(1) *Res judicata*, on the other hand, applies to cases in which the decision was made, or the point decided arose, in another suit or in proceedings taken in execution of a decree in another suit. Where there is a trial of a suit, and a point has been decided in an execution proceeding in a former suit, or *vice versâ*, then the rule of *res judicata* may apply.(2) It is, however, to be noted, that it has been said (3) that it is only certain descriptions of orders passed in the course of the execution of a decree that have operation by way of *res judicata*, and not every order passed in execution. There will in some cases not be *res judicata*, as all its conditions may not have been fulfilled.(4) *Res judicata* will not apply when the decree, with regard to which a question arises, is really different from that with reference to which it had arisen before,

appeal after]; Ballabh Shanker *v.* Narain Singh, 3 A. 173 (1880) [order by appellate Court on application for execution]. In this country the principle has been most usually acted upon in execution proceedings, *vide ante*, and see Bani Ram *v.* Nanhu Mal, 11 I. A. 181 (1884); Bandey Karim *v.* Romesh Chunder, 9 C. 65 (1882); Futteh Narain *v.* Chandrabali, 20 C. 551 (1892); Budan *v.* Ramchandra, 11 B. 539 (1887); Chathappan *v.* Pyder, 15 M. 403 (1891); Venkatanarasimhah *v.* Papammah, 19 M. 54 (1895); Sher Singh *v.* Doya Ram, 13 A. 564 (1891); Basudev Narain Singh *v.* Seelojy Singh, 14 C. 640 (1887); Hafizuddin *v.* Abdul Aziz, 20 C. 755 (1893); Kishan Sahai *v.* Aladad Khan, 14 A. 64 (1891); Jogendro Bhuttacharya *v.* Hiranya Kumar, 2 C. L. J. 499 (1904); Nabi Muhammad *v.* Jwala, 27 A. 148 (1904); Hukm Chand, C. P. C. 117-119, and *post*, p. 149; Gulab Koer *v.* Badshah Bahadur, 13 C. W. N. 1197 (1909).

(1) Langat *v.* Janaki, 14 C. L. J. 481 (1911).

(2) In Manjunath *v.* Venkatesh, 6 B. 54, 60, 61 (1881), the Court considered that the A. H. C. in Rupkuari *v.* Ramkirpal, 3 A. 141 (1880), had put too narrow a construction on the word "suit" in excluding execution proceedings. In Dinkar Ballal *v.* Hari Shirdhar, 14 B. 206, 209 (1889), Scott, J., said: "Moreover the previous proceeding was not an independent suit, but a proceeding in execution; and although a decision in such a proceeding is binding in subsequent proceedings in the same suit, it is a matter of doubt whether they affect claims in independent suits." The learned Judge, however, stated that it was under the circumstances not necessary to examine that question. Jardine, J., appears to have held that an order in execution proceedings in one suit could not be *res judicata* in another suit, though the decision in the case turned upon another point. There can, however, it is submitted, be no room for contention after the amendment of s. 647 in 1892, with respect to execution proceedings, and that there will be *res judicata* provided the conditions of that rule have been fulfilled, which may often be not the case having regard to the nature of the order passed in execution proceedings in the former suit. See cases in following notes.

(3) Gourmani *v.* Jagut Chandra Audhikari, 17 C. 57, 63 (1889).

(4) So in Abedoonissa *v.* Ameeroonissa, 4 I. A. 66 (1876), the Court in the prior suit was held incompetent to try the particular issue; in Dinkar *v.* Hari, 14 B. 206 (1889), the subject-matter was held not to be the same, and that the conclusiveness given to s. 283 of the last Code exists only as regards the particular property in dispute. So also the decisions in Gourmani *v.* Jagut Chandra, 17 C. 57 (1889); Ram Lal *v.* Narain, 12 A. 539 (1890); Sheik Budan *v.* Ram Chandra, 11 B. 537 (1887), turned on the point decided not having been adjudicated upon in the former execution proceedings, the objection in the Calcutta case having been raised by the judgment-debtor not in his character as such under the decree but in a different character. See Ashfag *v.* Gauri, P. C., 33 A. 264, 271 (1911). And see *post*.

as the matter in issue in the two cases will be different. So a decree directing periodical payments has for its purpose been deemed to be a separate decree in regard to each of such payments.(1) And a decree confirmed in appeal has also been deemed to be different from what it was before the confirmation: and a dismissal of an application for the execution of the original decree has been held to be no bar to an application for execution of the appellate decree.(2)

"**Issue.**"—The principle of *res judicata* applies both to the trial of suits and the trial of issues. A suit ends in a dismissal, or a decree in whole or in part. An issue ends in a finding, and the rule contained in the section enacts that not only is a suit which has once been tried and determined not again maintainable, but an issue which has once been directly and substantially raised and decided cannot be litigated a second time: the principle upon which the rule is based applying equally to issues as to suits.(3)

The first clause of the section is not well constructed. It would be clearer if it ran, "No Court shall try any issue which, or any suit in which, the matter directly and substantially in issue has been," etc.(4) The trial of a subsequent suit will be barred only if the matter is directly and substantially in issue in it (*vide ante*, first paragraph). An issue is said to arise "when a proposition of law or fact, which a plaintiff must allege in order to show a right to sue, is affirmed by the one party and denied by the other." And see Explanations III. and IV.(5)

There is nothing in the Code to restrict the application of the rule of *res judicata* to issues of fact as distinct from issues of law. In the original draft Bill it was proposed to affirm the view that a pure finding of law might operate as *res judicata*, but to limit the operation of the principle to adjudications on the merits, with a view to excluding, for instance, dismissals on a preliminary question of jurisdiction. Apparently it was considered that this was a matter which should be left to the Courts to determine. It has been said that a point of law can never be *res judicata*.(6) But it is submitted that the rule thus broadly stated is not sound. It is difficult, however, to reconcile the decisions on the point.

The principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as a bar was a right decision or a wrong decision in law or in facts, and it is immaterial whether the decree set up as a bar was rightly or wrongly passed in law or in fact.(7) It is obvious that if this were not so there would be no finality, for in all cases the

(1) Kuppu Ammal *v.* Saminatha Ayyar, 18 M. 482 (1894).

(2) Sakhal Chand *v.* Velchand, 18 B. 203 (1893); Muhammad Sulaiman *v.* Muhammad Yar Khan, 11 A. 267 (1888). See Harkant Sen *v.* Biraj Mohan Roy, 23 C. 876 (1896); Nanchand *v.* Vithu, 19 B. 258 (1894).

(3) Jamaitunnissa *v.* Lutfunnissa, 7 A. 615 (1885); Tirbhuwan *v.* Rameshar, 28 A. 727, 740 (1906). See Hukm Chand, Res Judicata, 7, 14, and *ante*.

(4) Hukm Chand, C. P. C. 112.

(5) O. XIV. rr. 1, 2, *post*.

(6) Chamanlal *v.* Bapubhai, 22 B. 669 (1897).

(7) Behari Lal *v.* Majid Ali, 24 A. 138 (1901); Sham Lal *v.* Ghasita, 23 A. 459, 460 (1901); Phundo *v.* Jangi Nath, 15 A. 327 (1893); see Nathu Ram *v.* Kalyan Das, 1 A. L. J. 217 (1904).

previous decision might be challenged for error. The force of *res judicata* attaching to a decision by a Court on an issue of law will not be affected, even if the decision is subsequently disapproved by a Full Bench of the High Court to which that Court is subordinate.(1) Where the question is one not purely of law, but of mixed law and fact, there will be *res judicata*. In such case the law has been applied to a particular state of facts, and if these facts come again in issue in another suit, the judgment on these facts, whether it rightly or wrongly applies the law, is *res judicata*.(2) So where in a previous suit a particular stipulation, contained in a particular kabuliat, had been held to be valid as between the parties, it was held not open to the Court subsequently to try the issue, whether that particular stipulation was valid or not, the question being a mixed question of law and fact, and whether the previous decision was or was not erroneous.(3) It has been recently held that though where the question is one of law the judgment is *res judicata* where the parties seek to litigate again on the same cause of action, yet where the dispute relates to matters which had formed a subsidiary consideration in the former suit, though the causes of action in the suits may be different, the application of this principle is limited to matters distinctly put in issue and determined in the former suit and to questions of fact or mixed questions of fact and law.(4) The Madras High Court has held that a Court is precluded from inquiry into the soundness of the law of the previous decision in respect of the precise subject-matter or immediate purpose of that suit; but that provided the decision in the latter suit does not in any way question the correctness of the former decree or in any way affect its operation, an erroneous decision on a question of law in a previous suit is no bar.(5) The operation of a decree as *res judicata*, so far at any rate as the subject-matter of a direct adjudication contained in the decree is concerned, can in no way be affected, in the absence of fraud or collusion, by the fact that the suit was the result of a mistake of law, or that the decree proceeded on such mistake. The remedy, if any, in such a case can only be by way of review, and not by separate suit for relief on the ground of mistake.(6)

As regards a question of pure law, it has been said that anomalous

(1) Gouri Koer *v.* Audh Koer, 10 C. 1087 (1884) [dist. in Alimunnessa *v.* Shama Charan Ray, 32 C. 749 (1905)]; s. c., 9 C. W. N. 466; Namappa Chetti *v.* Chedambaran Chetti, 21 M. 18, 25 (1897).

(2) Rai Churn Ghose *v.* Kumud Mohan Dutta, 1 C. W. N. 687 (1897). The head-note does not correctly represent the decision, in which no judgment is given as to what would happen in the case of an issue of pure law. See *post* and Bishnu Priya *v.* Bhalu Sundari, 28 C. 318, 322, 323 (1900).

(3) Bhishnu Priya *v.* Bhalu Sundari, 28 C. 318 (1900).

(4) Baij Nath *v.* Padmanund, 16 C. W. N. 621 (1912); Aghore *v.* Kamini, 11 C. L. J. 461 (1909); Purna *v.* Rasik, 13 C. L. J. 119 (1910).

(5) Mangalathammal *v.* Narayanswami, 30 M. 461 (1907); Gopu *v.* Sami Royar, 28 M. 517 (1905); Venku *v.* Mahalinga, 11 M. 393, 395, 396 (1888), following Parthasarathi Ayyangar *v.* Chinna Krishna, 5 M. 304 (1882), latter case dist. in Chathappan *v.* Pydel, 15 M. 403 (1891), as it was the same decree which was under execution though property attached was different; and also in Koyyanna *v.* Doosy, 29 M. 225 (1905). In Vishnu *v.* Ramling, 3 Bom. L. R. 450 (1901); s. c., 26 B. 25 (1901), Fulton, J., referred to the second case with approval, but the judgment of Chandavarkar, J., proceeded on the ground that the point in issue had not been previously decided.

(6) Kaveri Ammal *v.* Sastre Ramier, 26 M. 104, 109 (1902).

results might arise if an erroneous decision on a pure question of law in a previous suit is held to operate as *res judicata* in a subsequent suit relating to a different subject-matter, for an erroneous decision might have the effect of altering the law applicable as between the parties. Though the language of this section may perhaps make it apply to such a case, it is very doubtful whether it was intended to have such application.(1) It has been submitted that the facts decided in the first suit cannot be disputed, and for the purpose of the conclusiveness of those facts, but no further, the law applied must be accepted. Thus, if a decree in a suit to declare a mortgage invalid proceed upon the constitutionality of a statute, the parties afterwards cannot deny the validity of the statute in question, when the mortgagee attempts to foreclose. It could hardly be true that they could not raise the question again in a suit upon a different subject-matter.(2) A previous construction of law between the parties, it has been held,(3) ought not to be followed after that law has been replaced by another. So a decision upon a point of limitation given when either Act XIV. of 1859 or Act IX. of 1871 was in force, and which was subsequently held to be erroneous, was also held not to be *res judicata* in a suit which was brought when the present Limitation Act was in force.(4) In a recent case in the Calcutta High Court where, after the preliminary decree in a mortgage and before the final decree, the Chota Nagpur Tenancy Act was extended to the district in which the property was situate, it was held that the sale was forbidden by that Act and the judgment-debtor was not estopped from bringing this to the notice of the Court (5)

The matter directly and substantially in issue in the second suit or issue must be the same matter which was directly and substantially in issue in a former suit.—The former judgment is conclusive only upon the same matter.(6) Where causes of action are different the principle

(1) Rai Churn Ghose *v.* Kumud Mohan Dutta, 1 C. W. N. 687, 690 (1897), *per* Banerjee, J., and see remarks of same learned Judge in Bishnu Priya *v.* Bhalu Sundari, 28 C. 318, 322, 323 (1900); but see *per* Beaman, J., in Waman *v.* Hari, 31 B. 128, 137 (1906).

(2) Bigelow, Estoppel, 100, and see Hukm Chand, Res. Jud. 29 32.

(3) Chaman Lal *v.* Bapubhai, 22 B. 669 (1897).

(4) Ib.; but see Namappa *v.* Chidambaran, 21 M. 18, at p. 25 (1897), in which it was said that "a *change in the law* or different interpretation of it cannot operate to re-open matters, which had previously become *res judicata*."

(5) Lakshmi Bibi Kujrani *v.* Atal Bihary Aldar, 40 C. 534 (1913).

(6) See Duchess of Kingston's case, 2 Sm. L. C., 9th ed., 812; Outram *v.* Morewood, 3 East, 346; Barrs *v.* Jackson, 1 Y. & C. 585; Henderson *v.* Henderson, 3 Hare, 115; Hunter *v.* Stewart, 4 De G. F. & J. 168; Gregory *v.* Molesworth, 3 Atkyns, 626; Srimut Raja Mootoo Vijaya *v.* Katama Natchiar, 11 M. I. A. 50; 10 W. R., P. C., 1 (1866); Khugowlie Singh *v.* Hossein Bux Khan, 7 B. L. R. 673; 15 W. R., P. C., 30 (1871) [see as to this latter case Huri Sunker Mookerjee *v.* Mooktara; Patro, 15 B. L. R. 238, 240 (1875)]; Umatara Debi *v.* Krishna Kamini Dasi, 2 B. L. R. 102; 10 W. R. 426 (1868) [confirmed by P. C., 11 B. L. R. 158; 18 W. R. 163 (1872); followed in Brojo Lall Roy *v.* Kheter Nath Mitter, 12 W. R. 55 (1869); Sib Shunkur Neoghy *v.* Huro Soondaree Goopta, 13 W. R. 209 (1870); Dadsar Bibee *v.* Sakir Burkundaz, 15 W. R. 168 (1871); Thomas M. Pigou *v.* Syed Mohamad Aboo Syed, 3 C. L. R. 253 (1878); Dinomoyi Debia Chowdhrain *v.* Anungo Moyi, 4 C. L. R. 599 (1879)]; Soorjomonee Dayee *v.* Suddanund Mohapatter, 12 B. L. R. 304; 20 W. R. 377

does not apply.(1) But where they are substantially the same the principle applies, even though their forms or the frames of the reliefs are different.(2) It is not necessary to show that the subject-matter of the former suit was the same as that of the subsequent suit, but that the question, the trial of which is sought to be barred, was directly and substantially in issue in the former suit.(3) No precise rule of general applicability can be laid down for the solution of the question whether the same matter was directly and substantially in issue in the previous suit.(4) The question whether an issue has substantially been raised and decided is a matter of fact to be determined upon the circumstances of

(1873); Krishna Behary Roy *v.* Bunwari Lall Roy, 1 C. 144; 25 W. R. 1; L. R. 2 I. A. 283 (1875), and in the High Court, 19 W. R. 63; Niamut Khan *v.* Phadu Buldia, 6 C. 819; 7 C. L. R. 227 (1880)[but see Run Bahadur Singh *v.* Lucho Koer, 11 C. 301 (1884); Doorga Pershad Singh *v.* Doorga Konwari, 4 C. 190; L. R. 5 I. A. 149 (1878), and before the High Court, 20 W. R. 154]; (1873) Field, Ev. 237; Caspersz, Estoppel, 379 401

(1) Haji Noor Mahomed *v.* Macleod, 9 Bom. L. R. 274 (1907).

(2) Naganada *v.* Krishnamurti, 34 M. 97 (1910).

(3) Setanath *v.* Basudeb, 2 C. L. J. 540 (1900); as to the necessity for the point having been in issue in the former suit, see Malhi Kunwar *v.* Imam-ud-din, 27 A. 59, 61 (1904).

(4) Field, Ev. 237; the Code of Civil Procedure of 1859 enacted thus: "The Civil Courts shall not take cognizance of any suit brought on a *cause of action* which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties or between parties under whom they claim" (Act VIII. of 1859, s. 2). The meaning of the term "cause of action" has been the subject of difference of opinion in India as well as in England [Allhusen *v.* Malgarejo, L. R. 8 Q. B. 340; Cherry *v.* Thompson, L. R. 7 Q. B. 573; Jackson *v.* Spittlla, L. R. 5 C. P. 542; Durham *v.* Spence, L. R. 6 Ex. 46; Vaughan *v.* Weldon, L. R. 10 C. P. 48; De Souza *v.* Coles, 3 M. H. C. R. 284 (1868); Harjiban Das *v.* Bhagwan Das, 7 B. L. R. 102, 109 (1871); Baboo Mohan Lal Bhaya Gya *v.* Lachman Lal, 5 B. L. R. 663, 674, 675 (1870); 14 W. R. 73; Chunder Coomar Mundal *v.* Munnee Khanum, 11 B. L. R. 434, 442; Laljee Lall *v.* Hardey Narain, 9 C. 105 (1882); Muhammad Abdul Kadir, *v.* The East Indian Railway Company, 1 M. 375 (1878); Salima Bibi *v.* Sheikh Muhammad, 18 A. 131 (1895), see Field, Ev. 203 *n.*]. "It was no doubt with a view to elucidating the subject that the Legislature, in enacting Act X. of 1877, discarded the term 'cause of action.' The question chiefly to be considered is whether the matter decided in the previous suit was in substance part of the cause of action in the second suit, and the matter cannot be said to have been determined in the previous suit, unless it was put in issue and directly determined:" Caspersz, *op. cit.* 328 [and see Rajah of Pittapur *v.* Sri Rajah Row Buchi Sittaya Garu, L. R. 12 I. A. 16, 20 (1884)]. The term "cause of action" is not used in the present section. It, however, occurs in some other sections—20; O. II. rr. 2, 4, 3, 6. The term "right to sue" has been substituted in some sections—O. XXII. rr. 1-3. The expression "cause of action" has been frequently construed by the Privy Council [Soorjomonee Dayee *v.* Suddanund Mohapatter, 12 B. L. R. 315 (1873); Krishna Behari Roy *v.* Brojeswari Chowdhranes, L. R. 2 I. A. 285 (1875); Rajah of Pittapur *v.* Sri Rajah Row, *supra;* Rajah of Pittapur *v.* Sri Rajah Venkata Mahipati Surya, L. R. 12 I. A. 119 (1885); Moonshee Buzloor Ruheem *v.* Shumsoonissa Begum, 11 M. I. A. 605 (1867); Amanat Bibi *v.* Imdad Husain, L. R. 15 I. A. 111 (1888); Mussamut Chand Kour *v.* Partab Singh, L. R. 15 I. A. 157, 158 (1888); see Haji Hasan Ibrahim *v.* Mancharam Kaliandas, 3 B. 137 (1878); Sridhar Vinayak *v.* Narayan Valad Babaji, 11 B. H. C. R. 224 (1874); Caspersz, 323-325]. As to the meaning of the phrase "same right to sue," see Ranchod Morar *v.* Bezanji Edulji, 20 B. 92 (1894).

each particular case.(1) The rule is that where a final decree is couched in general terms, the extent to which it ought to be regarded as *res judicata* can only be determined by ascertaining what were the real matters of controversy in the cause.(2) The leading principles of *res judicata* were thus enunciated by Sir William de Grey in the Duchess of Kingston's case.(3) "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: *first*, that the judgment of a Court of concurrent jurisdiction, *directly upon the point*, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, *directly* in question in another Court; *secondly*, that the judgment of a Court of exclusive jurisdiction, *directly upon the point*, is, in like manner, conclusive upon the same matter, between the same parties, coming *incidentally* in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within their jurisdiction, nor of any matter *incidentally* cognizable, nor of any matter to be inferred by argument from the judgment."(4) Provided the immediate subject of the decision be not withdrawn from its operation so as to defeat the direct object of the decision, the parties may litigate matters incidentally or collaterally in issue between them for any other purpose as to which they may come in question. The test applicable is whether the question decided in the previous suit was in substance part of the cause of action, or whether it was only ancillary to the main cause.(5) The cases upon this branch of the rule of *res judicata* may be divided into two classes. (6) (*a*) The class of cases in which it has been held that the matter directly and substantially in issue in the second suit, or in an issue in such second suit, was, not directly and substantially, but collaterally or incidentally,

(1) Girdhar Manordas *v.* Dayabhai Kalabhai, 8 B. 174, 180 (1882), *per* West, J.

(2) Amriteswari Debi *v.* Secretary of State for India in Council, 24 C. 504 (1897).

(3) Sm. L. C., 9th ed., 812 [the doctrine laid down in this case is applicable to cases tried under the Civil Procedure Code: Khugowlee Sing *v.* Hossein Bux Khan, 7 B. L. R., P. C., 673 (1871)]. The section is not a precise reproduction of the rule in this case, whatever may have been the intention of the Legislature, and the Court's duty is to construe the section as it stands: Prithi Singh *v.* Umad Sing, 6 B. L. R. 98, 103 (1903); and in Gokul Mandar *v.* Pudmunund Singh, 29 C. 707 (1902), the Privy Council pointed out s. 13 goes beyond the law laid down in the Duchess of Kingston's case.

(4) Ib.; Barrs *v.* Jackson, 1 Y. & C. 585; R. *v.* Hutchings, L. R. 6 Q. B. D. 300, 304. The rule, as laid down in the first two cases, has been frequently affirmed by the Indian Courts in the terms of Sir W. de Grey's judgment in The Duchess of Kingston's case [Mussamut Edun *v.* Mussamut Beehun, 8 W. R. 175 (1867); Kanhya Lall *v.* Radha Churn, B. L. R., Sup. Vol., 662 (1867); Mahima Chundra Chuckerbutty *v.* Rajkumar Chuckerbutty, 1 B. L. R., A. C., 1 (1868); Chunder Coomar Mundul *v.* Nunnee Khanum, 11 B. L. R. 434, 444 (1873); Cook *v.* Jadab Chandra Nandi, 2 B. L. R., O. C., 48 (1868)], and in those of the judgment of Knight Bruce, V.-C., in Barrs *v.* Jackson [Ooma Churn Dutt *v.* Beckwith, 5 W. R., Act X., 3 (1866); Modhoo Ram Dey *v.* Boydonath Doss, 9 W. R. 592 (1868); Gooroo Churn Sircar *v.* Brija Nath Dhur, 24 W. R. 111 (1875)].

(5) Doorga Persad Singh *v.* Doorga Konwari, L. R. 5 I. A. 149, *supra*; Barrs *v.* Jackson, 1 Y. & C. 585; Run Bahadur Singh *v.* Lucho Koer, 11 C. 301 (1884); Caspersz, 384.

(6) Field, Ev. 259–269.

in issue in the previous suit; (1) and (*b*) that class of cases in which the decision turned upon the identity of the matter, the matter in issue in the second suit, or in an issue in such suit being held (a) to be,(2) or (b) not to

(1) Shib Nath Chatterjee *v.* Nuboo Kishen Chatterjee, 21 W. R. 189 (1874) ["it may be that in that judgment there is a finding which may have some bearing upon that issue, or his judgment may contain observations applicable to such an issue; but he did not directly determine it. Any opinion which he may have incidentally expressed cannot be considered a finding upon the issue so as to make his judgment in the former suit a determination of the cause of action in the present suit," *per* Couch, C.J.]; Modhoo Ram Dey *v.* Boydonath Doss, 9 W. R. 592 (1868); Mussamut Edun *v.* Mussamut Bechun, 8 W. R. 175 (1867); Mohima Chandra Chuckerbutty *v.* Rajkumar Chuckerbutty, 1 B. L. R., A. C., 1 (1868); Raghu Ram Biswas *v.* Ram Chandra Dobay, B. L. R., Sup. Vol., 34 (1863); W. R., F. B., 127; Chunder Coomar Mundul *v.* Munnee Khanum, 11 B. L. R. 434 (1873); Run Bahadur Singh *v.* Lucho Koer, 11 C 301 (1884); L. R. 12 I. A. 23; Nundo Lall Bhuttacharjee *v.* Bidhoo Mookhy Debee, 13 C. 17 (1886); Thakur Magundeo *v.* Thakur Mahadeo Singh, 18 C. 647 (1891); Anusayabai *v.* Shakaram Pandurang, 7 B. 464 (1883); Jamaitunissa *v.* Lutfunissa, 7 A. 606 (1885); Balak Tewari *v.* Kausil Misr, 4 A. 491 (1882); Moni Roy *v.* Mussamut Rajbunsee Koer, 25 W. R. 393 (1876); Doorga Ram Paul *v.* Kally Kristo Paul, 3 C. L. R. 546 (1878); Jardine Skinner & Co. *v.* Dwarka Nath Chuckerbutty, 14 W. R. 412 (1871); Gangaraju *v.* Kondireddiswami, 17 M. 106 (1893) [the decision of a question of title by a Revenue Court is merely incidental, and no bar to a fresh suit on title in a Civil Court; see also Ashrafunnissa *v.* Ali Ahmad, 26 A. 601 (1904); Rani Kishori *v.* Raja Ram, 26 A. 468 (1903)]; Srihari Banerjee *v.* Khitish Chundra Rai Bahadoor, 24 C. 569 (1897); Nitya Nunda Sarkar *v.* Ram Narain Das, 6 C. W. N. 66 (1901) [Title—question of—raised in rent suit].

(2) Pahlwan Singh *v.* Risal Singh, 4 A. 55 (1881); Nirman Singh *v.* Phulman Singh, 4 A. 65 (1881); Wilaiti Begam *v.* Noor Khan, 5 A. 514 (1883); Jeo Lal Singh *v.* Sarfun, 11 C. L. R. 483 (1882); Rakhal Doss Singh *v.* Sremutty Heera Motee Dossee, 22 W. R. 282 (1874); Hurry Behari Bhugat *v.* Porgun Ahir, 19 C. 656 (1890); Bakshi *v.* Nizamuddi, 20 C. 505 (1892) [followed in Balaram Mondul *v.* Kartick Chandra Roy Chowdhuri, 4 C. W. N. 165 (1899)]; Nobo Doorga Dossee *v.* Foyzbux Chowdhry, 1 C. 202 (1875); 24 W. R. 403; Mohima Chunder Mozoomdar *v.* Asradha Dassia, 15 B. L. R. 251 *n.* (1874); Mohesh Chunder Bundopadhya *v.* Joykissen Mookerjee, 11 B. L. R. 248 *n.* (1874); Cook *v.* Jadab Chandra Nandi, 2 B. L. R., O. C., 48 (1868); Muthumadera Naik *v.* Senatta Muthumdeva Naik, 7 M. H. C. R. 160 (1872); Radhia *v.* Beni, 1 A. 560 (1878); The Rajah of Pittapur *v.* Sri Rajah Row Buchi Sittaya Garu, L. R. 12 I. A. 16 (1881); Abdoolla Khan *v.* Sree Kunto Pershad Hajrah, 15 W. R. 252 (1871) [set-off barred]; Bussun Lall Shookul *v.* Chundee Dass, 4 C. 686 (1879); Gopal Chandra Roy *v.* Nobin Chandra Bhandari, 3 B. L. R. App. 31 (1869); Sheoraj Rai *v.* Kashi Nath, 7 A. 247 (1884); Devrav Krishna *v.* Halambhai, 1 B. 87 (1876). A decision as to the validity or otherwise of a document, where the question has been properly in issue and determined, is binding upon the parties or other representatives in subsequent litigation [Srimut Rajah Mootoo Vijaya *v.* Katama Natchiar, 10 W. R., P. C., 1; Gunga Ram Sadhookhan *v.* Panch Cowree, 25 W. R. 366 (1876); Kally Persad Sein *v.* Mohesh Chunder, 1 Hay, 430 (1862); Mir Fursund Ali *v.* Mussamut Jaffree, 5 N. W. P. 118 (1873); Dhundi *v.* Ram Lal, 7 N. W. P. 149 (1875)]; Arunachala *v.* Panchanadam, 8 M. 348 (1885); Krishna Behari Roy *v.* Brojeswari Chowdranee, L. R. 2 I. A. 283; 1 C. 144 (1875); Nuffur Chunder Paul Chowdhry *v.* Luckee Moonee Dabee, 9 W. R. 300 (1868); Bussun Lall Shookul *v.* Chundee Dass, 4 C. 686 (1879); Belchambers *v.* Ashootosh Dhur, 7 C. L. R. 308 (1880); Muttu Samarawuri Chetti *v.* Shanmuga Chetti, 5 M. 47 (1881); Rajah of Pittapur *v.* Buchi Sittayya, 8 M. 219 (1884); L. R. 12 I. A. 16; Venkatadri Appa Rau *v.* Peda Venkayamma, 10 M. 15 (1886); Ram Chunder Singh *v.*

be,(1) the same matter which was directly and substantially in issue in the first suit. This section does not enact that no property comprised in a suit which is dismissed shall be the subject of further litigation between the

Madho Kumari, 12 C. 184 (1885); L. R. 12 I. A. 188; Vishnu Chintaman *v.* Balaji Bin Raghuji, 12 B. 352 (1887); Radhamadhub Holdar *v.* Monohur Mukerji, 15 C. 756 (1888); L. R. 15 I. A. 97; Triloki Nath Singh *v.* Pertab Narain Singh, 15 C. 808 (1888); L. R. 15 I. A. 113; Kamini Debi *v.* Asutosh Mukerji, 16 C. 103 (1888); L. R. 15 I. A. 139; Ananta Balacharya *v.* Damodhar Makund, 13 B. 25 (1888); Balkishan *v.* Kishan Lal, 11 A. 148 (1888); Gopi Nath Chobey *v.* Bhugwat Pershad, 10 C. 697 (1884); see Chhaganlal *v.* Bapu Bhai, 5 B. 68 (1880); Dulabh Vahuji *v.* Bansidharrai, 9 B. 111 (1884); Dakhyani Debea *v.* Dolegobind Chowdry, 21 C. 430 (1893); Guruvayya *v.* Vudayappa, 18 M. 26 (1894) [an order under s. 258 of the Civ. Pr. Code is appealable under s. 244; no separate suit lies, since the question is *res judicata*, between the parties]; Rai Churn Ghose *v.* Kumud Mohan Dutt Chowdhury, 2 C. W. N. 297, 299 (1898); s. c., 25 C. 571; Nainappa Chetty *v.* Chidambaran Chetti, 21 M. 18 (1897); Krishnan Nambiar *v.* Kannan, 21 M. 8 (1897); Chundee Prasad *v.* Mohendro Singh, 23 A. 5, 12 (1900); Fazlar Rahman Chowdhry *v.* Raj Chunder Sen, 5 C. W. N. 234 (1900); distinguishing Ismail Ariff *v.* Mahomed Gous, 20 C. 831; Ram Saran *v.* Chatar Singh, 23 A. 465 (1901) [suit for perpetual injunction; previous suit for same relief]; Panga *v.* Nunnikutti, 24 M. 275 (1900); Chandi Prasad *v.* Maharaja Mohendra Singh, 24 A. 112 (1901); Rampal Singh *v.* Ram Prasad, 27 A. 37 (1904); Sitanath *v.* Basudeb, 2 C. L. J. 540 (1900); Niadar Mal *v.* Raunak Husain, 29 A. 608 (1907); s. c., 4 A. L. J. 665; Maganlal *v.* Lalchand, 9 Bom. L. R. 259 (1907); Mariamnissa Bibi *v.* Joynab Bibi, 33 C. 1101 (1906), dissented from in Zaharia *v.* Debia, 33 A. 51, P. B. (1910); see also Anant Das *v.* Udai Bhan, 35 A. 187 (1913); and Dakhin Din *v.* Syed Ali, 33 A. 151 (1910); Trailokya Mohini *v.* Kali Prosanna Ghose, 11 C. W. N. 380, 388 (1907). Cf. Chandra *v.* Pramatho, 15 C. W. N. 930 (1911).

(1) Ram Chunder Chowdhry *v.* Kashee Mohun, 21 W. R. 57 (1874); Moni Roy *v.* Musst. Rajbunsee Kooer, 25 W. R. 393 (1876); Kali Krishna Tagore *v.* The Secretary of State for India in Council, 16 C. 173 (1888); L. R. 15 I. A. 186; Moro Abaji *v.* Narayan Dhondbhat Pitre, 11 B. 355 (1886); Roy Dinkur Doyal *v.* Sheo Golab Singh, 22 W. R. 172 (1874); Sami Achari *v.* Somasundram Achari, 6 M. 119 (1882); see also Periandi *v.* Angappa, 7 M. 423 (1883); Karuthasami *v.* Juganatha, 8 M. 478 (1885); *per contra*, Gan Savant Bal Savant *v.* Narayan Dhond Savant, 7 B. 467 (1883); Maloji *v.* Sagali, 13 B. 567 (1888); Anrudh Singh *v.* Sheo Prasad, 4 A. 481 (1882); and see Kirty Chunder Mitter *v.* Anath Nath Dey, 10 C. 97 (1883); 13 C. L. R. 249; Sridhar Vinayak *v.* Narayan Valad Babaji, 11 B. H. C. R. 224 (1874); Girdhar Manordas *v.* Dayabhai Kalabhai, 8 B. 174 (1882); Nilo Ramchandra *v.* Govind Ballal, 10 B. 24 (1885); Dataram *v.* Ram Kristo, 9 W. R. 594 (1868); Kadir Buksh *v.* Golam Ali Gomashtah, 9 W. R. 90 (1868); Khedaroonissa Bibee *v.* Boodhee Bibee, 13 W. R. 317 (1870); Sudduruddin Ahmed *v.* Bani Madhub Roy Chowdhry, 15 C. 145 (1887); Baboo Gooroodas Roy *v.* Baboo Huronath Roy, 7 W. R. 423 (1867); Moro Balkrishna Mule *v.* Shek Saheb Valad Budruddin Kamble, 5 B. H. C. R., A. C., 199 (1868); Baboo Mohan Lal Bahay Gyal *v.* Lachman Lal, 5 B. L. R. 663 (1870); Ramanugra Narain *v.* Mahasundur Kunwar, 12 B. L. R. 433 (1873); Amir Zama *v.* Nathu Mal, 8 A. 396 (1886); Roghoonath Mundul *v.* Juggut Bundhoo Bose, 7 A. 214 (1881); 8 C. L. R. 393; Ekram Mundul Holodhur Pal, 3 C. 271 (1878); Gopee Mohun Mozoomdar *v.* Hills, 3 C. 789 (1878); Sadu *v.* Baiza, 4 B. 37 (1878); Lukshman Dada Naik *v.* Ramchandra Dada Naik, 5 B. 48 (1880); Konerrav *v.* Gurrav, 5 B. 589 (1881); Kashinath Morsheth *v.* Ramchandra Gopinath, 7 B. 408 (1883); Muttu Chetti *v.* Muttan Chetti, 4 M. 296 (1879); Ananda Raman Vathiar *v.* Paliyil Vittil Nanu Nayar, 5 M. 9 (1882) [but see Gopal Das *v.* Gopinath Sircar, 12 C. L. R. 38 (1882)]; Ratan Rai *v.* Hanuman Das, 5 A. 118 (1882); Ahmad Hossein Khan *v.* Nihal-ud-din Khan, 9 C. 945 (1883); L. R. 10 I. A. 45; 13 C. L.

parties.(1) And an estoppel may be binding, notwithstanding that the suit which raises it relates to a different property.(2) The mere fact that a claim has been included in a previous suit, without its having been directly and substantially put in issue and decided, does not, upon the dismissal of that suit, preclude a subsequent suit upon it.(3) But, on the other hand, the mere fact that an issue was not framed, will not prevent the operation of the rule of *res judicata*, provided that in substance the matter has been heard and determined.(4) A decision may be by implication.(5) The fact that the reasoning upon which the former judgment was based is equally applicable to the second suit, does not give the former judgment the force of *res judicata* in the second case.(6) But a matter in issue may be one of law as well as of fact; and where a recurring liability is the subject of a claim, a previous judgment,

R. 330; Gobind Chunder Addya *v.* Afzal Rabbani, 9 C. 426 (1882); 12 C. L. R. 29; Amanat Bibi *v.* Imdad Hossein, 15 C. 800 (1888); L. R. 15 I. A. 106; Fatmabai *v.* Aishabai, 13 B. 242 (1888); Chinnasami *v.* Hariharabadra, 16 M. 380 (1893); Nil Madhub Sirkar *v.* Brojo Nath Singha, 21 C. 236 (1893); The Zamindar of Pittapuram *v.* The Proprietors of the Mutta of Kolanka, 2 M. 23 (1878); L. R. 5 I. A. 200; 3 C. L. R. 365; Vallabh Dhula *v.* Rama, 9 B. H. C. R. 65 (1872); Gobind Mohun Chuckerbutty *v.* Sheriff, 7 C. 169 (1881); Roghoonath Mundul *v.* Juggut Bundhoo Bose, 7 C. 214; Luckinarain Mitter *v.* Khettra Pal Singh Roy, 13 B. L. R. 146 (1873); Ishr Dat *v.* Har Narain Lal, 3 A. 334 (1880); Umrao Lal *v.* Behari Singh, 3 A. 297 (1880); Fatmabai *v.* Aishabai, 13 B. 242 (1888); Sheoraj Nundun Singh *v.* Raj Coomar, 24 W. R. 23 (1875); Sheo Raj Rai *v.* Kashi Nath, 7 A. 247 (1884); Kishore Bun Mohunt *v.* Dwarkanath Adhikari, 21 C. 784 (1894); 21 I. A. 89; Nil Madhub Sircar *v.* Brojo Nath Singha, 21 C. 236 (1893) [rent suit]; (distinguished in Mane Mahammed *v.* Dhani Mahammed, 17 C. L. J. 71 (1912)); Keshavlal Girdharlal *v.* Baiparvati, 18 B. 327 (1893) [restitution of conjugal rights]; Kuppal Amal *v.* Saminatha Ayyart, 18 M. 482 (1894); Dwarkanath Roy *v.* Ram Chand Aich, 26 C. 428 (1899); s. c., 3 C. W. N. 266; Tepu Khan *v.* Rojoni Mohun Das, 2 C. W. N. 501 (1898); Balaram Mondul *v.* Kartick Chandar Roy Chaudhuri, 4 C. W. N. 161 (1899); Chandi Prasad *v.* Mahendra Singh, 23 A. 5, 8 (1900); Tara Lal Singh *v.* Sarobur Singh, 4 C. W. N. 533 (1899); Haranund Roy Chotlangia *v.* Ram Gopal Chotlangia, 4 C. W. N. 429, 432 (1899); Umesh Chunder Dey *v.* Sharbessur Chunder, 5 C. W. N. lxx, 304 (1901); Venkatarama Ayyar *v.* Venkata Subrahmaian, 24 M. 27, 29 (1900); Dondh Bahadur Rai *v.* Tek Narain Rai, 21 A. 251 (1899) [dismissal of suit for redemption does not operate as a decree for foreclosure]; Sita Ram *v.* Madhu Lal, 24 A. 44 (1901) [redemption, subsequent suit for, not barred]; Nakta Ram *v.* Chiranji Lal, 32 A. 215 (1910); *contra*, Vedapuratti *v.* Vallabh Valiya Raja, 25 M. 300 (1901); Veerana Pillai *v.* Muthukumar Asarg, 27 M. 102 (1903); Bhikabhai *v.* Rai Bhuri, 27 B. 418 (1903). See as to suits for redemption notes to s. 9, *ante*; Maharani Beni Pershad Koeri *v.* Raj Kumar Chowby, 6 C. W. N. 589 (1902); Balaram *v.* Kartick, 4 C. W. N. 161 (1899); Jotindra Mohun Tagore *v.* Shumbhu Chunder, 4 C. W. N. 43 (1897) [previous decision in suit for rent]; Abdul Majid *v.* Boida Nath Dhur, 6 C. W. N. 314 (1901); Balbhaddar Nath *v.* Ram Lal, 26 A. 501 (1904); Mana Vikrama *v.* Gopalan Nair, 30 M. 203 (1906); Mahomed Ibrahim *v.* Sheikh Hamja, 35 B. 507 (1911).

(1) Jagatjit Singh *v.* Sarabjit Singh, 19 C. 159, 172 (1891); L. R. 18 I. A. at p. 176.

(2) Rajah of Pittapur *v.* Śri Rajah Row Buchi Sittaya Garu, L. R. 12 I. A. 16 (1884).

(3) Jagatjit Singh *v.* Sarabjit Singh, 19 C. 159; L. R. 18 I. A. 165 (1891); Ram Charan Buhardur *v.* Reazuddin, 10 C. 857 (1884).

(4) Soorjemonee Dayee *v.* Suddanund Mohapatter, 12 B. L. R. 304 (1873).

(5) Pahlwan Singh *v.* Maharajah Moheshur Buksh Singh, 12 B. L. R. 391 (1872).

(6) Chandi Prasad *v.* Maharaja Mahendra, 13 A. 5 (1900).

dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*, but if such previous judgment does negative the title itself, the plaintiff cannot re-agitate the same question of title by suing to obtain relief for a subsequent item of the obligation.(1) The plaintiff cannot re-agitate the same question of liability upon the pure and simple incident that the subject-matter of the latter suit is geographically distinct from the subject-matter of the previous suit,(2) or that the suits related to different years.(3) A decree which has been made without jurisdiction cannot work an estoppel by judgment.(4) Upon the question as to what may be looked to, in order to see what has been in issue in a previous suit, and what has been actually decided, the rule to be gathered from the case-law is (5) that, although the decree in a former suit operates as *res judicata*, the decree is to be construed with reference to the pleadings,(6) judgment,(7) and the record,(8) in order to see what was in issue; and that even the acts of the parties immediately after the decree are very important to fix the meaning of indefinite terms in it.(9) One of the criteria of the identity of two suits, in considering a plea of *res judicata*, is to inquire whether the same

(1) Sham Lal *v.* Ghasita, 23 A. 459 (1901); Durga Prasad *v.* Sm Sashibala, P. C. 16 C. W. N. 603 (1911) (suit for maintenance on a *Brittipatra*; s. c., 14 Bom. L. R. 177).

(2) Chandi Prasad *v.* Maharaja Mahendra Singh, 24 A. 112, 110 (1901).

(3) Dwarka Das *v.* Akhay Singh, 30 A. 470 (1908).

(4) Kalka Persad *v.* Kanhaya Singh, 7 N. W. P. 99 (1875).

(5) See Caspersz, 380.

(6) Gurdeo Singh *v.* Chandrikah, 5 C. L. J. 611 (1907); Lachman Singh *v.* Mohun, 2 A. 497 (1879); Robinson *v.* Dulip Singh, L. R. 11 Ch. D. 78, 813; *In re* May, L. R. 25 Ch. D. 236; Houston *v.* Marquis of Sligo, L. R. 29 Ch. D. 448, 455; Edun *v.* Bechun, 8 W. R. 176; Jagatjit Singh *v.* Sarabjit Singh, 19 C. 159, 172; L. R. 18 I. A. 165, 176 (1891).

(7) Gurdeo Singh *v.* Chandrikah, *supra*; Kali Krishna Tagore *v.* Secretary of State for India in Council, 16 C. 173, 192, 193; L. R. 15 I. A. 186 (1888) [followed in Sri Raja Rao Lakshmi Kantaiyammi *v.* Sri Raja Inganti Raja Gopal Rao, 2 C. W. N. 337 (1898); s. c., 21 M. 344]; Magniram *v.* Medhi Hossain Khan, 31 C. 95 (1903); Houston *v.* Marquis of Sligo, *supra*; *In re* Bank of Hindustan, China, and Japan, L. R. 9 Ch. App. 25; Dondh Bahadur Rai *v.* Tek Narain Rai, 21 A. 251, 258 (1899); Ram Dayal *v.* Madan Mohan Lall, 21 A. 425, 430 (1899); Maqbul Fatima *v.* Lalta Prasad, 20 A. 527 (1898); Edun *v.* Bechun, *supra* ["The matter conclusively adjudicated upon in a suit *inter partes* is generally to be sought only by a comparison of the plaint with the judgment," *per* Phear, J.]; Lachman Singh *v.* Mohan, *supra*; Jagatjit Singh *v.* Sarbajit Singh, *supra*; Mahadeo *v.* Vasudeo, 5 B. L. R. 737, 740 (1903); but if a decree is specific and at variance with the judgment, the statement in the decree is to prevail: Indarjit Prasad *v.* Richha Rai, 15 A. 3 (1892); and see Avala *v.* Kuppu, 8 M. 77 (1884); Anusuyabai *v.* Sakharam Pandurang, 7 B. 464 (1883), though there may be cases where this is otherwise. See Ram Chunder *v.* Kondo, 22 A. 442 (1900); Ghelabhai *v.* Bai Javer, 16 Bom. L. R. 1142 (1912); s. c., 37 B. 172.

(8) Lachman Singh *v.* Mohan, *supra* ["As to the decree itself, where it is ambiguous or imperfect as to any essential particular, it may be read with the judgment and record," *per* Stuart, C.J.]; but see as to the distinction between "judgment" and "decree," ib. 509, 510; and Jamaitunissa *v.* Lutfunissa, 7 A. 606 (1885). As to the interpretation of the decree by examination of the record, see Amritaswari Debi *v.* Secretary of State for India in Council, 24 C. 504, 519 (1897); one must look at the contentions of the parties: Dondh Bahadur Rai *v.* Tek Narain Rai, 21 A. 251, 258 (1899).

(9) Secretary of State for India in Council *v.* Durjibhoy Singh, L. R. 19 I. A. 69, 74 (1892).

evidence would support them both.(1) "At one time the test applied to discover whether a finding was incidental or not, was the fact of its being embodied in, or excluded from, the decree, and many cases appear to have been expressly decided upon this ground. Two propositions, however, appear to be well settled: (*a*) that the decree itself is not the test of what is or is not *res judicata*, but that the question in each case is, What did the Court really decide? *Res judicata*, in other words, is matter of substance; (2) (*b*) that where the decree of a Court is not based upon a finding, but is, in spite of it,(3) such a finding, cannot work an estoppel."(4) A finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree, or some operative part of it, was made, otherwise the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit. A matter cannot be said to be "*directly and substantially in issue*," unless and until it is, or becomes, material for the decision of the suit to find as to it.(5) There is no such thing as constructive estoppel. The question is not whether the previous judgment was right, but whether it finally decided the matter in issue.(6) The fact that the reasoning upon which a former judgment was based was equally applicable to the second case, has been held (7) not to give the former judgment the force of *res judicata* in the second case. The rejection of applications to set aside an *ex parte* decree under O. IX. r. 13 (formerly sect. 108), *post*, and sale in execution thereof under O. XXI. r. 89 (formerly sect. 311), *post*, relate only to specific matters in that suit, and is therefore no bar to a fresh suit to set aside the decree on the ground that the whole suit was fraudulent.(8) The finding of a Criminal Court is not, of course, *res judicata* in a civil action, and no fact found or proved in a Criminal Court is on that account to be taken to be proved in a Civil Court (*vide ante*, "*Suit*").

Explanation I.—See note, *ante*, on word "Try."

Explanation II.—See note, *post*, on competency of jurisdiction.

Explanation III.—This *Explanation* provides that the matter must, in the former suit, have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other.(9) In order to constitute the bar of *res*

(1) Hunter *v.* Stewart, 4 De G. F. & J. 168, *per* Lord Westbury, L.C.

(2) *Vide ante*, p. 110.

(3) Nundo Lall Bhattacharjee *v.* Bidhoo Mookhi Debi, 13 C. 17 (1886); Thakur Magundeo *v.* Thakur Mahadeo Singh, 18 C. 647 (1891); Parbatty *v.* Mathura, 40 C. 29 (1912); 16 C. W. N. 877.

(4) Caspersz, *op. cit.* 398–401, 382, where the subject is discussed and cases are cited.

(5) Shib Charan Lall *v.* Raghu Nath, 17 A. 174 (1895).

(6) Parsotam Gir *v.* Narbada Gir, 21 A. 505 (1899).

(7) Chandi Prasad *v.* Mahendra, 23 A. 5 (1900).

(8) Khagendra Nath Mahata *v.* Prannath Roy, 6 C. W. N. 473 (1902); Golap Singh *v.* Indra Coomar, 13 C. W. N. 493 (1909).

(9) Expl. III.

judicata, it is not sufficient merely that an issue on the same point should have been raised in the former suit, although that issue may have been incidentally decided, but it must appear that the matter referred to was alleged by one party, and either denied, or admitted expressly or impliedly, by the other,(1) and the issue must further have been a material one.(2) Matter not put in question by the parties, and not necessary to the adjudication of the subject-matter of the suit, is immaterial, and any observation of the Court thereupon is *obiter dictum*, which can have no effect in any other litigation.(3) The rule of English law, that where the allegation on record is uncertain there is no *res judicata*, is also the rule embodied in this section. "If a thing be not directly and precisely alleged, it shall be no estoppel." That rule is reproduced in this explanation.(4) Matter alleged in the written statements of the parties may in subsequent proceedings be relevant as an admission; but it will not operate as an estoppel, unless, being admitted or denied, and found in favour of the person alleging it, it forms the basis of judicial decision.(5)

Explanation IV.—This *Explanation* deals with matters *constructively* in issue in a former suit,(6) providing that any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in such suit.(7) In

(1) Shama Churn Chatterjee *v.* Prosunno Coomar Santiharee, 5 C. L. R. 251 (1879); see Wilaiti Begum *v.* Nur Khan, 5 A. 514 (1883); Sheo Ratan Sing *v.* Sheosahai Misr, 6 A. 358 (1884).

(2) Dahoo Munder *v.* Goopee Nund Jha, 2 W. R. 79 (1865).

(3) Field, Ev. 270: "If the Court decide a point put in question by the parties, but not necessary to the adjudication of the subject-matter of the suit, will such decision be binding? It may be said that the point was not directly and substantially in issue; certainly it was not *material*." See on the point the authorities cited, 2 Smith L. C., 7th ed. *ib. n.*; as to findings on immaterial matters, see Jamiatunissa *v.* Latfunissa, 7 A. 606 (1885).

(4) Vishnu *v.* Ramling, 26 B. 25 (1901).

(5) Ib. See Boileau *v.* Rutlin, 2 Exch., 665.

(6) Hari Narayan Brahme *v.* Ganptarav Daji, 7 B. 272 (1883).

(7) Expl. IV.: "Considerable difference of opinion has prevailed in India as to the application of the principle contained in this *Explanation* which, no doubt, was enacted with the purpose of reconciling the apparently conflicting views expressed in Hunter *v.* Stewart (4 De G. F. & J. 168) and Henderson *v.* Henderson (3 Hare, 115), both of which decisions were largely relied upon before the enactment of the Code of 1877. And even since the enactment of the *Explanation* now to be considered, the cases have been far from uniform" (Caspersz, *op. cit.* 402, 403, and see Broughton, 46–56). The principle embodied in the above *Explanation* in 1877 had already been asserted and acted upon by the Judicial Committee [Srimut Rajah Mootto *v.* Katama Natchiar, 11 M. I.A. 50, 73; 10 W. R., P. C., 1 (1866); Woomatara Debi *v.* Unnopoorna Dassee, 11 B. L. R. 158; Mahamad Gaus *v.* Rajbux, 15 Bom. L. R. 266 (1912); s. c., 37 B. 224; 18 W. R. 163 (1872); see Dinobundhoo Chowdhry *v.* Kristomonee Dossee, 2 C. 152, F. B. (1876), in which the effect of the latter decision is discussed], and by the Courts in India (see cases cited in Caspersz, *op. cit.* 406–416) before the Code of 1877. In the following cases the *Explanation* has been considered or acted upon: Muttu Chetti *v.* Muttun Chetty, 4 M. 296 (1879); Gursobhit Ahir *v.* Ramdut Singh, 5 C. 923–925 (1880); 6 C. L. R. 537; Narain Dutt *v.* Bhairo Bukhspal, 3 A. 189 (1880); Sultan Ahmad *v.* Maula Bakhsh, 4 A. 21 (1881); Nirman Singh *v.* Phulman Singh, 4 A. 65 (1881); Chenvirappa *v.* Puttappa, 11 B. 708 (1887); Sheo Ratan Singh *v.* Sheo Sahai Misr, 6 A. 358 (1884); Hari Narain Brahme *v.* Ganpatrav Daji, 7 B. 272

other words, neither party can decline to meet an issue tendered by the other, and then maintain that it has not become *res judicata*. The plaintiff must support all the issues necessary to maintain his cause of action. The defendant must bring forward all the defences which he has to the cause of action asserted in the plaintiff's pleadings. But the plaintiff is under no obligation to tender issues not necessary to support his cause of action, nor is the defendant required to meet issues not tendered by the plaintiff.(1) The principle has been applied to applications for execution where the point might have been, but was not, raised in the suit.(2) A litigant cannot re-open a case on materials which might

(1883); Churn Manjee *v.* Ishan Chunder Dhur, 9 C. L. R. 474 (1881); Allunni *v.* Kunjusha, 7 M. 264 (1883); Kandunni *v.* Katiamma, 9 M. 251 (1885); Thandavan *v.* Valliamma, 15 M. 336 (1892); Maloji *v.* Sagaji, 13 B. 567 (1881); Hasan Ali *v.* Siraj Husain, 16 A. 252 (1894); Dhani Ram Shaha *v.* Bhagirath Shaha, 22 C. 692 (1895); Imam Khan *v.* Ayub Khan, 19 A. 517 (1897); Peary Mohun Mookerjee *v.* Ambica Churn Bandapadhya, 24 C. 900 (1897); Dost Muhammad Khan *v.* Said Begam, 20 A. 81 (1897); Sri Gopal *v.* Pirthi Singh, 20 A. 110 (1897); F. B., s. c., in appeal, 24 A. 429 (1902) [foll. in Gopal Lall *v.* Benarasi Pershad Chowdhry, 31 C. 428 (1904)]; Jamadar Singh *v.* Serazuddin, 35 C. 979 (1908); Pulandar Singh *v.* Jwala Singh, 20 A. 516 (1898); Ram Chand *v.* Durga Pershad, 26 A. 61 (1903); Alagirsamai Naickar *v.* Sundareswara Ayyar, 21 M. 278, 285 (1898); Purushottam *v.* Atmaram Janardan, 23 B. 597 (1899) [partition suit]; Kutti Ali *v.* Chindan, 23 M. 629 (1900) [suit for land based on title—previous suit as lessor]. The *Explanation* has also been applied by the Judicial Committee in two cases: Mahabir Pershad Singh *v.* Macnaghten, 16 C. 682; L. R. 16 I. A. 107, 113, 114 (1889); Kameswar Pershad *v.* Rajkumari Ruttun Koer, 20 C. 79; L. R. 19 I. A. 334, 338 (1892); foll. in Shyama Charan Banerjee *v.* Mrinmaya Devi, 31 C. 79 (1902); Guddappa *v.* Tirkappa, 25 B. 189 (1900) [diss. from in Ramaswami Ayyar *v.* Vithmatha Ayyar, 26 M. 760 (1902), which last case was followed in Thrikaikat *v.* Theruthiyil, 29 M. 153 (1905)]; Rangayya Goundari *v.* Nanjappa Rao, 24 M. 491 (1901); Kachu *v.* Lakshmansing, 25 B. 115 (1900); Kuth Al *v.* Chundan, 23 M. 629 (1900); Venayak *v.* Dattatraya, 4 B. L. R. 492 (1902); s. c., 26 B. 661; Sri Gopal *v.* Pirthi Singh, 4 B. L. R. 827, 830 (1902); s. c., 6 C. W. N. 889 [foll., Gopal Lal *v.* Banarasi, 31 C. 428 (1904); s. c., 8 C. W. N. 385; distinguished in Ajudhia Pande *v.* Inayat Ullah, 35 A. 111 (1912); Shyama Charan Bannerje *v.* Mrinmayi Debi, 31 C. 79 (1902)]; the plaintiff must have had an opportunity of recovering that which he seeks to recover in the second action: Bhikabai *v.* Bai Bhuri, 5 B. L. R. 396 (1903); in Kedar Mal Marwari *v.* Dewan Bishen Persad, 8 C. W. N. 609 (1903), the Privy Council refused to entertain an objection taken for the first time on appeal that the appellant ought to have enforced his rights in a previous suit; Deputy Commissioner of Kheri *v.* Khanyan Singh, 34 I. A. 72; 12 C. W. N. 474 (1907); s. c., 4 A. L. J. 232; 29 A. 331; 9 Bom. L. R. 591; Satyabadi Behara *v.* Harabati, 34 C. 223 (1907); Rukhminibai *v.* Venkatesh, 31 B. 527 (1907); 9 Bom. L. R. 958; Jagan Nath *v.* Balkishan, 4 C. L. J. 675 (1907); Sellappa Chettyar *v.* Velayutha Teran, 30 M. 498; 17 M. L. J. 433 (1907); Zinat-un-nissa *v.* Rayan, 27 A. 142 (1904); Mahomed Ibrahim *v.* Sheikh Hamja, 35 B. 507 (1911); Dhanapala *v.* Anantha Chetti, 24 M. L. J. 418 (1913); Mahomed Ibrahim Hussain Khan *v.* Ambika Pershad Singh, P. C., 39 C. 527 (1912); Bayyan Naidu *v.* Suryanarayana, 37 M. 70 F. B. (1914); Jamadar Singh *v.* Serazuddin, 35 C. 979 (1908). And as to execution proceedings, Narayana Pattar *v.* Gopala Krishna, 28 M. 355 (1904); Viyathen *v.* Neela Kanta, 17 M. L. J. 311 (1907) [effect of non-appearance when notice silent as to relief claimed].

(1) Freeman, Jud. 441; cited in Hukm Chand, Res. Jud. 17.

(2) Basdeo Prasad *v.* Jathan Ram, 27 A. 684, 686 (1905).

have been laid before the Court in the first trial; but the discovery of additional evidence, not originally available (for instance, evidence proving that a decree against him was obtained by perjury) will enable him to apply for a review of judgment under O. XLVII. r. 1.(1)

It depends upon the particular facts of each case to say whether a matter ought to have been made ground for defence or attack in a former suit.(2) The *Explanation* is intended to meet the case of a point which properly belonged to the subject of litigation in a former suit, and which the parties, exercising reasonable diligence, might then have brought forward.(3) The object of the *Explanation* would seem to be to compel the plaintiff to rely on all grounds which were open to him in support of the claim made by his plaint.(4) "If the parties have had an opportunity of controverting it, that is the same thing as if the matter had been actually controverted and decided."(5) Although upon a literal interpretation of the words of the *Explanation*, it might be argued that a point not raised, and not decided in a previous litigation, might still be taken as conclusive in a subsequent suit between the parties, yet upon a proper construction of the section, the question ought not and cannot be treated as *res judicata* unless there is a judicial determination, express or implied, on the matter not put directly in issue.(6) Where, however, separate rights have been infringed, separate actions may be maintained, since the infringement of separate rights gives rise to separate causes of action.(7) The principal consideration is whether it is precisely the same cause of action in both. And one great criterion of this identity is that the same evidence will maintain both actions.(8) The real test is whether the cause of action or transaction on which the two suits are based is the same, and not whether the transaction is sought to be established in different modes or by different means.(9) When, however, independent grounds of action are available, a party is not bound to unite them all in one suit, though

(1) Munshi Mosuful *v.* Surendra, 16 C. W. N. 1002 (1912); Abdul Huq *v.* Abdul Hafiz, 14 C. W. N. 695 (1910); Lakhmi *v.* Nur Ali, 38 C. 936 (1911); 15 C. W. N. 1010.

(2) Kameswar Pershad *v.* Rajkumari Ruttun Koer, 19 I. A. 234, 238; 20 C. 79 (1892). Followed in Akayi Kunhi *v.* Ayissa Bi, 26 M. 645 (1903). Explained in Ramaswani Ayyar *v.* Vishmathuayyar, 26 M. 760 (1902); Moosa Goolam *v.* Ebrahim Goolam, P. C., 40 C. 1 (1912); s. c., 14 Bom. L. R. 1211; 16 C. W. N. 937.

(3) Henderson *v.* Henderson, 3 Hare, 115; see remarks on this case in Worman *v.* Worman, L. R. 42 Ch. D. 296, 307.

(4) Nathu Valad Pandu *v.* Budhu Valad Bhika, 18 B. 537 (1893).

(5) Newington *v.* Levy, L. R. 6 C. P. 180, 189, *per* Martin, B., citing Greathead *v.* Bromley, 7 T. R. 456; Langmead *v.* Maple, 18 C. B. N. S. 255, 270. See also *per* Blackburn, 6 C. P. at p. 193; Rakhal Das Singh *v.* Heera Motee Dossee, 22 W. R. 282 (1874).

(6) Woomesh Chundra Maitra *v.* Baroda Das Maitra, 28 C. 17, 21 (1900); Kailash Mondul *v.* Baroda Sundari Dasi, 24 C. 711 (1897).

(7) *Per* Brett, M.R., in Serrao *v.* Noel, L. R. 15 Q. B. D. 549, 558; see Brunsden *v.* Humphrey, L. R. 14 Q. B. D. 141; consider O. II. rr. 1, 2, *post*; see Broughton, 32–34; O'Kinealy's Civ. Pr. Code, notes to rules mentioned; Field, Ev. 275–284.

(8) Hitchen *v.* Campbell, 2 W. Bl. 827, *per* De Grey, C.J.; Naro Hari *v.* Anpurnabai, 11 B. 165 (1886).

(9) Ramaswami Ayyar *v.* Vithmatha Ayyar, 26 M. 760 (1902). In Purshottam *v.* Atmaram, 1 B. L. R. 76 (1899), the cause of action was held not to be the same: Masilamania *v.* Thiruvengadam, 31 M. 385 (1908).

he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action.(1) The question what is a different title is one of great practical difficulty, and must be decided upon the circumstances of each case separately.(2) All that this *Explanation* enjoins is that every ground which could and ought to have been urged *in support of the claim actually made in the suit*, shall be deemed to have been adjudicated upon therein, whether it was actually urged or not.(3) This *Explanation* applies only to cases in which the plaintiff, having on a former occasion sued for certain relief on the strength of one title, afterwards claims the same relief on the ground of another title, of which he might have availed himself in the former suit. It does not apply to cases where the subject-matters of the two suits are different; (4) nor to cases where no relief was asked for or granted as against the particular person in the former suit though he was a party to it.(5) The word "might" presupposes that the claim to be barred must be within the knowledge of the person during the first suit.(6) It was proposed to add to this *Explanation* the words "and to have been heard and finally decided so far as the subject-matter of the former suit was concerned and no further," which was stated to be intended to meet such cases as rent suits, in which, unless the question of title is expressly raised, such question is

(1) Altunni *v.* Kunjusha, 7 M. 264 (1883); see Piltapur Raja *v.* Surcya Rau, 8 M. 520 (1885); Mahomed Reasat Ali *v.* Hasm Banu, 21 C. 157 (1893); A. L. J. 26, 27.

(2) See Girdhar Manordas *v.* Dayabhai Kalabhai, 8 B. 180 (1882), *per* West, J.; Kameswar Pershad *v.* Rajkumari Ruttun Koer, L. R. 19 I. A. 238 (1892); Caspersz, 408; Kashee Kishore Roy Chowdhry *v.* Kristo Chunder Sandyal Chowdhry, 22 W. R. 464 (1874); Woomatara Debia *v.* Unnopoorna Dassee, 11 B. L. R. 158 (1872); Denobundhoo Chowdhry *v.* Kristomonee Dossee, 2 C. 152, 169 (1876). The Calcutta High Court have held that a party to a suit is bound to assert all his titles [Denobundhoo Chowdhry's case, *supra*; *per cur.* Garth, C.J., diss.; foll. in Bheeka Lall *v.* Bhuggoo Lall, 3 C. 23 (1877); dist. in Radhanath Cundu *v.* Land Mortgage Bank, 6 C. 559 (1880)]; but this view has been dissented from by the Madras High Court [Thyila Kandi Ummatho *v.* Thyila Kandi Cheria Kunhamed, 4 M. 308 (1881); Sadaya Pillai *v.* Chinni, 2 M. 352 (1879); see also in Allahabad High Court, Babu Lal *v.* Ishri Persad, 2 A. 582 (1878); Sheo Ratan Singh *v.* Sheo Sahai Misr, 6 A. 358 (1884)], and by the Bombay High Court [Konnerav *v.* Gurrav, 5 B. 589 (1881); see Bhisto Shankur Patil *v.* Ramchandrara, 8 B. H. C. R., A. C., 89 (1871); but see also Shridar Vinayak *v.* Narayan Valad Babaji, 11 B. H. C. R. 224 (1874); and Haji Hasam Ibrahim *v.* Mancharam Kaliandas, 3 B. 137 (1878); in which latter case West, J., suggests a rule which will reconcile the decisions and the more recent decision: Guddappa *v.* Tirkappa, 25 B. 189 (1900); s. c., 2 Bom. L. R. 872, in which Jenkins, C.J., reviews the previous decisions and accepts the view of the section taken by the Calcutta Full Bench case]; see Caspersz, 408–416, in which the question is discussed, and Naro Hari *v.* Anpurna-bai, 11 B. 160 (1886). In Balbathar Nath *v.* Ram Lal, 1 A. L. J. 228 (1904), the title was held not to be the same.

(3) Ramaswami Ayyar *v.* Vythinatha Ayyar, 26 M. 760 (1902).

(4) Sarkum Abu Torab Abdul Waheb *v.* Rahaman Baksh, 24 C. 83 (1896), referred to in Koilash Mondul *v.* Baroda Sundari Dasi, 24 C. 714 (1897).

(5) Ramdas *v.* Vazir Saheb, 25 B. 589 (1901); s. c., 3 B. L. R. 179; Syed Mahomed *v.* Ambika Pershad, 39 C. 527 (1912); 15 C. W. N. 505; 14 Bom. L. R. 280; 22 M. L. J. 468; 15 C. L. J. 411; foll. in Gajadhar *v.* Bhagwanta, 34 A. 599 (1912).

(6) Manekbai *v.* Virchand, 9 Bom. L. R. 1020 (1907); Masilamania *v.* Thiruvengadam, 31 M. 385 (1908).

only incidental and not a matter directly and substantially in issue in the suit. The addition, however, has apparently been considered unnecessary. It has been held that if the effect of a decision in a suit is necessarily inconsistent with a defence which ought to have been raised (but was not raised) that defence must under this section be deemed to have been finally decided against the defendant who ought to have raised it.(1)

Explanation V.—According to the provisions of this *Explanation*, any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of the section, be deemed to have been refused.(2) The legal effect of this *Explanation* is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal, and the claim thereto in a fresh suit as *res judicata*.(3) This *Explanation* refers to relief applied for, which the Court is bound to grant with reference to the matters directly and substantially in issue.(4) The words "relief claimed" apply only to something which forms part of the "claim" strictly so-called, that is, something which the plaintiff may claim as of right, something included in his cause of action and which if he establishes his cause of action the Court has no discretion to refuse. They do not include something which the plaintiff cannot in the suit claim as of right, but can only claim in the sense of an appeal to the discretion of the Court and which the Court may refuse in the exercise of its discretion on grounds of general expediency or otherwise even if the cause of action is fully established.(5) Even if the suit, as regards the relief claimed, has been wrongly dismissed, the plaintiff cannot sue again for the same relief.(6) The *Explanation* does not apply where the Court is silent on a head of relief only claimed as ancillary to the main relief, and which by implication is rather granted than refused. It only applies where the Court is silent on an independent head of relief, claimed and duly controverted.(7) A decree cannot be superseded by the mere omission of the Court executing the decree to pass orders on a claim made under it.(8)

The former suit must have been a suit between the same parties or between parties under whom they or any of them claim, litigating under the same title.—This is an application of the principle contained

(1) Mahim *v.* Anil Bandhu, 13 C. W. N. 513 (1909).

(2) Expl. IV. See Jiban Das Oswal *v.* Durga Persad Adhikari, 21 C. 252 (1893); Dhani Ram Saha *v.* Bhagirath Saha, 21 C. 692 (1895); Kachu *v.* Lakshman Sing, 25 B. 115 (1900); s. c., 2 B. L. R. 781.

(3) Rambhadra *v.* Jagannatha, 14 M. 328 (1890); see Mon Mohun Sirkar *v.* The Secretary of State for India in Council, 17 C. 968 (1893); foll. in Ram Dayal *v.* Madan Mohan Lal, 21 A. 425 (1899), F. B.; Bhibra *v.* Sitaram, 19 B. 532 (1894); Hays *v.* Padmanand Singh, 32 C. 118 (1903), where mesne profits claimed in second suit were for period subsequent to first suit.

(4) Thyila Kandi Ummbatha *v.* Thyila Kandi Cheria Kunhammed, 4 M. 308 (1881).

(5) Ram Dayal *v.* Madan Mohan Lal, 21 A. 425, 433 (1899), F. B. [claim for mesne profits accruing due after institution of former suit]. See as to taking money, decree in mortgage, and not asking for relief by sale, Shebu Bera *v.* Chandra Mohan Jana, 33 C. 849 (1906); foll. in Piari Lal *v.* Nand Ram, 31 A. 19 (1908).

(6) Sukh Lal *v.* Bhikhi, 4 A. 187, 190 (1888).

(7) Fatmabai *v.* Aishabai, 12 B. 454 (1888); s. c., in appeal, 13 B. 242 (1888).

(8) Nityanunda Gantayet *v.* Gajapati Vasudeva Deva, 24 M. 681 (1901).

in the maxim, *res inter alios acta alteri nocere non debet;* what is transacted between one set of persons ought not to injure or affect another person. Judgments and decrees only bind parties and privies.(1) A person who is no party to a decree is not bound by it.(2) "Parties," in the larger legal sense, are all persons having a right to control the proceedings, to make defence, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies; and it may be added, those who assume such a right. The only extension given to this rule by Indian Courts is that a decree against a *benamidar* binds also the beneficial owner, in which case the parties are the same in fact though not in name.(3) If the verdict were not required to be between the same parties, a man might be bound by a decision who had not the liberty to cross-examine; and it is contrary to natural justice that a man should be injured by a determination that he or those under whom he claims were not at liberty to controvert.(4) Except in the case of judgments *in rem*,(5) and judgments relating to matters of a public nature,(6) which are governed by a different principle, no person is bound by a decision, unless he or those under whom he claims were parties to the proceedings in which it was given.(7) But it is reasonable that the same set of persons, or persons claiming under them, should be bound by previous proceedings concerning the same matter. There is no hardship in holding that a man shall be bound by that which would have bound those under whom he claims *quoad* the subject-matter of the claim, for he who feels the advantage, ought also to feel the burden (*qui sentit commodum, sentire debet et onus*), and no man can, save in certain cases excepted by the Statute law and the law merchant, transfer to another a better right than he himself possesses.(8) Persons other than the parties to a suit have been divided (9) into three classes, with reference to their position as affected by the judgment:—

(*a*) Persons who claim under the parties to the former suit, or, in the language of English law, privies to those parties.(10)

(1) Mohunt Das *v.* Nil Komul Dewan, 4 C. W. N. 283 (1899). In Gool Khan *v.* Tetar Goala, 4 C. W. N. 63 (1899), the judgment was not *inter partes*.

(2) Srishnan *v.* Chadayan Sutti Haji, 17 M. 17, 20 (1892); Gool Khan *v.* Tetar Goala, 4 C. W. N. 63 (1899).

(3) Mohunt Das *v.* Nil Komul Dewan, 4 C. W. N. 283 (1899).

(4) Buller, N. P. 233; Field, Ev. 307; Gujju Lall *v.* Fatteh Lall, 6 C. 171, 189 (1880).

(5) See s. 41, Evidence Act.

(6) See s. 42, ib.

(7) Gujju Lall *v.* Fatteh Lall, *supra*.

(8) Field, Ev. 307, 308.

(9) In Ahmedbhoy Habibhoy *v.* Vullechhoy Cassumbhoy, 6 B. 703, 709 (1882), *per* Latham, J.

(10) In the law of estoppel one person becomes privy of another, (1) by succeeding to the position of that other as regards the subject of the estoppel, *e.g.*, an assignee or grantee; (2) by holding in subordination to that other, *e.g.*, the case of a landlord and tenant. The ground of privity is *property*, not personal relation. To make a man privy to an action he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party *subsequently* to the action, or he must hold property subordinately. Thus an assignee is not estopped by a judgment against the assignor obtained after the assignment: Bigelow on Estoppel, 5th ed. 142–144. A person is said to claim under another when he derives his title through that other by assignment or otherwise: Sundar Lal *v.* Chhitar Mal, 29 A. 1, 3 (1906). A privity exists between an execution creditor and a

(*b*) Persons who, though not claiming under the parties to the former suit, were *represented* by them therein.(1) Such are persons interested in the estate of a testator or intestate, in relation to the executor or administrator; shareholders in a company,(2) in relation to the registered officer of that company; and in India, members of a joint and undivided family, in relation to a member who has sufficiently represented their interests in a former suit.(3)

(*c*) Strangers, who are neither privies to, nor represented by, the parties to the former suit.

The general rule is that, in the absence of fraud,(4) an adjudication is binding upon the parties to a suit or persons claiming under or represented by them, but upon these only. It must be shown that the party in the former suit represented the interest claimed in the latter suit. A party represents all interests owned by him at the time of the action or subordinate to his, though belonging to others. A decision against him will bind interests acquired by him subsequently, and all subordinate interests represented by him whensoever acquired.(5) The nature and object of the former suit must be regarded in order to ascertain who was really and substantially the litigant.(6) When once it is made clear that the self-same right and title is substantially in issue in two suits, the precise form in which either suit was brought, or the fact that the plaintiff in the one case was the defendant in the other, is immaterial.(7) And the fact that there are other parties, introduced in the subsequent litigation, does not alter the case; the estoppel subsists between the parties who were parties to the former litigation.(8) But there is no *res judicata* where the subsequent decision is not between the parties or those claiming under them.(9) The decision in a suit by one of two zemindars against the other as to the right to the profit rental of a

purchaser at a Court sale: Krishnabhupati Devu *v.* Vikrama Devu, 18 M. 13 (1894). As to whether decree by ijaradar is evidence when superior landlord sues for rent, see Balaram *v.* Kartick, 4 C. W. N. 161 (1899). An auction purchaser of an entire estate, at a sale for arrears of revenue, is not the successor of the defaulting proprietor: Kanta Proshad Hajari *v.* Abdul Jamir, 8 C. W. N. 676 (1904). A prior purchaser of land is not estopped as being privy in estate by a judgment against the vendor in a suit begun after the purchase: Abdul *v.* Miakhan, 35 B. 297 (1911).

(1) S. 11 of the Code does not, however, in express terms, mention representatives or the case of persons represented by, but not claiming through the parties to the former suit. As to representative suit against sect of worshippers, see Sadagopa Chariar *v.* Rama Rao, 30 M. 185 (1907); 11 C. W. N. 585; 17 M. L. J. 240; 9 Bom. L. R. 663.

(2) Under 7 Wm. IV. and 1 Vict. c. 75.

(3) See Jogendro *v.* Funindro, 14 Moo. I. A. at p. 376.

(4) See s. 44, Authors' Evidence Act.

(5) Seshappaya *v.* Venkatramana, 33 M. 459 (1910).

(6) Zamindar of Pittapuram *v.* The Proprietors of the Mutta of Kolanka, L. R. 5 I. A. 206; 2 M. 23; 3 C. L. R. 265 (1878); see also Ram Chunder Poddar *v.* Hari Das Sen, 9 C. 463, 466 (1882).

(7) Gobind Chunder Coondoo *v.* Taruck Chunder Bose, 3 C. 145, F. B. (1877): see Shadal Khan *v.* Amin-ullah Khan, 4 A. 92 (1881).

(8) Mohidin *v.* Muhammad Ibrahim, 1 M. H. C. R. 245 (1863); Gopal Das *v.* Gopinath Sirkar, 12 C. L. R. 38 (1882). That is provided the relief sought in both the suits is the same: Dwarkanath Roy *v.* Ram Chand Aich, 26 C. 428 (1899).

(9) Zamindar of Pittapuram *v.* The Proprietors of the Mutta of Kolanka, *supra*.

bazaar was held by the Privy Council not to be *res judicata* in a subsequent suit for possession of a share of the bazaar, in which suit all the parties, plaintiffs, and defendants, claimed under the plaintiff in the former suit. Such a plea, however, might well be a defence to a hostile claim by persons asserting a title under the defendant zemindar in the former suit, against their claiming under the plaintiff zemindar in that suit.(1) A decision of a material issue in a suit against one who is the representative of an estate, bars a suit by the true owner on the same issue.(2) And a representative of the person is bound by a decree against the person whom he represents; but it is essential that there should be an adjudication as to the fact that he is representative.(3) A verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, is a different person.(4) The principle of *res judicata* has no application in a dispute between parties all of whom claim under the person in whose favour the decision in the previous suit was given.(5)

Hindu widow.— A decree fairly and properly obtained against a Hindu widow, relating to her husband's estate, binds the reversionary heirs, the whole estate being for the time vested in her, absolutely for some purposes, though in some respects for a qualified interest.(6) It was held under the Limitation Act of 1859, that when the widow as plaintiff sues to recover the husband's estate, held adversely to her by the defendant, a decree against her would bind the reversioner and that adverse possession, which would bar her right of suit, if she were alive, on the ground of limitation, would equally bar that of the reversioner.(7) But under Article 141 of the present Act, it has been decided that a reversioner who succeeds to immoveable property has twelve years to bring his suit for possession from the time when his estate falls into

(1) Asghar Reza Khan *v.* Mahomed Mehdi Hossein Khan, 30 C. 556 (1903).

(2) Shivalingaya *v.* Nagalingaya, 4 B. 27 (1878).

(3) Kanai Lall *v.* Sashi Bhuson Biswas, 6 C. 777; 8 C. L. R. 117 (1881); see Gourmoni Dabee *v.* Jugut Chundra Audhikari, 17 C. 57 (1889). Where one of the parties to a suit dies, and no steps are taken to revive the suit, and the suit abates or is dismissed, no fresh suit can be brought. This was not so under Act VIII. of 1859, which contained no similar provision. Another suit should be brought: Bepin Behari Bundopadhya *v.* Brojo Nath Mookopadhya, 8 C. 357 (1882).

(4) Babajirao *v.* Luxmandas, 5 Bom. L. R. 932 (1903); Harjovan *v.* Mulji, 34 B. 416 (1909).

(5) Syed Asgar *v.* Syed Mahomed, 7 C. W. N. 482 (1903).

(6) Katama Natchiar *v.* Srimut Rajah Moottoo, 9 M. I. A. 539, 604 (1863); Nugender Chunder Ghose *v.* Sreemutty Kaminee Dossee, 11 M. I. A. 241, 267 (1867); Brahmomoye Dassee *v.* Kristo Mohun Mookerjee, 2 C. 222 (1876); Nobin Chunder Chuckerbutty *v.* Guru Persad Doss, B. L. R., Sup. Vol., 1008; 9 W. R. 505 (1868); Nand Kumar *v.* Radha Kuari, 1 A. 282 (1876); Sant Kumar *v.* Deo Saran, 8 A. 365 (1886); Sachit *v.* Budhua Kuor, 8 A. 429 (1886); Adi Deo Narain Singh *v.* Dukharan Singh, 5 A. 582 (1883); Hari Nath Chatterjee *v.* Mothur Mohun Goswami, 21 C. 8 (1893); 20 I. A. 183 [the rule in the Shivagunga case (9 Moo. I. A. 539), to the effect that an adverse decree against a Hindu widow binds those claiming in succession, applies equally to the case of the daughter]; Tribhuwan Sundar Kuar *v.* Sri Narain Singh, 20 A. 341 (1898); Lachmi Narain *v.* Ram Chandra, 4 A. L. J. 117 (1907); Behari Lal *v.* Daud Husein, 35 A. 240 (1913).

(7) Nobin Chunder Chuckerbutty *v.* Guru Persad Doss, B. L. R., Sup. Vol., 1008 (1868); s. c., 9 W. R. 505; Amirtolal Bose *v.* Rajoneekanta Mitter, 15 B. L. R. 10 (1875).

possession.(1) A decree in a suit by a reversioner against the widow for a declaration that she cannot dispose of the property purchased by her out of the profits of her husband's estate, and that her alienation is null and void, except as regards her own interest, will not bind a new reversioner, should the plaintiff predecease the widow, although it "would be so strong an authority in point as to deter either party from disputing it;" (2) or in a suit to restrain waste brought by a reversioner, who subsequently predeceased the widow, as against the new reversioner.(3) In a recent Full Bench decision of the Allahabad High Court it was held that a Hindu widow can not only alienate her life-interest, but also can transfer the corpus of her deceased husband's estate (even without legal necessity or for a pious purpose) so that the transfer shall not be void, but only voidable by the reversioner.(4) It has also been held that only the nearest reversioner is entitled to a declaration that a mortgage by a Hindu widow is not binding on reversioners.(5) Where by the terms of her husband's will a Hindu widow was the full representative of his estate, a decree against her declaring that the will was revoked, and that the appellant was entitled to succeed *ab intestato*, was held to bind the respondent, whose claim was by-appointment from the widow under the will, whether or not he was a party to the suit in which the decree was made.(6) Where a Hindu widow and her son, the then presumptive heir to property claimed by the widow, obtained a decree against a more remote reversionary heir, and the son predeceased his mother, and the person against whom the decree had been obtained became the next reversionary heir, it was *held* in a suit for possession by him, that the decree in the previous suit did not operate as *res judicata*.(7) For a case in which it was held that the reversioners were not affected by a former judgment, on the ground that in the suit in which it was given they merely represented the interest of their predecessor, the life-tenant, see below.(8) In a more recent case it was held, referring to two of the Privy Council decisions already cited, that where there are several reversioners successively entitled to succeed to property for the time being in the possession of a Hindu female, a decree in a suit by some of such reversioners will not necessarily constitute *res judicata* in respect of a similar suit brought by other reversioners.(9) An

(1) Srinath Kur *v.* Prosunno Kumar Ghose, 9 C. 934 (1883). See Broja Lal Sen *v.* Jiban Krishna Roy, 26 C. 285, 295 (1898).

(2) Isri Dutt Koer *v.* Mussamut Hansbutti Koerain, L. R. 10 I. A. 150, 157 (1883).

(3) Zamindar of Pittapuram *v.* The Proprietors of the Mutta of Kolanka, L. R. 5 I. A. 206 (1878); as to decrees in suits to set aside an adoption, see Brojo Kishore Dossee *v.* Sreenath Bose, 9 W. R. 463, 465 (1868); Ranee Bromo Moyee *v.* Rajah Anund Lall Roy, 19 W. R. 419 (1873); Jumoona Dassya Chowdhrani *v.* Bamasoonderi Dassya Chowdhrani, L. R. 3 I. A. 72 (1876); see also Nogendro Chundro Mittro *v.* Sreemutty Kishen Soondory Dassee, 19 W. R. 133 (1873).

(4) Durga Kunwar *v.* Matu Mal, 35 A. 311, F. B. (1913): the transfer of the corpus is not void but voidable by the reversioner; and see also Bijoy Gopal Mukerjee *v.* Krishna Mahishi Debi, 34 C. 329 (1907).

(5) Meghu Rai *v.* Ram Khawalan Rai, 35 A. 326 (1913).

(6) Partab Narain Singh *v.* Trilokonath Singh, L. R. 11 I. A. 197 (1884).

(7) Ram Chunder Poddar *v.* Hari Das Sen, 9 C. 463 (1882).

(8) Mussamut Bai Kunwar *v.* Mussamut Inderjit Kunwar, 5 B. L. R. 585 (1870).

(9) Chhiddu Singh *v.* Durga Dei, 22 A. 382 (1900); following Bhagwanta *v.* Sukhi, 22 A. 33 (1899).

appellant having been a party to a former suit, in which the respondent obtained a decree for possession of the estate in question as mother and heiress of the last proprietor, is barred by such decree from afterwards recovering possession, on the ground that the respondent is not such heiress. Although such decree barred the appellant from setting up in this suit a family custom for the purpose of showing that he was entitled to possession during the life of the respondent, he is not thereby debarred from showing that upon her death, if he survives, he will be entitled, under such custom, to succeed her, and therefore to have a certain deed executed by her declared illegal and inoperative after her death.(1)

Benamidar.—Where the parties are parties in fact, although not in name, as in the case of a person who buys an estate for himself, but has it conveyed *benami* in the name of another, a decree properly obtained by or against the benamidar is binding upon the real owner, the presumption being that the benamidar instituted the suit with his authority and consent.(2)

Co-defendants.—Where it was broadly contended that there would be no *res judicata*, as between co-defendants, it was held that such contention was incorrect. Section 11 does not preclude the decisions upon any issue from operating as *res judicata*, merely because the issue is raised as between co-defendants, if the matter was directly and substantially in issue in a former suit, and the other necessary conditions are satisfied. The words "*between the same parties*" in this section, qualify not only the words "*former suit*," but the whole expression "*in issue in a former suit*." Therefore an issue raised and decided as between co-defendants in a former suit may be *res judicata* in a subsequent suit, in which they are arranged as plaintiff and defendant.(3) When the same parties were contending in the former suit, in fact though not in form, as where they were co-defendants on the record, but their interests were different, and there was an issue between them which was decided; its decision is a bar to a second suit or defence raising the same issue between them, when in the position of plaintiff and defendant.(4) The

(1) Tekait Doorga Persad Singh *v.* Tekaini Doorga Konwari, L. R. 5 I. A. 149 (1878); 4 C. 190; 3 C. L. R. 31.

(2) Mohunt Das *v.* Nil Komul Dewan, 4 C. W. N. 283 (1899); Gopi Nath Chobey *v.* Bhugwat Pershad, 10 C. 897 (1884); Khub Chand *v.* Narain Singh, 3 A. 812 (1881); Shangara *v.* Krishnan, 15 M. 267 (1889); see Bhuwabal Singh *v.* Maharaja Rajendra Pratap Sahoy, 5 B. L. R. 321 (1870); Prosonno Coomar Chowdhry *v.* Koylash Chunder Pal Chowdhry, B. L. R., F. B., 759 (1867); and, on the evidence disclosing who is the real owner, as to making him party to the suit, see Sitanath Saha *v.* Nobin Chunder Roy, 5 C. L. R. 102 (1879); Mohecronissa Bibee *v.* Huri Churn Bose, 10 W. R. 220 (1868); Kalee Prosonno Bose *v.* Dinonath Bose Mullick, 19 W. R. 434 (1873); 11 B. L. R. 56.

(3) Mangniram *v.* Syed Md. Hossen Khan, 8 C. W. N. 30 (1903); s. c., 31 C. 95; Kandiyil Cheriya *v.* Zamorin of Calicut, 29 M. 515 (1903); Yusuf Sahib *v.* Durgi, 30 M. 447 (1907).

(4) Ramchandra Narayan *v.* Narayan Mahadev, 11 B. 216 (1886); Ahmed Ali *v.* Najabat Khan, 18 A. 65 (1895); Shadal Khan *v.* Amin-ullah Khan, 4 A. 92 (1881) [see Bhagwant Singh *v.* Tej Kuar, 8 A. 91 (1885)]; Shaikh Khoorshed Hossein *v.* Nubee Fatima, 18 A. 65 (1895); Chamley *v.* Lord Dunsany, 2 Sch. & Lef. 690; Cottenham *v.* Earl of Shrewsbury, 3 Hare, 627 [see Kovan *v.* Crawford, L. R. 6 Ch. D. 29, and Caspersz,

rule has been stated to be, that where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants, and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group.(1) A decree for partition is not like a decree for money or the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each shareholder or set of shareholders having a distinct share.(2) As to the effect of a partition decree as constituting *res judicata* as against the plaintiff (3) and between co-defendants,(4) see the undermentioned cases.

Joint contractors and joint wrongdoers.—A judgment obtained against one or more of several joint contractors or joint wrongdoers operates as a bar to a second suit against any of the others.(5) For there is but one

368]; Bissorup Gossamy *v.* Gorachand Gossamy, 9 C. 120 (1882); Venkayya *v.* Narasamma, 11 M. 204 (1887) [see Madhavi *v.* Kelu, 15 M. 264 (1892)]; Chajja *v.* Umrao Singh, 22 A. 386 (1900). See Latchanna *v.* Saravaya, 18 M. 164 (1894). One of the defendants may appeal against the decree as between himself and the other defendant: Soiru *v.* Narayanrao, 18 B. 520 (1893).

(1) Ramchandra Narayan *v.* Narayan Mahadev, 11 B. 216 (1886), *supra* [followed in Bapu *v.* Bhavani, 22 B. 245 (1896)]; Rakhmini *v.* Dhondo, 36 B. 207 (1911); 14 Bom. L. R. 128; Saroda Prasad *v.* Kailash Bashini, 17 C. W. N. 128 (1912); Ahmad Ali *v.* Najabat Khan, *supra*; see Juma Singh *v.* Kamar-un-nissa, 3 A. 152 (1880); Bhagwant Singh *v.* Tej Kuar, 8 A. 91 (1885); but see also Brojo Beharf Mitter *v.* Kedar Nath Mozumdar, 12 C. 580, F. B. (1896) [dissented from in Chandu *v.* Kunhamed, 14 M. 225 (1891); 15 M. 264 (1892)]; Surrender Nath Pal Chowdhry *v.* Broja Nath Pal Chowdhry, 13 C. 352, F. B. (1886) [followed and applied in Gobind Chunder Nundy *v.* Sri Gobind Chowdhry, 24 C. 330 (1896)]; Balambhat *v.* Narayanbhat, 25 B. 74 (1900); and remarks and cases cited in Caspersz, 371, 372; Balambhat *v.* Narayanbhat, 25 B. 74 (1900); s. c., 2 B. L. R. 511 [such previous judgment is not *res judicata* when the plaintiff in the subsequent suit was only a nominal party in the first suit]; Raj Narain *v.* Khobdari Rai, 5 C. W. N. clxxvi. 724 (1901); Mohammad Kunj Rowthan *v.* Viswannathanyar, 26 M. 337 (1902); Balwantrao *v.* Narayanshet, 5 Bom. L. R. 97 (1903); Chajju *v.* Umrao Singh, 22 A. 386 (1900); Rajnarain *v.* Khobdavi, 5 C. W. N. 724 (1901); Ghurphekni *v.* Purmeshar Dayal, 5 C. L. J. 653 (1807); Gurdeo Singh *v.* Chandrikah Singh, 5 C. L. J. 611 (1907).

(2) Sheikh Khoorshed Hossein *v.* Nubbee Fatima, 3 C. 551 (1887); but see Hikmat Ali *v.* Wali-un-nissa, 12 A. 506, 508 (1899).

(3) Soni *v.* Munshi, 3 Bom. L. R. 94 (1900). See notes to ss. 10, 11, *ante*; Mahadeo *v.* Vasudeo, 5 Bom. L. R. 737 (1903).

(4) Dost Mahammad Khan *v.* Said Begam, 20 A. 81 (1897); Saroda Prasad *v.* Kailash Bashini, 17 C. W. N. 128 (1912).

(5) King *v.* Hoare, 13 M. & W. 494; Brinsmead *v.* Harrison, L. R. 7 C. P. 547; Kendall *v.* Hamilton, L. R. 4 App. Cas. 504; Hammond *v.* Schofield, L. R. 1 Q. B. 453 (1891); see Cambefort *v.* Chapman, L. R. 19 Q. B. D. 229. This rule has been applied and adopted in India as a matter of principle: see Nathu Lall Chowdhry *v.* Shoukee Lall, 10 B. L. R. 200 (1872) [dissenting from Ramnath Roy Chowdhry *v.* Chunder Sekhur Mohapater, 4 W. R. 50 (1856)]; Hemendro Coomar Mullick

cause of action for the injured party in the case of either a joint contract or a joint tort; and that cause of action is exhausted and satisfied by a judgment being obtained by the plaintiff against all or any of the joint contractors or joint wrongdoers whom he chooses to sue.(1) But the rule is otherwise where there is a joint and several liability; a decree against one of several joint and several promisors without satisfaction will not bar a second suit.(2) And in the under-mentioned case a decision in a suit against a banian was held not to be *res judicata* in a suit for the same money against a manager, the liability not being joint but being based on distinct contracts.(3) Conversely, where a plaintiff has failed in a suit against one of several joint debtors, a judgment recovered by one of such debtors cannot be pleaded as a defence to a subsequent action against the other joint debtors in respect of the same cause, unless the plea shows that the judgment was recovered on a ground which operated as a discharge of all.(4) It has, however, been more recently held by the Allahabad High Court that the effect of sect. 43 of the Contract Act being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid down in King *v.* Hoare, and Kendall *v.* Hamilton, *supra*, is no longer applicable to cases arising in India, at all events in the Mofussil since the passing of that Act, and a judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit on the contract against the other joint contractors.(5)

Father of joint Hindu family.—Where the Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father, he does not claim under him within the meaning of this section.(6) Therefore the dismissal of a suit for redemption of a mortgage of joint family property brought by the father in a joint Hindu family alone was held not a bar to a subsequent suit for redemption by the sons, inasmuch as their title was not through their father, but was separate and independent.(7) The question whether a Hindu father in a particular suit, in which he alone of the family is a party, represents his co-parceners is a question to be decided with reference to the circumstances of the case. *Held* therefore, under the circumstances of the case, that an erroneous decree in ejectment obtained against a Hindu father was not *res judicata* in a subsequent

v. Rajendro Lall Moonshee, 3 C. 353 (1878); Garusami Chetti *v.* Samurti Chinna Mannar Chetti, 5 M. 37 (1881); Chockaling Modali *v.* Subbaraya Mudali, 5 M. 133 (1882); Lukmidas Khimji *v.* Purshotam Haridas, 6 B. 700 (1882); see Nobin Chandra Roy *v.* Maganatra Dassya, 10 C. 924, 928 (1884); Dharam Singh *v.* Angan Lall, 21 A. 301 (1899). A fresh assignment in respect of a tort subsequent to the tort originally sued upon will not come within the scope of the first judgment so as to bar the fresh assignment: Govind *v.* Jijibai, 14 Bom. L. R. 9 (1911); 36 B. 189.

(1) Hemendro Coomar Mullick *v.* Rajendro Lall Moonshee, *supra*.

(2) Dhunput Singh *v.* Sham Soonder Mitter, 5 C. 291 (1879); 4 C. L. R. 501; as to the administration of assets of a deceased or bankrupt partner, see Broughton, 81, 82.

(3) Lawless *v.* Calcutta Landing and Shipping Co., 7 C. 627 (1881).

(4) Phillips *v.* Ward, 2 H. & C. 717.

(5) Muhammad Askari *v.* Radhe Ram Singh, 22 A. 307 (1900).

(6) Sundar Lal *v.* Chhitar Mal, 29 A. 1 (1906).

(7) Ib.

suit by the son for recovery of the holding.(1) An auction-purchaser of the right of a Hindu father in joint property cannot raise the plea that a mortgage was made without legal necessity as long as there is still time for the sons to challenge the purchase.(2) The obligation of a Hindu son to pay his father's debt is not an obligation which he had incurred jointly with his father; and the creditor's cause of action against the father and the son is not a single cause of action which is exhausted upon a decree being obtained against one of them only. A judgment recovered, against his father only, does not therefore bar a suit against the son.(3) Where the plaintiff had sued the defendant's father for a declaration of his right to a share of property, which he claimed as ancestral property governed by Mitakshara law, and had obtained a decree, the defendant's father's plea of a custom of primogeniture being rejected, it was *held* in a subsequent suit by the plaintiff for partition of the property that the defendant (who had not been a party to the former suit) was barred from pleading a custom of primogeniture.(4)

Manager of same. -The manager of a joint Hindu family suing or being sued acts in a representative capacity. He can execute decrees on behalf of the joint family and receive payments and give receipts which will be binding on it.(5) Where, therefore, the interest of a joint and undivided family being in issue, one member of the family prosecuted or defended a suit, such a decree may afterwards be considered as binding upon all the members of the family, their interest being sufficiently represented in the suit,(6) and the presumption being that he is acting for the family, unless it were made out that he acted and professed to act for himself alone.(7) In defining, however, the relation of the managing member to the joint family and estate we are brought into contact with a relationship which has no counterpart in English law, neither the term partner nor principal, nor agent, nor even co-parcener will strictly apply.(8)

Karnavan.—The karnavan or managing member of a Malabar *tarwad* (family) is in a similar position to a Hindu father under the Mitakshara law. And a decree against him may in some cases bind the members.(9) It was,

(1) Sri Raja Varadaraya *v.* Sankara Venkatadri, 17 M. L. J. 197 (1907). For Hindu father's power to bind his descendants by a compromise, see Ram Kuber Pande *v.* Ram Dasi, 35 A. 428 (1913).

(2) Bakshi Ram *v.* Liladhara, 35 A. 353 (1913); distinguishing Muhammad Musamilullah *v.* Mithu Lal, 33 A. 783 (1911).

(3) Dharam Singh *v.* Angan Lal, 21 A. 301 (1899).

(4) Kali Charan *v.* Sheo Buksh, 16 C. W. N. 783 (1912).

(5) Acchaibar Singh *v.* Ram Saruf Sahu; following Hari Lal *v.* Munman Kunwar, 34 A. 549 (1912); distinguishing Ganga Dayal *v.* Mani Ram, 31 A. 156 (1909).

(6) Jogendro Deb Roykut *v.* Funindro Deb Roykut, 14 M. I. A. 376; 11 B. L. R. 214; 17 W. R. 104 (1871); see Gan Savant Bal Savant *v.* Narayan Dhand Savant, 7 B. 467 (1883); Narayan Gop Habbu *v.* Pandurang Ganu, 5 B. 685 (1881); Khub Chand *v.* Narain Singh, 3 A. 812 (1881); Caspersz, 358, 359; Hukm Chand, 211.

(7) Gan Savan Bal Savant *v.* Narayan Dhond Savant, *supra*.

(8) Muhammed Askari *v.* Radha Ram Singh, 22 A. 317 (1900).

(9) See Vasudevan *v.* Narayanan, 6 M. 121 (1882); Varanakot Narayan Namburi *v.* Varanakot Narayan Namburi, 2 M. 328 (1880) [in which a description is given of the position, powers, and responsibilities of the karnavan]; Thengu *v.* Chimmu, 7 M. 413

however, later held by a Full Bench reviewing the preceding cases that a decree in a suit in which the *karnavan* of a *nambudri illom* or *marumakkatayam tarwad* is, in his representative capacity, joined as a defendant, and which he honestly defends, is binding upon the other members of the family not actually made parties.(1)

Shebait.—Where a shebait has incurred debts in the service of an idol, for the benefit and preservation of its property, his position is analogous to that of a manager for an infant heir,(2) and decrees properly obtained against him in respect of debts so incurred are binding upon succeeding shebaits. For if such debts and the judgments founded upon them were not held to be thus binding on successors, the consequence would be that no shebait would be able to obtain assistance in times of need.(3)

Managers. Guardians.—In the case cited below,(4) the decision of a Forest Settlement Officer, upon an inquiry held under the Boundary Act of 1860, at which inquiry the plaintiff, then a minor, was represented by a manager of his estate appointed under sect. 8 of Regulation V. of 1804, was held to be *res judicata* in a suit to recover the land. A manager of an estate, who has obtained a certificate under Act XL. of 1858, is the guardian of infant co-proprietors, and represents them fully in suits for money advanced in reference to the estate.(5) The fact that the plaintiff, a minor, had through his guardian actively intervened in proceedings to set aside a sale of property in which he and his father were jointly interested as members of a Mitakshara family, was held to be no bar to a suit to recover the property, the purchaser having at the sale acquired the interest of the father only.(6)

Minor.—To maintain the plea of *res judicata* it must appear that the person whose interest it is sought to bind was in some way a party to the suit. An intention that a suit should be for the benefit of a minor is insufficient. The minor must be properly represented in it.(7) A decree passed against

(1884); Haji *v.* Atharaman, 7 M. 513 (1883); Kombi *v.* Lakshmi, 5 M. 201 (1881); Ittiachan *v.* Velappan, 8 M. 484, F. B. (1885); Sri Devi *v.* Kelu Eradi, 10 M. 79 (1886); Shankaram *v.* Kesavan, 15 M. 6 (1891); Kamappan Nambiar *v.* Ukkaram Nambiar, 17 M. 214 (1893).

(1) Vasudevan *v.* Sankaran, 20 M. 129 (1896).

(2) See Hunooman Persaud Panday *v.* Mussamut Babooee Munraj Koonweree, 6 M. I. A. 393, 423 (1856).

(3) Prasunno Kumari Debya *v.* Golab Chand Baboo, L. R. 2 I. A. 145, 152 (1875); see 20 W. R. 86, for this case in the lower Court; Juggut Chunder Sein *v.* Kishwanund, 2 Sel. Rep. 126 (1814); Kissonund Ashrom Dundy *v.* Nursingh Doss Byragee, 1 Marsh. 485 (1863); Maharanee Shibessouree Debia *v.* Mothooranath Acharjo, 13 M. I. A. 270, 275 (1869); Tulsidas Mahanta *v.* Bejoy Kishore Shome, 6 C. W. N. 178 (1901). As to suits relating to muths, see Babajirao *v.* Luxmandas, 5 Bom. L. R. 932 (1903); s. c., 28 B. 215.

(4) Kamaraja *v.* The Secretary of State for India, 11 M. 309 (1886).

(5) Doorga Persad *v.* Kesho Pershad Singh, L. R. 9 I. A. 27 (1883).

(6) The Collector of Monghyr *v.* Harda Narain Shahai, 5 C. 425 (1879); as to the position of a Hindu son, in a joint Mitakshara family, see Ramnarain *v.* Bisheshar Prashad, 10 A. 411, 413 (1888); Mussamut Nanom Babuasin *v.* Modun Mohun, L. R. 13 Ind. App. 1 (1885); Broughton, 69-72.

(7) Chaudri Ahmad Buksh *v.* Seth Raghubar Dayal, 28 A. 1 (1905); 32 I. A. 229.

an infant properly represented is binding upon him like a decree passed against an adult, but it is open to the infant to impeach such decree by a separate suit in cases where his guardian has been guilty of fraud or negligence in allowing the decree to be passed against him.(1) It is only where fraud or negligence is proved on the part of the guardian of a minor that the right to bring a suit to set aside a previous decision can be claimed by a minor or his administrator; where no fraud or negligence is proved a previous decision will operate as a bar.(2)

Mortgagor.—The acts of a mortgagor prior to the mortgage bind his mortgagee; (3) but his acts subsequent to the mortgage do not; so that a suit by the mortgagor subsequent to his mortgage, and not brought at the instance or with the concurrence of the mortgagee, does not bind the latter.(4) The proprietor of an estate cannot be said to represent the whole estate after he has mortgaged it.(5) A decree obtained by the mortgagees against the original mortgagors, the vendors of the appellants, was held to be no evidence against the appellants, purchasers of the interests of the mortgagors, if they were no parties to that decree, and if the transfer to them was before the institution of the suit in which that decree was passed; and the purchasers were in no way bound by the result of that suit.(6) Where a mortgagor obtained a decree for redemption, which was not executed, and subsequently sold the equity of redemption to the plaintiff, who sued the mortgagee for redemption, it was *held* that the suit was not barred by the former decree, as the relation of mortgagor and mortgagee had not been terminated, and the right to redeem was inseparable from the relation as long as it existed.(7)

Lessor and Lessee.—A lessee claims under his lessor, but a lessor does not claim under his lessee, so that a decision in a suit by the lessee to eject a stranger does not bar a suit by the lessor against the same person with the same object.(8) So also decrees obtained against the registered tenants of a

(1) Cursandas Natha *v.* Ladkavahu, 19 B. 571, at p. 576 (1895); and see Lalla Sheo Churn Lal *v.* Ramnandan Dobey, 22 C. 8 (1894).

(2) Hanmantapa *v.* Jivabai, 24 B. 547 (1900).

(3) Radhamadhab Haldar *v.* Monohur Mookerji, L. R. 15 I. A. 97; 15 C. 756 (1888).

(4) Bonomaly Nag *v.* Koylash Chunder Dey, 4 C. 692 (1878); Dooma Sahoo *v.* Joonarain Lall, 12 W. R. 362 (1869); Sitaram *v.* Amir Begum, 8 A. 324 (1886); Krishnaji Lakshman Rajvadi *v.* Sitaram Marrarrav Jakhi, 5 B. 496 (1880); Soshi Bhusun Guha *v.* Gogan Chunder Shaha, 22 C. 371 (1894). A purchaser from a mortgagor is in the same position, whether he purchases *pendente lite*, Radhamadhub Haldar *v.* Monohur Mookerji, *supra*; or in execution of a decree, or otherwise, Poresh Nath Mookerjee *v.* Anath Nath Deb, 9 C. 265 (1882).

(5) Soshi Bhusun Guha *v.* Gogan Chunder Shaha, 22 C. 364 (1894); Seshappaya *v.* Venkatsamana, 33 M. 459 (1910).

(6) Basudeb Sirc *v.* Brojo Mohan Jana, 7 C. W. N. 54 (1902).

(7) Karuthasami *v.* Jakanatha, 8 M. 478 (1885); see Sami Achari *v.* Somasandram, 6 M. 119 (1882); Roy Dinkur Doyal *v.* Shew Golam Singh, 22 W. R. 172 (1874); but see *contra*, Anrudh Singh *v.* Sheo Prasad, 4 A. 481 (1882); Gan Savant *v.* Narayan Dhand Savant, 7 B. 467 (1883); as to the effect of abatement, see Nistarini Debi *v.* Brojo Nath Mookopadhya, 10 C. L. R. 229 (1882).

(8) Rambrohmo Chuckerbutti *v.* Bunsi Kurmokur, 11 C. L. R. 122 (1882); Brojo Behari Mitter *v.* Keder Nath Mozumdar, 12 C. 580 (1886).

tenure were held inadmissible in evidence against the real owner of the tenure, who was not a party to the suits obtained, and who did not claim through the parties against whom the decrees were passed.(1) And a suit by a lessor against a *raiyat* to set aside a pottah is not barred by the fact that the pottah has been declared genuine in a suit by the plaintiff's *ticcadar* against the same defendant.(2) Where two persons each claim title to land in the possession of a tenant, and one of them sues the tenant for rent in a competent Court, and the other intervenes and claims title, and the issue is contested and finally decided that the tenant should pay his rent to one of them, the title cannot be contested in a subsequent suit between the two claimants.(3) A decree obtained in a previous suit for rent by an *ijaradar* does not operate against the tenant as *res judicata* on the question whether the relation of landlord and tenant exist in a subsequent suit for rent brought by the superior landlord.(4) As to suits for the recovery of cesses (5) and rents, see cases also below.(6) On dismissal of a suit for rent on denial of relationship of landlord and tenant, the plaintiff may sue again for ejectment;(7) though where the tenant sets up his own title to the land, the decision on the issue of title may be *res judicata*.(8)

Partition.—The right to enforce it is a legal incident of a joint tenancy, and as long as such tenancy subsists so long may any of the joint tenants apply to Court for partition.(9)

Different titles.—The words "*litigating under the same title*" do not refer to the identity of the ground of action, but mean that the question must have been raised and decided in the same right, that is to say, in the right of the parties to the second suit and not in the right of any other person. Thus if one is made defendant in an official capacity, the judgment will not bind him personally, and *vice versâ*. A plaintiff suing as next heir to his uncle was held not barred by a decision against his father, inasmuch as he claimed under a title not derived from his father.(10) A suit against an elder brother for maintenance was held not to be barred by a previous order made upon other grounds dismissing a claim for maintenance against the father. The adjudication in the previous suit was not between the brothers, but between the plaintiff

(1) Ram Narain Rai *v.* Ram Coomar Chunder Poddar, 11 C. 562 (1885).

(2) Shaikh Wahid Ali *v.* Nauth Tooraho, 24 W. R. 128 (1875).

(3) Gobind Chunder Koondu *v.* Taruck Chundra Bose, 3 C. 145 (1877).

(4) Bolaram Mondul *v.* Kartick Chunder Roy Chowdhuri, 4 C. W. N. 161 (1899).

(5) Picketts *v.* Rameswar Malia, 28 C. 109 (1900).

(6) Hurry Behari Bhagat *v.* Purgun Ahir, 19 C. 656 (1890); Bukshi *v.* Nizamuddi, 20 C. 505 (1892); Nil Madhub Sarkar *v.* Brojo Nath Singha, 21 C. 236 (1893); Maharaja Jotindra Mohun Tagore *v.* Shumbhu Chunder Bhuttacharjee, 4 C. W. N. 43 (1897); Baloram Mondul *v.* Kartick Chunder Roy Chowdhuri, 4 C. W. N. 161 (1899).

(7) Khatel Mistri *v.* Sadruddi Khan, 34 C. 922 (1907).

(8) Sahadeb Dhali *v.* Ram Rudra Haldar, 10 C. W. N. 820 (1906).

(9) Bisheshar Das *v.* Ram Prasad, 28 A. 627 (1906); and see Madon Mohun Mondul *v.* Barkanta Nath Mondul, 10 C. W. N. 839 (1906); Monsharam *v.* Ganesh, 17 C. W. N. 521 (1912).

(10) Ruder Narain Singh *v.* Rup Kuar, 1 A. 734 (1878).

and his father, and was based upon a different sort of claim.(1) A suit by persons representing the public is not barred by a decision in a previous suit by the same plaintiff in their individual and private capacity.(2) In a previous suit in which plaintiff had been a party it had been attempted to assert plaintiff's title to a piece of land occupied by the defendants by proving that they held the same by virtue of an alleged specific lease. The Court had held that no such lease had been executed. Plaintiff now claimed the land as belonging to his *devasan*, and sued to recover it on the strength of his title; he also set up the alleged lease once more. *Held*, that though the question of the validity of the lease was *res judicata*, plaintiff was at liberty to sue also on the strength of his title, independently of the lease, and he was not estopped from so suing by the fact that the former suit had been based upon the lease alone.(3) A claim on a *kanam* is a claim arising *ex contractu*, while a claim on title against a trespasser is founded on tort.(4)

Miscellaneous.—The purchaser of land at a sale by the Government for the recovery of arrears of revenue under the sale laws, buys free of encumbrances, and is therefore not bound by the decision in a suit brought by or against the former owner.(5) It has been held in Madras that a priest of a temple, as the representative of a former priest, is bound by a decree in a suit brought by the latter to establish his right to damages for the invasion of his rights as priest.(6) The co-sharer of an estate cannot be bound by a decision in a suit for rent brought by another co-sharer against a tenant.(7) Where all the conditions prescribed by sect. 11 exist, the fact that in the first suit the defendant was an execution creditor and in the second he is a purchaser at an execution sale makes no difference as to the second suit being *res judicata*. A privity exists between an execution creditor and a purchaser at a Court sale, the latter representing the former in so far as he had a right to bring the property to sale in execution of his decree.(8) As to a suit by the *karnam* of a *mitta*; (9) by one claiming as the *dharmakarta* of a *devasthanam*; (10) and by one of five trustees in whom the *uraima* right over a *devasan* was vested; (11) see the cases noted below. A judgment against one holder of service *vatan* lands is *res judicata* as regards a succeeding holder.(12) A purchaser of land cannot be estopped by a judgment in a suit against his vendors commenced after the purchase.(13)

(1) Ahmad Hossein Khan *v.* Nihaluddin Khan, 9 C. 945, 948 (1883).

(2) Lakshmandas *v.* Jugalkishore, 22 B. 216 (1896).

(3) Zamorin of Calicut *v.* Narayanan Mussad, 22 M. 323 (1899).

(4) Parambath *v.* Puthengathil, 28 M. 406 (1905).

(5) Narain Chunder Chowdhry *v.* Tayler, 3 C. L. R. 151 (1878).

(6) Archakam Srinivasa Dikshatulu *v.* Udyagiry Anantha Charlu, 3 M. H. C. R. 349 (1869).

(7) Surender Nath Pal Chowdhry *v.* Brojo Nath Pal Chowdhry, 13 C. 352, 356 (1886).

(8) Krishnabhupati Devu *v.* Vikrama Devu, 18 M. 13 (1894).

(9) Venkayya *v.* Suramma, 12 M. 235 (1889); see Babaji *v.* Nana, 1 B. 535 (1876).

(10) Ramalingam *v.* Thirugnana, 12 M. 312 (1889).

(11) Madhavan *v.* Keshavan, 11 M. 191 (1887).

(12) Radhabai *v.* Anantrav, 19 B. 198 (1885).

(13) Joy Chandra Banerjee *v.* Sreenath Chatteree, 32 C. 357 (1904).

Explanation VI.—This *Explanation* provides that where persons litigate *bonâ fide* in respect of a public or private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of the section, be deemed to claim under the persons so litigating.(1) It has been *held* that the Courts should be careful in their application of this *Explanation*, which should not be applied to any case which does not come within its very wording; (2) and that it only applies to cases where several different persons claim an easement or other right under one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land, or to take water from the same spring or well.(3) And, therefore, it does not apply to a prescriptive right claimed by an individual in respect of his own house and premises.(4) This *Explanation* does not refer to the case of a defendant at all but only to the case of a plaintiff.(5) But it is not in terms so limited. One party having a right in common with others is not at liberty or authorized to sue in his own name to establish the right of the others except by their authority. This *Explanation* must therefore be read with the provisions of rule 3, *post*, and the principles to be found in that rule.(6) A right to relief can be said to be claimed "in common" only as between parties who would be benefited by such relief if granted, and who have such an interest in the relief claimed that they could join as co-plaintiffs.(7) The inclusion of *public rights* in the amended Explanation is to give due effect to suits relating to public nuisances, as to which see the new sect. 91, *post*.

The Court which decided such former suit must have been a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue is subsequently raised.—In order to make an adjudication by one Court final and conclusive in another Court, the first Court must have been possessed of a jurisdiction (8) sufficient to try the matter

(1) Expl. VI.

(2) Ram Narain *v.* Bisheshar Prasad, 10 A. 411, 412 (1888), *per* Edge, C.J.

(3) Kalishunker Doss *v.* Gopal Chunder Dutt, 6 C. 49 (1880); as to suits involving claims for land, see Madhavan *v.* Keshavan, 11 M. 191 (1887); Kunnathurillath Vasudevan Nambudri *v.* Narayanan Nambudri, 6 M. 121 (1882); Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi, 2 M. 328 (1880); see as to suits against co-sharers, Hazir Gazir *v.* Sonamonee Dossee, 6 C. 31 (1880); Ram Narain *v.* Bisheshur Prasad, 10 A. 411 (1888); and as to decrees against Karnavans, Sri Devi *v.* Kelu Eradi, 10 M. 79 (1886); Elayachanidathil Kombi Achen *v.* Kenatumkora Lakshmi Amma, 5 M. 201 (1881); and Madras cases cited, *supra*; and as to a suit for possession of share in the property of a Mahomedan family, Chandu *v.* Kunhamed, 14 M. 324 (1891); referred to in Latchanan *v.* Saravayya, 18 M. 164 (1894). As to representative suit against sect of worshippers, see Sadagopa Chariar *v.* Rama Rao, 30 M. 185 (1907).

(4) Lakhsmishankar *v.* Vishnuram 24, B. 77, 85 (1899); Kalishunker Doss *v.* Gopal Chunder Dutt, 6 C. 49 (1880).

(5) Kunnathurillath Vasudevan Nambudri *v.* Narayanan Nambudri, 6 M. 121, 126, 127 (1882), *per* Innes, J.; Laxmishankar *v.* Vishnuram, 1 B. L. R. 534 (1899).

(6) Thanakoti *v.* Muniappa, 8 M. 496, 499 (1885); but see also remarks in Varanakot Narayanan Namburi *v.* Varanakot Narayanan Namburi, 2 M. 328, 332 (1880); Sri Devi *v.* Kelu Eradi, 10 M. 79, 82 (1886).

(7) Somasundara *v.* Kulandaivelu, 28 M. 457 (1904).

(8) As to the meaning and nature of juris-

which arose in the subsequent suit. In other words, a decision to be *res judicata* must have been passed by a Court having jurisdiction not only over the suit in which it was passed, but also over the subsequent suit in which it is pleaded as a *res judicata*. And since, according to the judicial system of British India, there are, throughout the country, Courts of different grades having jurisdiction in suits of different amounts, in certain prescribed local areas, the Courts must be of concurrent jurisdiction as regards both pecuniary (1) limit and subject-matter of the suit before the decision of one can be *res judicata* as to matter coming before the other Court. So where a previous suit was cognizable by the Munsif and was tried and determined by him, it was held that the judgment in the former suit was no bar as *res judicata* to the trial of a subsequent suit which was cognizable only by the Subordinate Judge and was tried by him.(2) And it has been held that neither the decision of a Revenue Court as between the plaintiff and third parties (whose rights had been set up by the defendants in that suit), (3) nor the decision of a Probate Court, can operate as *res judicata* in a subsequent title-suit.(4)

In the case of Misir Raghobardial *v.* Rajah Sheo Baksh Singh,(5) the Privy Council said: "Mussumat Edun *v.* Mussumat Bechun (6) may be referred to as the leading case on this subject. In that case the Chief Justice, Sir Barnes Peacock, held that the two Courts must be Courts of concurrent jurisdiction, and in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive.(7) As to what is a Court of concurrent jurisdiction, it is material to notice that there is in India a great number of Courts, that one main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction, and that by the Code of Procedure a suit must be instituted in the Court of the

diction, see notes to s. 9, *ante*, in which the subject is fully discussed: Shibo Raut *v.* Baban Raut, 35 C. 353 (1908).

(1) See Geiriya Chettiar *v.* Sabhapathy Mudaliar, 29 M. 65 (1905).

(2) Hari Das Acharjee Chowdhury *v.* Baroda Kishore Acharjee Chowdhury, 4 C. W. N. 87 (1899); and see Lakshmishankar *v.* Vishnuram, 24 B. 77, 85 (1899); and as to subsequent suit non-triable by rent Court, Ashraf-un-nissa *v.* Ali Ahmad, 26 A. 601 (1904); Makesh Prasad *v.* Ranjor Singh, 27 A. 163 (1904); and as to *talukdari* settlement officer, Mahubhai *v.* Sursang, 30 B. 220 (1905).

(3) Jaimangal *v.* Bed Saran, 33 A. 493 (1911).

(4) Lalit *v.* Radharaman, 13 C. L. J. 547 (1911); 15 C. W. N. 1021.

(5) L. R. 9 I. A. 197, 203, 204 (1882); 9 C. 439; 12 C. L. R. 520. See Sheikh Hassu *v.* Ram Kumar Singh, 16 A. 183 (1894); Gokul Mandar *v.* Pudmanand Singh, 6 C. W. N. 825, P. C. (1902); foll. in Gomti Kunwar *v.* Gudri, 25 A. 138 (1902).

(6) 8 W. R. 175 (1867); the rule in this case, which is fully affirmed by the Privy Council in the decision above cited, and in Run Bahadur Singh *v.* Lucho Koer, 11 C. 301; L. R. 12 I. A. 23 (1884); followed in Bharasi Lal Chowdhry *v.* Sarat Chunder Dass, 23 C. 415 (1896), has been followed and applied, and disregarded in other cases, which will be found cited in Caspersz, *op. cit.* 329, 332 *et seq.*; and see Hukm Chand, *op. cit.* 20, 283, 391; Bababhat *v.* Naharbhat, 13 B. 224 (1888); Ganapati *v.* Chathu, 12 M. 223 (1889); Vythilinga Padayachi *v.* Vythilinga Mudali, 15 M. 111 (1891).

(7) See Field's Ev. 298, 299; and as to the Courts in particular of the Bengal Presidency, see Field's Introduction to the Bengal Regulations, Ch. IV.

lowest grade competent to try it. For instance, in Bengal, by the Bengal Civil Court Act, No. VI. of 1871, the jurisdiction of a Munsif extends only to original suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1000. The qualifications of a Munsif and the authority of his judgment would not be the same as those of a District or of a Subordinate Judge, who have jurisdiction in civil suits without any limit of amount. In their Lordships' opinion, it would not be proper that the decision of a Munsif upon (for instance) the validity of a will, or of an adoption in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court for property of a large amount, the title to which might depend upon the will or the adoption. Other similar cases are mentioned in the judgment of the Chief Justice. It is true that there is an appeal from the Munsif's decision, but that upon the facts would be to the District Court, and not to the High Court. And that the decision should be conclusive would be still more improper as regards many other of the various Courts in India, the qualifications of whose Judges differ greatly. By taking concurrent jurisdiction to mean *concurrent as regards the pecuniary limit as well as the subject-matter*, this evil or inconvenience is avoided; and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case." (1) And the Council, in a later portion of the judgment, say, "that by Court of competent jurisdiction, Act X. of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or, in other words, a Court of concurrent jurisdiction." The rule may be stated to be that the judgment in the previously decided suit must have been delivered either by a Court of exclusive or of concurrent jurisdiction upon a matter falling within such jurisdiction, and where the jurisdiction is concurrent the Court which adjudicated on the previously decided suit must have been such a Court as would have been competent to adjudicate upon the later suit. The question of whether any particular judgment is passed in the exercise of exclusive or concurrent or limited jurisdiction must depend upon the terms of the law upon which the judgment relies for its authority. It has been held that the bar of *res judicata* arises where the Court deciding the first suit was competent to try the same, and its inability to entertain it arose not from incompetence, but from the existence of another Court with a preferential jurisdiction.(2)

(1) The Privy Council, in Run Bahadur Singh *v.* Lucho Koer, *supra*, referring to the above remarks, further say:—"If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire." Ramdyal *v.* Jankidas, 2 Bom. L. R. 415 (1900); the extent of the jurisdiction depends on that of the Court in which the first suit was instituted at the time it was brought. In Panga *v.* Unnikatti, 24 M. 275 (1900), the suit was held to be *res judicata*, for though brought in the Subordinate Judge's Court, it ought, if rightly valued, to have been brought in the Munsif's Court in which the previous decision had been given: Ramdyal *v.* Jankidas, 24 B. 456 (1900).

(2) Ghulappa *v.* Raghvendra, 6 Bom. L. R. 77 (1904); s. c., 28 B. 338.

It has also been held that "*competent to try*" means "competent to try with conclusive effect:" (1) and that concurrence of jurisdiction must exist not only as to the original Court, but also as to the appellate tribunals and their powers in the respective suits.(2) The Calcutta High Court, and later decisions in the Madras High Court, have, however, dissented from this view, holding that there was nothing in sect. 12 of the last Code to indicate that the judgments in two suits must be open to appeal in the same way, in order that the decision upon any issue in the earlier suit can bar the trial of the same issue in the later one. So it was held that the decision of an issue in a suit in which no second appeal lies to the High Court bars the trial of the same issue in a subsequent suit in which such second appeal is allowed.(3) And see now the new Explanation II. which is intended to affirm the view that the competence of the jurisdiction of a Court does not depend on the right of appeal from its decision. The word "*competent*" is further to be considered with reference to the time when the suit is brought, and the jurisdiction of the Court at that period. The words of the section must be taken to mean competent to try the subsequent suit if it had been brought at the same time that the former suit was brought.(4) A plaintiff cannot, however, evade the provisions of the Code by joining several causes of action against the same defendant in the subsequent suit and instituting it in a Court of superior jurisdiction.(5) In a recent case in the Bombay High Court, where the defendant in a suit for restitution of conjugal rights pleaded *res judicata* on the ground that plaintiff had filed a previous suit, though this had been dismissed for want of jurisdiction because the leave necessary under clause 12 of the Letters Patent had not first been obtained, it was held on second appeal that the former Court had not been "competent to try" and that there was no *res judicata*.(6)

The prevailing view as to the effect of an appealable decision is that it constitutes *res judicata* until appealed against, when it ceases to be such, and does not so operate again unless it is adopted by, and thus becomes the decision of, the Appellate Court.(7) Where there were decrees in cross suits on

(1) Bholabhai *v.* Adesang, 9 B. 75 (1884); Bahabhat *v.* Narharbhat, 13 B. 224, 228 (1888); Govind *v.* Dhondbarav, 15 B. 104 (1890); Anusuyabai *v.* Sakharam Pandurang, 7 B. 464 (1883); Vythilinga Padayachi *v.* Vythilinga Mudali, 15 M. 111, 118 (1891); see also Bhavanishankar *v.* Naranshankar, 23 B. 536, 538 (1899); but see also N. W. P. cases cited in Hukm Chand, *op. cit.* 394, 395, and Shib Charan Lal *v.* Raghu Nath, 17 A. 174, 185, 186 (1895).

(2) Vythilinga Padayachi v. Vythilinga Mudali, *supra*, 118; Srirangachariar *v.* Ramasami Ayyangar, 18 M. 189 (1894).

(3) Rai Churn Ghose *v.* Kumud Mohan Dutt Chowdhury, 2 C. W. N. 297 (1898); s. c., 25 C. 571; followed in Bhugwanbutti Chowdhrani *v.* Forbes, 28 C. 78 (1900); s. c., 5 C. W. N. 483; Ahmed *v.* Moidin, 24 M. 444 (1901); following Subbammal *v.* Huddlestone, 17 M. 273 (1894); in, however, the recent F. B. decision, Aranasi Gounden *v.* Nachammal, 29 M. (1905), these last two cases were overruled, it being held there was no *res judicata*; see also David *v.* Grish Chunder Guha, 9 C. 183 (1882).

(4) Gopi Nath Chobey *v.* Bhugwat Pershad, 10 C. 697 (1884); Raghunath Panjah *v.* Issur Chunder Chowdhry, 11 C. 153 (1884); Kunji Amma *v.* Raman Menon, 15 M. 494 (1891); Rai Churn Ghose *v.* Kumad Mohan Dutt Chowdhury, 2 C. W. N. 297, 301 (1898).

(5) Bhugwanbutti Chowdhrani *v.* Forbes, 28 C. 78 (1900).

(6) Abdul Kadir *v.* Doolanbibi, 37 B. 563 (1913).

(7) See Nilvaru *v.* Nilvaru, 6 B. 110 (1881) [affirmed in Balkishan *v.* Kishan Lal, 11 A.

the same facts, and an appeal against one decree only, it was held that the decree unappealed was no bar to the decision of the appeal.(1) In a suit brought in the Agency Court at Kattiawar, relating to the villages in Kattiawar, the Court decided that there existed between the parties a custom of *metap* (*i.e.*, right to an extra share by the senior member). A second suit was subsequently brought in a British Court as regards the villages belonging to the parties situate in the British territories, wherein plaintiffs alleged that the custom of *metap* did not exist in their family. It was contended, on behalf of the defendant, that the question was *res judicata*, on the ground that the test of competency to try the subsequent suit was whether the suit was one which in respect of its subject-matter and the valuation thereof could have been tried by the Agency Court, and that its exclusion on territorial grounds had not to be taken into account. The High Court declined to accept the contention, as not being consistent with the express terms of sect. 11 of the Code.(2) There can be no *res judicata* unless the Judge who made the decree in the previous suit had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subsequently raised.(3)

The under-mentioned cases and authorities may be consulted as to the competency of special Courts, and of Courts in special cases; Revenue Courts; (4)

148 (1888), where the effect of judgments in pending suits is considered]; and Gungabishen Bhugut *v.* Raghoonath Ojha, 7 C. 381 (1881); Rajah Mokond Narain Deo *v.* Jonardan Dey, 15 W. R. 208 (1871); Hukm Chand, *op. cit.* 144 *et seq.*; Caspersz, *op. cit.* 344 *et seq.*, 397, 440; Emamooddeen Sowdaghur *v.* Shaikh Futteh Ali, 3 C. L. R. 447 (1878). As to matters not entertained by an Appellate Court, see Mussamut Imaman *v.* Fazul Karim, 7 N. W. P. 251 (1875); Gungabishen Bhugut *v.* Raghoonath Ojha, *supra*; Chinniya Mudali *v.* Venkatachella Pillai, 3 M. H. C. R. 320 (1867); Ghurphekni *v.* Purmeshar Dayal, 5 C. L. J. 653 (1907). In Narayanan *v.* Kannammai, 28 M. 338 (1904), it was held that the H. C. did adopt the findings.

(1) Panchanada *v.* Varthinatha, 29 M. 333 (1905).

(2) Prithesingji *v.* Umedsingji, 6 Bom. L. R. 98 (1903); doubting Bahabhat *v.* Narharbhat, 13 B. 224 (1888). See these cases referred to, *post*, "*Foreign Judgment.*" In Laksmishankar *v.* Vishnuram, 24 B. 77; s. c., 1 Bom. L. R. 534 (1899), it was held that there was no *res judicata* because the Baroda Court had no jurisdiction over the defendants.

(3) Gokul *v.* Pudmanand, 4 Bom. L. R. 794 (1902); s. c., 29 C. 707, in which the P. C. point out that in this respect s. 13 went beyond the Duchess of Kingston's case.

(4) Hurri Sunker Mookerjee *v.* Muktaram Patro, 15 B. L. R. 238 (1875); Gangaraju *v.* Kondireddiswami, 17 M. 106 (1893); Hari Charan Singh *v.* Har Shankar Singh, 16 A. 464 (1894); 18 A. 59 (1895); Rangayya Appa Rau *v.* Ratnam, 20 M. 392 (1897); Kalliani *v.* Dassu Pande, 20 A. 520 (1898); Field, Ev. 304, 305; Caspersz, *op. cit.* 338–340; Jafar Khan *v.* Gholam Muhammad, 25 A. 282 (1903); Niadar *v.* Bani Mal, 24 A. 153 (1901); Niranjan Rao *v.* Abdul Rahman, 1 A. L. J. 122 (1904); Dharani Kanta Lahiri *v.* Gaber Ali Khan, 30 C. 339 (1903); Gokul Mendar *v.* Pudmanand Singh, 6 C. W. N. 825 (1902); Gomti Kunwar *v.* Guari, 25 A. 138 (1902); Vedachala *v.* Boomeappa, 28 M. 65 (1903); as to the decision of the special Judge under the Bengal Tenancy Act, ib., v.; Shewbarat Koer *v.* Nirpal Roy, 16 C. 597 (1886); Lala Kirut Narain *v.* Palukdhari Pandey, 17 C. 326 (1889); and of Revenue Officer as to entries in Record of Rights: Gokhul Sahu *v.* Jodu Nundun Roy, 17 C. 721 (1890); Pandit Sardar *v.* Meajan Mirdha, 21 C. 378 (1893); Raghubar Dyal *v.* Banke Lal, 22 A. 182 (1900). As to proceedings of a Settlement Officer, see The Secretary of State for India in Council *v.* Kajimuddy, 23 C. 257 (1895).

land proceedings; (1) applications by petition under sect. 63 of the Administrator-General's Act (II. of 1874); (2) applications for the guardianship of a minor; (3) proceedings of Registration Officers; (4) Collector's decision under Madras Act III. of 1895.(5) A decision by a settlement officer, under Chapter X. of the Bengal Tenancy Act, as to which of two persons claiming to be tenant ought to be recorded as such, does not operate as *res judicata* in a subsequent civil suit between the same parties concerning the title to the land.(6) A finding in a suit for the recovery of interest on a mortgage is not *res judicata* in a subsequent suit under the Dekhan Agriculturists' Relief Act (XVII. of 1879), which is in relief of a certain class and has a special character, unless the previous suit falls within the class of suits to which that Act applies.(7) A settlement officer's decision, under sect. 107 of the Bengal Tenancy Act, was held in the undermentioned suit to have the force of a decree, though it did not make the question of rent *res judicata* it was admissible in evidence as to the rent.(8) A decision in a previous suit in a district Munsif's Court, in the exercise of its ordinary jurisdiction, may operate as *res judicata* in a subsequent suit between the same parties on the Small Cause side of the Court.(9)

In respect of the presumption as to jurisdiction, the rule is, that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged.(10) It is necessary, therefore, for a party, who relies upon the decision

And as to the effect of an award under the Central Provinces Land Revenue Act (XVII. of 1881), see Rewa Pershad Sukal *v.* Deo Dutt Ram Sukal, 4 C. W. N. 582 (1899); Beni Pande *v.* Kausal Kishore, 29 A. 160 (1906); Bihari *v.* Sheobalak, 29 A. 601 (1907) [Agra Tenancy Act]; Natesa Gramani *v.* Reddi, 17 M. L. J. 518 (1907); Bed Saran *v.* Bhagat, 33 A. 453 (1911); Jaimangal *v.* Bed Saran, 33 A. 193 (1911).

(1) Raja Nilmoni Singh Deo Bahadur *v.* Ram Bandhu Rai, 7 C. 388 (1881); Nobodeep Chunder Chowdhry *v.* Brojendro Lall Roy, 7 C. 406 (1881); 9 C. L. R. 117; Nilmonee Singh Deo *v.* Rambundhoo Roy, 4 C. 757 (1879); Mahadevi *v.* Neelamani, 20 M. 269 (1896).

(2) Smith *v.* Secretary of State, 3 C. 310 (1878).

(3) Nchalo *v.* Nawal, 1 A. 428 (1877).

(4) Mohima Chunder Dhur *v.* Jugul Kishore Bhuttacharji, 7 C. 736 (1881).

(5) Balijepalli *v.* Balijepalli, 30 M. 320 (1906).

(6) Pandit Sardar *v.* Mcajan Mirdha, 21 C. 378 (1893); Hamid-un-nisa *v.* Abdul Hamid, 1 A. L. J. 9 (1904) [order under s. 63, Act XIX. of 1873].

(7) Vithal Ramchandra *v.* Sitabai, 36 B. 518 (1912); s. c., 14 Bom. L. R. 579.

(8) Ashutosh Nath Roy *v.* Abdool, 28 C. 676 (1901); see as to same section, Mohim Chandra Ray *v.* Kalitara Debya, 11 C. W. N. 939 (1906); as to a proceeding under s. 104 of the same Act, see Maharaja Durga Charan Laha *v.* Hatteen Mandul, 5 C. W. N. clv. (1901); s. c., 29 C. 252. See generally as to proceedings under the Bengal Tenancy Act, Gokul Mandur *v.* Pudmanand Singh, 29 C. 707 (1902); Mohunt Jagannath *v.* Chandra Kumar, 5 C. W. N. 421 (1900); Sheikh Korban *v.* Sheikh Jafar, 5 C. W. N. 798 (1901); Dharani Kant Lahiri *v.* Gobar Ali, 7 C. W. N. 33 (1902).

(9) Raja Sumhadri *v.* Ramchandrudu, 27 M. 63 (1902).

(10) R. *v.* Nabadwip Goswami, 1 B. L. R., O. Cr., 15, 29, 30 (1868); 15 W. R., Cr., 71; Field, Ev. 306, where also an opinion is expressed that the High Courts, and the Courts occupying a similar position in the Punjab and Burma, are probably the only Courts which can in India be regarded as superior Courts within the rule.

of an inferior tribunal, to be prepared to show that the proceedings were within its jurisdiction. In the case of a Court of superior jurisdiction, the want of jurisdiction is not to be presumed.

A decree made without jurisdiction cannot operate as *res judicata*.(1) And the consent of parties will not give to a Court a jurisdiction which it does not otherwise possess.(2) But the jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff as his cause of action, and the matter involved in it; and does not depend upon what the defendant may assert by way of defence.(3)

Such matter must have been heard and finally decided by the Court in the former suit.—In order to operate as *res judicata*, the matter must have been *heard and finally decided*. There must have been a decision upon the matter alleged to be *res judicata*, which finally granted or withheld the relief sought in respect thereof. "*Res judicata* by its very words means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. In my opinion, *res judicata* signifies that the Court has, after argument and consideration, come to a decision on a contested matter." (4) These words should be read to mean "*heard and finally decided*" by such Court, either if no appeal is preferred from its judgment, or if an appeal being preferred has been disposed of, and the judgment of the Appellate Court, which takes the place of its judgment, has decided the point.(5) "The conditions for the exclusion of jurisdiction, on the ground of *res judicata*, are that the same identical matter shall have come in question already in a Court of competent jurisdiction; that the matter shall have been controverted, and that it shall have been finally decided. That is just what sect. 13 requires, there must be a final decision." (6) As to judgments by consent, see *post*.

According to Explanation V. of the last Code (which has now been omitted) a decision was final within the meaning of the section, when it was

(1) Kalka Persad *v.* Kanhaya Singh, 7 N. W. P. 99 (1875).

(2) Kadambinee Dassee *v.* Doorga Churn Dutt, Marsh. 4 (1862); The Government of Bombay *v.* Ranmol Singji Amarsinji, 9 B. H. C. R. 242 (1872); Roy Bhopendro Nath Chowdhry *v.* Kalee Prosunno Ghose, 24 W. R. 205 (1875).

(3) Chunder Coomar Mundul *v.* Bakul Ali Khan, 9 W. R. 598 (1868); Jag Lal *v.* Har Narain Singh, 10 A. 524, 528 (1888); but see Kali Charan *v.* Sheobur, 17 C. L. J. 93.

(4) Jenkins *v.* Robertson, L. R. 1 H. L., Sc. Ap., 147; see also Udaiya Tevar *v.* Katama Natchair, 2 M. H. C. R. 131, 140 (1864); Saikappa Chetti *v.* Rani Kulandapuri, 3 M. H. C. R. 84 (1866); Chunder Sekhur Deb Roy *v.* Doorgendro Deb, 3 W. R. 39 (1865); Sheosagar Singh *v.* Sitaram Singh, 24 C. 616 (1897); Kailash Mondul *v.* Baroda Sundari Dasi, 24 C. 711 (1897); Bitto Kunwar *v.* Kesho Prasad Misr, 19 A. 277 (1896). In Balaram Mondul *v.* Kartick Chandra Roy Chowdhury, 4 C. W. N. 161 (1899), it was held that the point (rate of rent) was never raised and decided in the previous suit.

(5) Rai Churn Ghose *v.* Kumud Mohan Dutt Chowdhury, 2 C. W. N. 297, 300 (1898); s. c., 25 C. 571. See Ghurphekni *v.* Parmeshar Dubey, 5 C. L. J. 653 (1907).

(6) Parsotam Gir *v.* Narbada Gir, 21 A. 505, 514 (1899); citing Langmead *v.* Maple, 18 C. B. N. S. 255, 270. In Rango *v.* Muddiyappa, 23 B. 296 (1898), the decision was held to be not final.

such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. Though this Explanation has been now omitted, the word "final" presumably has still the same meaning. A decision liable to appeal may be final within the meaning of this section until the appeal is made.(1) It is not, however, necessary, in order to justify a plea of *res judicata*, to show that the first case was fully entered into and discussed, either by oral or written testimony, where no question was raised but all the parties interested declared themselves satisfied on the point; (2) and a final decree is conclusive, notwithstanding it may have proceeded upon an erroneous view of the law.(3) It, however, generally speaking, follows from the rule which requires a hearing and final decision, that a finding which is inconclusive, or which is based upon technical points and which dismisses a suit for any reason not on the merits, will not operate as a bar; as where a demurrer was allowed; (4) or a suit is dismissed for misjoinder and failure to pay court-fees; (5) or improper valuation; (6) or because the permission of Government was not previously obtained; (7) or because of failure to give security for costs; (8) or on the ground of jurisdiction; (9) or non-joinder of all proper parties; (10) or as against a party whose name was ordered to be expunged from the record in a former suit; (11) or where a suit has been dismissed for failure to pay the costs of service of summons on the defendants; (12) or where a suit to remove an attachment is dismissed on the ground that the attachment has already been removed; (13) or where a suit has been dismissed on the ground that it was premature; (14) or wrongly framed.(15) In a suit to recover principal and interest due on a bond executed

(1) See Nilvaru *v.* Nilvaru, 6 B. 110 (1881); Balkishan *v.* Kishan Lal, 11 A. 148 (1888); as to *ex parte* decree, see Modhusudun *v.* Brae, 16 C. 300 (1889). But see Kanakayya *v.* Janardhana Paddi, F. B., 36 M. 439 (1910), a final decree is one which is neither under appeal nor liable to be set aside or modified on appeal.

(2) Dundas *v.* Waddell, L. R. 5 Ap. Ca. 265.

(3) Gouri Koer *v.* Audh Koer, 10 C. 1087 (1884).

(4) Lakshman Dada Naik *v.* Ramchandra Dada Naik, 5 B. 48 (1880); L. R. 7 I. A. 181; 7 C. L. R. 320; see Broughton, *op. cit.* 94, 99.

(5) Muhammad Salim *v.* Nabian Bibi, L. R. 8 A. 282 (1886); Fatteh Singh *v.* Mussamut Luchmee Koer, 21 W. R. 105 (1873).

(6) Dullabh Jogi *v.* Narayan Lakhu, 4 B. H. C. R., A. C., 110 (1866); see also Rajendro Lall Gossami *v.* Shama Churn Lahori, 5 C. 188 (1879); Irawa *v.* Satyappa, 35 B. 38 (1910).

(7) Pattaravy Mudali *v.* Audimaul Mudali, 5 M. H. C. R. 419 (1870); Putali Mehcti *v.* Tulja, 3 B. 223 (1879).

(8) Rangrav Ravji *v.* Sidhi Mahomed, 6 B. 482 (1882); see r. 173.

(9) Baban Mayacha *v.* Nagu Shravucha, 2 B. 19 (1876); Mahabeer Singh *v.* Rambhajan Sah, 16 C. 545 (1889); Bhukhandas Vijbhukhandas *v.* Lallubhai Kashidas, 17 B. 562 (1892); Ram Govind Jha *v.* Mungur Ram Chowdhry, 13 C. L. R. 83 (1883); Ganesh Koer *v.* Umdat-un-nissa Begum, 6 N. W. P. 77 (1874); Grish Chundra Mookerjee *v.* Ramessuree Dabee, 22 W. R. 308 (1874).

(10) Pursun Gopal Pal *v.* Poornanund Mullick, 21 W. R. 272 (1874).

(11) Kalee Coomar Dutt Roy *v.* Pran Kishoree Chowdhrain, 18 W. R. 29 (1872).

(12) Bessessur Bhugut *v.* Murli Sahu, 9 C. 163 (1882).

(13) Kashinath Morsheth *v.* Ramchandra Gopinath, 7 B. 408 (1883).

(14) Lakshman Dada Naik *v.* Ramchandra Dada Naik, 5 B. 48 (1880); Shaikh Elahee Buksh *v.* Baboo Sheo Narain Singh, 17 W. R. 360 (1872); Ramireddi *v.* Subbareddi, 12 M. 500 (1889).

(15) Doohari Singh *v.* Lala Sewsurun Lall, 3 C. L. R. 395.

by the defendants in favour of the plaintiff's father (deceased), it appeared that the plaintiff had previously brought a similar suit, which was dismissed for the reason that the plaintiff produced no succession certificate: it was *held* that the previous proceedings did not bar the present suit.(1) And generally a case summarily dismissed for a technical defect or irregularity of any kind cannot operate as a *res judicata*.(2) Where a suit was dismissed, having regard to sect. 42 of Act I. of 1877, on the ground that the plaintiffs had omitted to sue for possession, the decision was *held* no bar under sect. 43 (corresponding with O. II. r. 2 of the present Code) to a suit for possession and to have a deed declared void.(3) In a recent case in the Allahabad High Court, two suits had been instituted by the plaintiff on the same day and in the same Court, he had made A. defendant to one and A. and S. defendants to the other, and both suits had been decided by a single judgment, followed by separate decrees. In the first suit A. appealed and in the other S. only. During the pendency of A.'s appeal, S. died and his appeal abated and the judgment in that suit became final. Held that the hearing of A.'s separate appeal was barred.(4) Where a party agreed to be bound by the oath of certain persons, and an issue was thus decided, this was held not to be an adjudication which would have the effect of an estoppel in subsequent proceedings.(5) No finding upon a question not directly put in issue, and no opinion incidentally expressed, can be regarded as a final judgment.(6) The dismissal of a suit under sect. 102 of the former Code (corresponding with O. IX. r. 8) for non-appearance was not intended to operate in favour of the defendant as *res judicata*. It imposes, however, when read with sect. 103 of the former Code (corresponding with O. IX. r. 9), a certain disability on the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action.(7) Where a plaintiff appeared in a suit and went into evidence, but before the evidence was closed made default and the case was dismissed, there was held to be a bar.(8) There is no such thing known to the law as constructive estoppel, and if there were it would not satisfy the require-

(1) Petaperumala Chetti *v.* Murungandi Servaigaran, 18 M. 466 (1895).

(2) Ramnath Rai Chowdhari *v.* Bhagbat Mohapatro, W. R., Act X., 140 (1865); Shokhee Bewa *v.* Medhee Mundul, 9 W. R. 327 (1868); approved in Ramireddi *v.* Subbareddi, 12 M. 500 (1889); see also Pogha Mahtoon *v.* Gooroo Baboo Gunesh Ram, 24 W. R. 114 (1875). [The striking off a suit on the day of hearing, because neither plaintiff nor defendant is present, does not bar the plaintiff from suing again.]

(3) Ram Sewak Singh *v.* Nakched Singh, 4 A. 261 (1882).

(4) Anant Das *v.* Udai Bhan, 35 A. 187 (193).

(5) Keshava Tharagan *v.* Rudran Nambudri, 5 M. 259 (1882); dissented from in Sanyasi Baritya *v.* Artaswaro, 24 M. L. J. 321 (1913).

(6) Shib Nath Chatterjee *v.* Nubokissen Chatterjee, 21 W. R. 189 (1874); Ghela Ichharan *v.* Sankalchand Jetha, 18 B. 597 (1893); see Shib Charan Lal *v.* Raghu Nath, 17 A. 175 (1895).

(7) Chand Kour *v.* Partab Singh, 16 C. 98; L. R. 15 I. A. 156 (1888); see also Shankar Baksh *v.* Daya Shanker, 15 C. 422; L. R. 15 I. A. 66 (1887); Ramchandra Jivaji Tilve *v.* Khatal Mahomed Gori, 10 B. 28 (1852); Gobind Chunder Addya *v.* Afzul Rabbani, 9 C. 426 (1882); Ramchandra *v.* Bhikibai, 6 B. 477; Rungrav Ravji *v.* Sidhi Mahomed, 6 B. 482, 486 (1882); Ram Chandra *v.* Narringhacharya, 24 B. 251, 253 (1899).

(8) Roma Nath Das *v.* Mohesh Chander Pal, 9 C. W. N. 679 (1900).

nents of sect. 11. Where in a former suit between the same parties in which the ame claim upon title was made, a decree dismissed the suit, but the judgment n the former suit stated that it was left open to the plaintiff to sue again and hat no matters affecting the rights of the parties were decided between them, t was *held* that the prior decree was not a final decision within the meaning of the Code and the defence of *res judicata* was not maintained.(1) Where, though there has been a decision on other points, the matter of the second suit as literally not been determined in the previous suit, there can be as to it no *es judicata*.(2) The section does not apply where the former suit is withdrawn.(3) It has already been remarked that upon appeal a matter ceases o be *res judicata*. When a matter, although decided by the Court of first nstance or by the lower Appellate Court, is not decided by the last Court of Appeal, it has not been heard and finally decided. The fact of an appeal being in point of form dismissed is not conclusive as to every point decided by the lower Court.(4) As to the effect of withdrawal from a suit, see note below.(5) The dismissal of a claim after issue has been joined, because the plaintiff has failed to produce evidence to substantiate it, has the same effect as a dismissal founded upon evidence, and the subject-matter of such claim will be *res judicata*.(6) A subsisting judgment on an award is as binding as any other judgment.(7) As between the parties a decree arrived at after the taking of an oath on a question of fact in a case under the Oaths Act is none the less a final adjudication.(8) A judgment by consent is as effective an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested cause.(9) And where a Court has heard and determined

(1) Parsotam Gir *v.* Narbada Gir, 21 A. 505 (1899)

(2) Field, Ev. 289; Broughton, *op. cit.* 103, and cases there cited; so where no issue is raised and decided, or an issue is raised and the Court declines to decide it, there is, of course, no estoppel.

(3) Durdundyapa *v.* Malhar, 2 Bom. L. R. 871 (1900).

(4) Chunder Coomar Mitter *v.* Shib Sundari Dossee, 8 C. 631 (1882); 11 C. L. R. 22; Gungabishen Bhugut *v.* Raghoonath Ojha, 7 C. 381; 9 C. L. R. 34 (1881); Nilvaru *v.* Nilvaru, 6 B. 110 (1881); Emamoodeen Sowdaghur *v.* Shaikh Futteh Ali, 3 C. L. R. 447 (1878); Rajah Mokond Narain Deo *v.* Jonardan Dey, 15 W. R. 208 (1871); Caspersz, *op. cit.* 440, 344, 345; Field, Ev. 289, 290 As to an appeal putting an end to any finality in the decision of the lower Court, see Seosagar Singh *v.* Sitaram Singh, 24 C. 616 (1897).

(5) O. XXIII. *post*; Watson *v.* The Collector of Rajshahye, 13 M. I. A. 160, 170 (1869); Bunwari Das *v.* Muhammad Mashiat, 9 A. 690 (1887); Sukh Lal *v.* Bhikhi, 11 A. 187 (1888); Ram Charan Buhardur *v.* Reazuddin, 10 C. 857, 860 (1884); Caspersz, *op. cit.* 436-438; Field, Ev. 293, 234; O'Kinealy, Civ. Pr. Code, notes to s. 373.

(6) Marriot *v.* Hampton, 17 East, 269; ref. to in Field, Ev. 271; Watson *v.* The Collector of Rajshahye, 13 M. I. A. 170 (1869); Sahadeo Pandey *v.* Nokhid Pandey, 15 W. R. 573 (1871); Mofizooddeen *v.* Shaikh Amooddeen, 23 W. R. 58 (1875); Kartik Chandra Pal *v.* Sridhar Mandal, 12 C. 563, 565 (1886).

(7) Wazer Mathon *v.* Chani Singh, 7 C. 727; 9 C. L. R. 377 (1881); foll. in Vyankatesh Chimaji *v.* Sakharan Dait, 21 B. 465 (1896); see as to refusal to file an award, Muhammad Nawaz Khan *v.* Alam Khan, L. R. 18 I. A. 73 (1891). As to awards, see further, Caspersz on Estoppel, 235, 238.

(8) Ahmed *v.* Moidin, 24 M. 444 (1901); foll. in Sanyasi Baritya *v.* Artaswaro, 24 M. L. J. 321 (1913).

(9) *In re* South American and Mexican Co., 1 Ch. (1895) 37 [explaining Jenkins *v.* Robertson, L. R. 1 H. L. (Sc. App.), 117, 122, 125; ref. to in Minalal *v.* Karsteji, 30 B. 395, 403 (1906); and see The Bellcairn, L. R.

the case judicially, and there has been an appeal, which has been withdrawn owing to a compromise entered into by the parties, the original decision becomes a final decision and operates as a bar to a second suit.(1) When a decree is passed by consent of parties, the question whether or not the compromise on which such decree is based is valid, cannot be gone into on an appeal against that decree.(2) The Court, however, has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties. So a consent order which had been completed and acted upon, but without affecting interests of third parties, was set aside by the Court on the ground of common mistake.(3) The test for determining whether there is an estoppel in any particular case is whether the parties decided for themselves the particular matter in dispute and the matter was expressly embodied in the decree passed on the compromise.(4) Compromises of suits by Hindu females are to be dealt with upon the principles applicable to alienations by them.(5) The rulings as to the effect of *ex parte* and unexecuted decrees in subsequent suits (a question which has been considered principally in connection with rent suits) are conflicting.(6) An *ex parte* decree is, when final, *res judicata* only so far as the decision necessarily decided an issue, but nothing more is concluded. The conclusive effect is confined to the point actually decided.(7) Thus an *ex parte* decree for rent concludes nothing more than that so much rent was due at a certain time from the tenant to his landlord, and assuming that the plaint goes no further, and makes no claim for a declaration as to the rate of the rent, the defendant having a proper opportunity to meet the case, the rate of rent is not *res judicata*, even although the decree may recite or declare

10 P. D. 161; Aubhoyessury Dabee *v.* Gouri Sunkur Panday, 22 C. 860, 861 (1895), *arguendo*]; foll. in Nicholas *v.* Asphar, 24 C. 216, 237 (1896); Laksmishankar Devshankar *v.* Vishnuram, 24 B. 77 (1899); see Lala Shib Lal *v.* Lala Gouri Prasad, 2 C. W. N. 174 (1897); Lakshmi Ammal *v.* Tikaram Tovaji, 1 M. H. C. R. 240 (1863); Lakshmishankar *v.* Vishnuram, 24 B. 77 (1899); Uramkumarath Kannan Nayar *v.* Uramkumarath Penju Nayar, 5 M. 1 (1882); a decree passed in accordance with a compromise may be final under O. XXIII. r. 3, *post*.

(1) Vythilinga Muppanar *v.* Vijayatammal, 6 M. 43 (1882); as to decrees by consent dismissing a suit, see The Bellcairn, L. R. 10 P. D. 161; Broughton, *op. cit.* 102; and where the consent is that the action be discontinued, Owners of the Cargo of the *Kronprinz* *v.* Owners of the Cargo of the *Andalusia*, L. R. 12 App. Cas. 250.

(2) Behari Lal *v.* Majid Ali, 24 A. 138 (1901).

(3) Huddersfield Banking Co., Ld. *v.* Henry Lister & Son, Ld. (1895), 2 Ch. D. 273; as to the effect of a clause not contained in a petition of compromise being added in a consent decree, see Rameshwar Prosad Narain Singh *v.* Chandreshwar Prosad Narain Singh, 7 C. W. N. 880 (1903).

(4) Venkata Perumal *v.* Thatha Ramasamy, 35 M. 75 (1911); Behari Lal *v.* Daud Husein, 35 A. 240 (1913).

(5) Sant Kumar *v.* Deo Saran, 8 A. 365 (1886); Ram Kuber Pande *v.* Ram Dasi, 35 A. 428.

(6) Field, Ev. 294–296; Gaspersz, *op. cit.* 441–446; Broughton, *op. cit.* 97, 98; Maharaja Beerchander Manick *v.* Ramkishen Shaw (F. B.), 14 B. L. R. 370; 23 W. R. 128 (1874); Birchunder Manickya *v.* Hurrish Chunder Doss (F. B.), 3 C. 383 (1878); Modhusudan Shaha Mundul *v.* Brae (F. B.), 16 C. 300 (1889), where the cases will be found cited and discussed; and see Raj Kumar *v.* Alimuddi, 17 C. W. N. 627 (1912).

(7) Modhusudan Shaha Mundul *v.* Brae, *supra*.

the rate.(1) Such decrees generally will be held conclusive as to all matters which shall have been heard and decided on the merits. A defendant respondent cannot avoid the application of the principle of *res judicata*, by saying that he did not appear at the trial of the suit, and a plaintiff who has got an *ex parte* decree on proof of his title or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in court to protect his own interest.(2) An *ex parte* decree in a suit for rent operates as *res judicata* upon the question of relation of landlord and tenant.(3) A finding on an issue not necessary for the determination of the suit will not effect a *res judicata*. Where an issue is not necessary for the decision of the suit in which it is raised, the decree, couched in general terms, does not cover the finding on that issue, nor can the insertion of such finding in the decree give it the force of *res judicata*. The Code does not contemplate findings on issues being inserted in it, and there is no section in the Code which makes it necessary to appeal from the decree, because such finding has been inserted in it.(4) A decree in a maintenance suit is not final in the sense that the rate fixed can never be altered. Altered circumstances may justify a suit for reduction of maintenance or a suit for its increase. If there be such altered circumstances a previous decision will be no bar.(5) An order of the Small Cause Court, made in a proceeding under sect. 278 of the former Code, is an order made in a suit within the meaning of sect. 37 of the Presidency Small Cause Courts Act (XV. of 1882), and as such is final.(6) A possessory suit filed in the Mamlatdar's Court was dismissed by the Mamlatdar on the merits. The plaintiff thereupon filed another suit under sect. 9 of the Specific Relief Act in a Civil Court which allowed the claim and passed a decree in his favour. It being contended that the Mamlatdar's decree barred the second suit, it was held that the Mamlatdar's decision was not conclusive.(7) Where there are conflicting decisions, the last decision operates as a bar.(8)

Preclusion by rule (sect. 12).—See first paragraph of the notes to these sections.

Foreign judgments (sects. 13 and 14).—The provisions of sect. 13 have been rearranged, with a view to clearer statement, and are substantially the same as those of sect. 14 of the last Code, with the exception of the addition

(1) Modhusudan Shaha Mundul *v.* Brae (F. B.) 16 C. 360 (1889). As to whether a decision on a previous rent suit as to relationship of landlord and tenant will operate as *res judicata* on a subsequent suit for rent, see Article in 8 C. W. N. (No. 26) cexiv., and cases there cited.

(2) Biraj Mohini Dassi *v.* Srimati Chinta Moni Dasi, 5 C. W. N. 877 (1901).

(3) Raj Kumar *v.* Alimuddi, 17 C. W. N. 627 (1912).

(4) Ghela Ichharam *v.* Sankal Chand Jetha, 18 B. 597 (1893); see Shib Charan Lal *v.* Raghu Nath, 17 A. 174 (1895); Irawa *v.* Satyappa, 35 B. 38 (1910).

(5) Bangaru Ammal *v.* Vijayamachi Reddier, 22 M. 175 (1898).

(6) Deno Nath Batabyal *v.* Nuffer Chunder Nundy, 3 C. W. N. 591 (1899); this judgment was reversed on appeal upon grounds which rendered it unnecessary to decide whether the order was final under s. 37 of the P. S. C. C. Act; 4 C. W. N. 470, 473 (1900).

(7) Ramchandra *v.* Narsinhacharya, 24 B. 251 (1899), disapproving of Ramchandra *v.* Bhikabai, 6 B. 477 (1882).

(8) Mallu Mal *v.* Shamman Lal, 1 A. L. J. 123 (1904).

of clause (*a*) and the omission altogether of the last clause of the former section, as to which, see *post*. A foreign judgment is a judgment of a foreign Court; as to the meaning of which term, see notes to sect. 2, *ante*, and *ante* "Court." A foreign judgment may be used in two ways. It may be either pleaded by a defendant as *res judicata* by way of *defence* to the claim made against him, or a suit may be brought to *enforce* it. Sects. 13 and 14 recognize the effect of a foreign judgment as *res judicata*, the latter section providing that whereupon, foreign judgment is relied on, the production of the document duly authenticated is presumptive evidence that the Court which made it had competence to pronounce it. jurisdiction.

All judgments, whether domestic or foreign, if delivered by a Court having no jurisdiction are void.(1) As regards competency, a question arose as to the meaning of the words "*Court of jurisdiction competent to try such subsequent suit*" in connection with foreign judgments. In the case of domestic judgments these words, as has been already stated, mean a Court having concurrent jurisdiction with the Court trying the subsequent suit, whether as regards the pecuniary limit of its jurisdiction or the subject-matter of the suit, to try it with conclusive effect.(2) The same construction has been given also with regard to foreign judgments: it being held that the mere fact that the actual (second) suit could not have been tried in the first Court did not matter; it being enough if a suit of that *class* could have been tried if the subject-matter of it had been within the local limits of that Court's jurisdiction.(3) it has been held that the determination of an issue as to adoption in a suit brought in the Court of a Native State for the recovery of land was conclusive on that question in a suit brought in a British Indian Court for the recovery of property in British territory.(4) It has, however, been doubted whether this decision is correct in so far as it holds that exclusion on territorial grounds is not to be taken into account, it being pointed out, with reference to the contention, that otherwise Explanation VII. of the former Code (now sect. 14) would be deprived of all meaning; that there are many suits which are within the jurisdiction both of a foreign and domestic Court, to which that Explanation would attach.(5) The existence of jurisdiction will primarily be determined with reference to the law of the country in which that Court may be situate and from the Government whereof it may derive its judicial power.(6) The Courts of other countries, however, are not bound and generally not inclined to recognize the jurisdiction as sufficient when it is conferred or exercised against the general principles of international

(1) See Authors' Evidence Act notes to s. 44.

(2) See Babathat *v.* Nasharbhat, 13 B. at p. 228 (1888).

(3) Ib. [See comments on this case in Prithisingji *v.* Umedsingji, 6 Bom. L. R. 98, 102, 103 (1903).]

(4) Ib.

(5) Prithisingji *v.* Umedsingji, 6 Bom. L. R. 98, 103 (1903), *per* Sir Lawrence Jenkins, C.J. It is possible that the question of Foreign Courts' Judgments was overlooked when the section was amended so as to render competency of jurisdiction necessary in regard to the subsequent suit also. See as to jurisdiction, Hukm Chand, C. P. C. 207.

(6) Cartrigue *v.* Imrie, 4 E. & I. A. 448 C.; Bikrama Singh *v.* Bir Singh (1888), P. R. No. 191; Hukm Chand, C. P. C. 217.

law.(1) So in the under-mentioned case (2) it was held that the Baroda Court had no jurisdiction over the defendants who were British subjects residing in British territory.

The Indian Legislature, however, while recognizing foreign judgments as *res judicata*, did not adopt the view of the English Courts as to their absolute conclusiveness; (3) and qualified the general rule enacted in sect. 11 by a number of limitations embodied in sect. 13. *Res judicata*, in connection with foreign judgments, is only of limited extent. Jurisdiction and the existence of the other elements common to both domestic and foreign judgments were formerly both dealt with in sect. 11, but jurisdiction is now separately provide for in sect. 13 (*a*).

The other special limitations prescribed by sect. 13, in order that a foreign judgment may operate as *res judicata*, are—

1. It must have been given on the merits. So a judgment of dismissal of a suit, as barred by limitation, will not be deemed to be on the merits and therefore to operate as *res judicata*, except where that law not only bars the remedy but extinguishes the right itself.(4)

2. There must be no apparent mistake of International or Indian law.(5) In the under-mentioned case,(6) the Court relied on this clause in support of the view that the judgment of a Court having jurisdiction otherwise than in accordance with the general principles of International law would not be *res judicata*; but this clause has reference to the judgment itself and not to the question of jurisdiction, which is provided for in clause (*a*) and which must be dealt with on general principles. As appears from the words used, a mistake of fact does not bar the operation of *res judicata*, the judgment being a bar even though the foreign Court had come on the evidence to an erroneous conclusion as to the facts. Nor will a mistake as to the law of the country in which the judgment is passed, or of any country other than British India, affect the operation of the judgment as *res judicata*.(7)

3. It must not be contrary to natural justice. It is never advisable to limit the meaning of wide terms intentionally used by the Legislature. The words are wide enough, it has been said, to allow of an investigation into the moral rightness of the decision,(8) though they would not permit the Court to inquire into the merits on the simple ground that the conclusion drawn from the facts was erroneous. For such a case assumes a mere error in decision and not a contrariety to natural justice. The scope of the term has, however, as a matter of general practice, been restricted to narrower limits, being used in

(1) Hukm Chand, C. P. C. 219, 223; see Barry & Co. *v.* Appasami Pillai, 2 M. 407 (1880), and the leading decision, Gurdyal Singh *v.* Rajah of Faridkote, 22 C. 222 (1894), and other cases cited *post*. See Flint on *Res Judicata*, 21 Encyc. Law, 281. As to accessory suits, see Kashee Nath *v.* Deb Kristo Ramanooj, 16 W. R. 240 (1871); Bombay Coast and River Steam N. Co. *v.* Léné Heleux, 4 B. H. C. R., O. C., 149 (1867).

(2) Lakshmishankar *v.* Vishnuram, 24 B. 77 (1899).

(3) See Hukm Chand, Res. Jud. 578.

(4) See Hukm Chand, Res. Jud. 580, C. P. C., p. 225.

(5) Ib., 582, C. P. C., p. 226.

(6) Hinde *v.* Ponnath, 4 M. 358 (1880).

(7) See Hukm Chand, C. P. C. 227; Res Jud. 583-585.

(8) Ib., C. P. C. 228-231; Res Jud. 585, 594.

reference rather to the conduct or mode of procedure of the foreign Court than to the merits of the particular case.(1) Thus a decision passed without reasonable notice to the persons concerned is contrary to natural justice.(2) This view is adopted by the amendment, that it is the proceedings leading to the judgment which are to be looked at.

4. The judgment must not have been obtained by fraud. All judgments, whether domestic or foreign, are void if obtained by fraud or collusion.(3) In the case of domestic judgments it has sometimes been held that the fraud for which they may be set aside must be extrinsic to the matter tried in the cause and not merely that consisting in false evidence or forged documents submitted to the Court.(4) The rule has been held to apply to foreign judgments also.(5) As regards these judgments, however, the weight of opinion appears to be in favour of the contrary view.(6)

5. It must not sustain a claim founded on a breach of any law in force in British India. If so, the judgment will not be enforced, even though the defect be not apparent on the face of the proceedings.(7) This clause refuses recognition to every foreign judgment which recognizes a legal relation condemned in this country. But it has been held that a domestic judgment is *res judicata* even when its effect is to sanction what is illegal in the sense of being prohibited by Statute.(8)

Foreign judgments *in rem* stand on a footing somewhat different from that of domestic judgments *in rem* as well as from that of foreign judgments *in personam*. Their recognition and enforcement is still void of express legislative sanction, as while they are beyond the rule of *res judicata* enunciated in these sections, there is nothing in sect. 41 of the Evidence Act to directly indicate that its provisions relating to judgments *in rem* are to be construed so as to include foreign judgments. But it is apprehended that in analogy with the practice of the English Courts, such judgments given in the exercise of probate, matrimonial, admiralty, or insolvency jurisdiction will, speaking generally, receive in India the same recognition as is afforded to domestic judgments of the same character.(9) While as in the case of other judgments they are no less binding because erroneous, foreign judgments *in rem* are generally

(1) See Hinde *v.* Ponnath, 4 M. 359-365 (1880).

(2) Bangarusami *v.* Balasubramanian, 13 M. 496 (1890); Jones *v.* Zahru Mal (1889), P. R. No. 66 [absence of actual notice]; London, Bombay, etc., Bank *v.* Burjorji, 5 B. 223 1881) [no *de facto* notice or what could be eemed equivalent to it]; Bikrama Singh *v.* Bir Singh (1888), P. R. No. 19 [notice must e given of institution of suit and probably otice a reasonable time before judgment, but he question of the irregularity of the rocedure in serving process cannot be iscussed].

(3) See Authors' Evidence Act, notes to 44.

(4) Ib.

(5) Castrigue *v.* Behrens, 30 L. J. Q. B. 163.

(6) Abouloff *v.* Oppenheimer, 10 Q. B. D. 295; Vadala *v.* Lawes, 25 Q. B. D. 310; ref. Nistarini Dassi *v.* Nundo Lal Bose, 26 C. at pp. 910-913 (1899); and see these English cases commented on in Hukm Chand's C. P. C. 233, 234.

(7) Duchess of Kingston's case, Sm. L. C., 9th ed., 812; Rousillon *v.* Rousillon, 14 Ch D. 351.

(8) Chaganlal *v.* Bai Harka, 33 B. 479 (1909).

(9) See Authors' Evidence Act, notes to s. 41.

open to the same objections as those *in personam*, such as want of jurisdiction, natural justice, or fraud.(1)

While the rules applicable to the class of cases where the defendant sets up a foreign judgment by way of *defence* are contained in sect. 13; yet apart from the amendment of that section, introduced by sect. 5 of Act VII. of 1888, no statutory provision existed with reference to suits brought to *enforce* foreign judgments. That amendment, however, recognized the previously existing right to bring a suit on a foreign judgment, and in fact such judgments have been frequently enforced by suit in this country, being considered to impose a duty or obligation which the Courts are bound to give effect to.(2) In respect of the latter class of suits, the general rules are that the judgment must be an adjudication upon the actual merits,(3) final and conclusive,(4) and may be impeached upon the ground that the Court was without jurisdiction to try the case; (5) or that the defendant had not been summoned, and had had no opportunity of making a defence,(6) or on the ground of fraud (7)

(1) Hukm Chand's Res Jud. 667.

(2) Nallatambi *v.* Ponnusami, 2 M. 400, at p. 403 (1879); Bhavanishankar *v.* Pursadri, 6 B. 292 (1882); Nalla Karuppa Settiar *v.* Mahomed Iburam Saheb, 20 M. 115 (1896); Hukm Chand's Res Jud. 512, 570; Caspersz, Estoppel, 459. An act of State, however, cannot be made the basis of an action, and be regarded as a foreign judgment: Sriman Goswami *v.* Goswami, 17 B. 620 (1878).

(3) Sreehuree Bukshee *v.* Gopal Chunder Samunt, 15 W. R. 500 (1871).

(4) Nouvion *v.* Freeman, L. R. 15 Ap. Ca. 1; but the pendency of an appeal in a foreign Court is no bar to a suit upon the judgment which is the subject of appeal, ib. 13; see Patrick *v.* Shedden, 2 E. & B. 14.

(5) As to jurisdiction, see Christien *v.* Delanney, 26 C. 931 (1899); s. c., 3 C. W. N. 614; Nalla Karuppa Settiar *v.* Mahomed Iburam Saheb, 20 M. 112 (1896), and Schibsby *v.* Westenholz, L. R. 6 Q. B. 155, 161; referred to and explained in Gurdyal Singh *v.* Raja of Faridkot, 22 C. 222 (1894); s. c., L. R. 21 I. A. 171; Mathappa Chetti *v.* Chellappa Chetti, 1 M. 196 (1876); Gurdyal Singh v. Raja of Faridkot, *supra;* Bangarusami *v.* Balasubramanian, 13 M. 496 (1890); Syed Moazim Hossein *v.* Robinson, 5 C. W. N. 741; s. c., 28 C. 641 (1900); Hadjee Kasseem *v.* Hadjee Isup, 6 C. W. N. 829 (1902); Mathappa Chetti *v.* Chellappa Chetty, 1 M. 196 (1876); as to the effect of appearance and voluntary waiver of objection to jurisdiction, Kandoth Mammi *v.* Neelancherayil, 8 M. H. C. R. 14 (1875); Fazal Shau Khan *v.* Gafar Khan, 15 M. 82 (1891); Nallatambi Mudaliar *v.* Ponnusami Pillai, 2 M. 400 (1879); Kaliyugam *v.* Chokalinga, 7 M. 105 (1883); where the submission to jurisdiction is not voluntary, see Parry & Co. *v.* Appasami Pillai, 2 M. 407 (1880). Where there is no submission, see Gurdyal Singh *v.* Raja of Faridkot, *supra;* Sivaraman *v.* Iburam, 18 M. 327 (1895). As to the transactions of Joint Stock Companies formed for the purpose of carrying on business in a foreign country, see Nallatambi Mudaliar *v.* Ponnusami Pillai, *supra;* Edulji Burjorji *v.* Manekji Sorabji Patel, 11 B. 241 (1886); The London, Bombay, etc., Bank *v.* Hormasji, 8 B. H. C. R., O. C., 200 (1871) [call order treated as foreign judgment]; The London, Bombay, etc., Bank *v.* Burjorji, 5 B. 223 (1881); The London, Bombay, etc., Bank *v.* Govind Ramchandra, 9 B. 346 (1885).

(6) Ochsenhein *v.* Papelier, *post, per* Mellish, L.J.; Sreehuree Bukshee *v.* Gopal Chunder Samunt, 15 W. R. 500 (1871); Syed Moazim Hossein *v.* Robinson, 5 C. W. N. 741; s. c., 28 C. 641 (1901); Hadjee Kaseem *v.* Hadjee Isup, 6 C. W. N. 829 (1902); Hukm Chand, Res Jud. 585; and see as to notice, the cases relating to companies cited, *ante.*

(7) Sreehuree Bukshee *v.* Gopal Chunder Samunt, 15 W. R. 500 (1871); Duchess of Kingston's case, 2 Sm. L. Ca., 9th ed., 822; the dicta in which apply to foreign as to English tribunals (Ochsenhein *v.* Papelier, *post*); Ochsenhein *v.* Papelier, L. R. 8 Ch.

in the judgment.(1) It may, in fact, be generally said that whatever objections are declared by the Legislature to be admissible against a foreign judgment produced by a defendant in bar to an action are equally admissible against a foreign judgment produced by a plaintiff either to found or support an action.(2) There is, however, a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit under sect. 11, and a case in which a plaintiff seeks to enforce a foreign judgment. In the former it may fairly be supposed that the parties submitted to the jurisdiction of the foreign Court.(3) Jurisdiction being properly territorial and attaching, with certain restrictions, upon every person permanently or temporarily resident within the territory, does not follow a foreigner, after his withdrawal thence, living in another State. As to land within the territory, jurisdiction always exists, and may exist, over moveables within it; and exists in questions of *status*, or succession, governed by domicile. But no territorial legislation can give jurisdiction, which a Court of a foreign State ought to recognize, over an absent foreigner owning no allegiance to the State so legislating. In a personal action, to which none of the above cases of jurisdiction apply, a decree pronounced by a Court of a foreign State *in absentem*, the latter not having submitted himself to its authority, is by international law a nullity. Not to the Courts of the State in which the cause of action has arisen, nor in cases of contract to those of the *locus solutionis*, should resort be had by the plaintiff, but to the Courts of the State in which the defendant resides, the Courts of the latter State having jurisdiction in all personal actions.(4) Though, as a general rule, a Court can exercise jurisdiction over a foreigner only if he is resident within the limits of its territorial jurisdiction, and though natives of British India are foreigners, yet they own allegiance to the common Sovereign of England and British India, and are subject to the supreme legislative authority in the British Empire. If, therefore, the supreme Legislature in the British Empire authorizes an English Court in any class of cases to exercise jurisdiction over a non-resident foreigner by reason of the cause of action arising within its jurisdiction, and the foreigner is a native of British India, he cannot treat the judgment passed as a nullity, merely because he did not reside within the jurisdiction of the Court which passed it. Order XI. r. 1 (*e*), under the English Judicature Act, constitutes a Legislative Act of the sovereign power regulating the jurisdiction in the case of a British subject resident in British India and outside the ordinary territorial jurisdiction of the English Courts, and gives the latter jurisdiction over such British subjects, assuming that the particular case falls within the order. But it is open to a defendant to show that this is

Ap. 695; Vadala *v.* Lawes, L. R. 25 Q. B. D. 310; Abouloff *v.* Oppenheimer, L. R. 10 Q. B. D. 295; Wallingford *v.* Mutual Society, L. R. 5 Ap. Ca. 701 [proof of fraud]; Cammel *v.* Sewel, 3 H. & N. 617, 646; Boloram *v.* Kameenee, 4 W. R. 108 (1865) [limitation].

(1) Sreehuree Bukshee *v.* Gopal, *supra*.

(2) Bikrama Singh *v.* Bir Singh (1888), P. R. No. 191, p. 506; Hukm Chand, Res Jud. 578, 579.

(3) Christien *v.* Delanney, 26 C. 931 (1899).

(4) Gurdyal Singh *v.* Raja of Faridkot, 22 C. 222 (1894); followed in Nalla Karuppa Settiar *v.* Mahomed Iburam Saheb, 20 M. 112 (1896); Christien *v.* Delanney, 26 C. 931 (1899); s. c., 3 C. W. N. 614.

not so, and that the English Court had in fact no jurisdiction.(1) It is not sufficient ground for impugning the judgment of a foreign Court, which ordinarily proceeds in accordance with the recognized principles of judicial investigation, to show that in the particular instance its procedure may have been irregular. It may be assumed that the procedure was regular, but if there was irregularity, it would not be sufficient ground for refusing respect to the judgment.(2)

On the other hand, as has been already observed, the general rule is that a Court which entertains a suit on a foreign judgment cannot institute an inquiry into the merits of the original action or the propriety of the decision.(3) This rule, however, was in the last Code abrogated with reference to the judgments of certain foreign Courts in Asia and Africa by the enactment in sect. 5 of Act VII. of 1888, amending sect. 13 of the Code, and which enactment was passed with reference to the arguments urged by the Bombay High Court (4) for distinguishing the judgments of the Courts of native States from those of other foreign Courts. So where a suit was brought in a Court in British India upon the basis of a decree of the Council of Regency of the State of Rampur, it was held that the Court was empowered by sect. 14 (corresponding with sect. 13) of the Code of Civil Procedure, as amended by Act VII. of 1888, to consider the merits of the case in which the decree of the Council of Regency had been passed.(5) It was held in effect by the Madras High Court that this amendment did not alter the general rule already mentioned, except by vesting in the Court a judicial discretion to inquire into the merits of any case in which it appeared that no confidence was to be reposed in the judgment of a foreign Court, being one of those which are mentioned in the amended section. A party to an action on such a judgment had not a right to have the case reheard. All that the section said was that the Judge was not to be precluded from inquiry into the merits.(6) The last paragraph of the corresponding

(1) Syed Moazim Hossein *v.* Robinson, 5 C. W. N. 741; s. c., 28 C. 641 (1901).

(2) Nallatambi Mudaliar *v.* Ponnusami Pillai, *supra*, at p. 406; as to limitation, *vide* ib.; and Parry & Co. *v.* Appasami Pillai, *supra*.

(3) Bhavanishankar Shevakram *v.* Pursadri Kalidas, 6 B. 292 (1882); Boloram *v.* Kameenee, 4 W. R. 108 (1865); Henderson *v.* Henderson, 6 Q. B. 288, 289; Bank of Australasia *v.* Nias, 16 Q. B. 717, 735; Scott *v.* Pilkington, 2 B. & S. 11, 41; Ochsenhein *v.* Papelier, L. R. 8 Ch. Ap. 695; Godard *v.* Gray, L. R. 6 Q. B. 139; Bank of Australasia *v.* Harding, 9 C. B. 661; De Cossé Brissac *v.* Rathbone, 6 H. & N. 801.

(4) Bhavanishankar Shevakram *v.* Pursadri Kalidas, 6 B. 292 (1882); Himmat Lal *v.* Shivajirav, 8 B. 533 (1884); in which it was held that no suit was maintainable founded upon the judgment of a Court of a native State. The contrary opinion prevailed in the Madras Court: Sama *v.* Annamalai, 7 M. 164 (1883), and has, since the amendment of the section, been adopted by the Bombay High Court: Mayaram *v.* Ravji, 24 B. 86 (1899) [a suit will lie on the judgment of a Court in a Native State]; s. c., 1 B. L. R. 539, where the preceding cases are reviewed. And in Gurdyal Singh *v.* Raja of Faridkot, 22 C. 222 (1894), the Privy Council held that there was no ground for supposing that no suit will lie upon the judgment of recognized foreign Indian States. See notes to s. 9. The last paragraph to s. 14 of the former Code was added to enforce the view of the Madras High Court. As to execution, see s. 113, *post*.

(5) The Collector of Moradabad *v.* Harbans Singh, 21 A. 17 (1898).

(6) Fazal Sahu Khan *v.* Gafar Khan, 15 M. 82 (1891). See also The Collector of Moradabad *v.* Harbans Singh, 21 A. 17 (1898).

section in the last Code has been now omitted, and no distinction now exists between the judgments of Asiatic and African Courts and other foreign Courts. Where a decree is obtained upon a foreign judgment it is to be executed according to the provisions of the Code.(1) The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree.(2) Sect. 112 provides for the execution of decrees of Courts established by the Government of India in Native States, and sect. 113 allows of the execution in particular instances, upon the permission of the Governor in Council, of the decrees of other Native Courts as if they had been made by the Courts in British India.

It is a well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of State Government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly, no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country.(3)

Interlocutory orders and orders in execution proceedings.—Sect. 11 is not exhaustive of the effects of the principle of *res judicata*.(4) These orders, if not appealed from, are binding upon the parties in all subsequent proceedings in the same suit. Though sect. 11 of the Code does not in terms apply to these orders, yet the principle which underlies it is equally applicable to them as to regular suits. The Privy Council, speaking of such an order, held that, "It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends, not upon sect. 13 of Act X. of 1877, but upon general principles of law. If it were not binding there would be no end to litigation." (5) The principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue which, in that suit or on the execution proceedings in that suit, had been previously determined.(6) Orders in execution proceedings, if not appealed from,

(1) Kandasami Pillai *v.* Moidin Saib, 2 M. 337 (1880).

(2) Fakuruddin Mahomed Assan *v.* Official Trustee of Bengal, 7 C. 82 (1881).

(3) Huntington *v.* Attrill (1893), A. C. at p. 155.

(4) Manchharam *v.* Kalidas, 19 B. 826 (1894).

(5) Ram Kirpal *v.* Rup Kuari, 6 A. 269; L. R. 11 I. A. 37 (1883); and see Krishen Sahai *v.* Aladad Khan, 14 A. 64, 66 (1891); Bandey Karim *v.* Romesh Chunder, 9 C. 65, 67 (1882); Mungul Pershad Dichit *v.* Grija Kant Lahiri Chowdry, 8 C. 51; L. R. 8 I. A. 123 (1881); Beni Ram *v.* Nanu Mal, 7 A. 102; L. R. 11 I. A. 181 (1884); cases cited in Caspersz, *op. cit.* 349-351; Field, Ev. 296, 297; Lakshmanan Chetti *v.* Kuteayan Chetti, 24 M. 669 (1901); Sheoraj Singh *v.* Kameshar Nath, 24 A. 28 (1902); Nabi Muhammad *v.* Jwala, 27 A. 148 (1904). In Bai Meherbai *v.* Magan Chand, 29 B. 96 (1904), the execution proceedings which were held a bar were in a former suit. As to awards, see Caspersz, 235, 236; Coventry *v.* Tulshi Prasad, 8 C. W. N. 672 (1904).

(6) Behari Lal *v.* Majid Ali, 24 A. 138 (1901); Vithoba *v.* Tejiram, 14 Bom. L. R. 264 (1912).

are binding upon the parties to the suit in all subsequent proceedings in that suit, on principles analogous to those of *res judicata* strictly so called. It is, therefore, necessary to constitute a bar that there should be a hearing and final decision. Where an application for execution is allowed to be withdrawn, the matters in dispute are not heard and decided. There is, therefore, no *res judicata*.(1) Though a decree does not in terms give a certain relief, yet if it is construed in orders passed upon it as having given that relief, it is not competent to the Court on a subsequent application to treat those orders as erroneous and put another construction on the decree.(2) Sect. 47 differs from sect. 11 in this respect, that the latter section bars not only the trial of a suit or issue, where the suit or issue had been previously heard and determined, but also the trial of an issue which should have been raised in a previous suit by either party. When an issue arising out of the execution of a decree has not been raised and determined under sect. 47, there is nothing in that section to prevent a defendant, in a separate suit subsequently brought, from raising that issue in that suit.(3) For a case where a previous application for execution was refused and judgment-debtor's objection as to limitation disallowed, and as to the effect of such an order in a subsequent application for execution, see below.(4) A judgment-debtor cannot question the right of a decree-holder to apply for execution when execution has been on previous occasions applied for by the latter, and granted by the executing Court.(5) In the under-mentioned case.(6) it was held that though the analogy furnished by sect. 11 could not be altogether left out of sight in the application there dealt with, yet the Court ought to facilitate inquiries which are necessary for the purpose of carrying out decrees passed by it, and to accept with readiness any information which shows that the litigants have disregarded any part of the Court's decree. It would be wrong to dismiss an application made with the above purpose, simply because the applicant may have made the same endeavour without success in another proceeding.

A witness in a proceeding under sect. 145 of the Criminal Procedure Code had asked for his costs in the Magistrate's Court but had been refused and was referred to a civil suit. On his bringing such suit it was held that there was no adjudication, no issues, no contesting parties, and that therefore the principle of *res judicata* did not apply.(7)

The grant of letters of administration by one High Court does not prevent another High Court from entertaining a petition for probate.(8)

(1) Hari Ganesh *v.* Yamunabai, 23 B. 35 (1897). In Bhavanishankar *v.* Naranshankar, 23 B. 536 (1899), it was held, with reference to s. 244 of the former Civil Procedure Code (now sect. 47), that the Judge could and should have acted in the execution proceedings upon the determination he had come to upon the same point in the suit: Vithoba *v.* Tejiram, 14 Bom. L. R. 264 (1912).

(2) Venkatanarasimha Naidu *v.* Papammah, 19 M. 54 (1895).

(3) Nil Kamal Mukerjee *v.* Jahnabi Chowdhurani, 26 C. 946 (1899).

(4) Bholanath Dass *v.* Prafulla Nath Kundu Chowdhry, 28 C. 122 (1900); dist. in Vyapuri *v.* Chidambara, 24 M. L. J. 26 (1912).

(5) Umrao Singh *v.* Lachmi Narain, 1 A. L. J. 80 (1903).

(6) Hari Narayan *v.* Moro Narayan, 4 B. L. R. 960 (1902).

(7) Nemai Chandra Ghose *v.* Ajahar Chowdhury, 8 C. W. N. 178 (1903).

(8) In the goods of Charlotte Rolgers, 8 C. W. N. clxxiv. (1904).

In a suit for probate, the caveators assailed the whole of the will on the ground of undue influence, but the probate Court granted probate disallowing the objection. Held, that in a subsequent suit it was not competent for the caveators to show that any particular clause in the will had been inserted through undue influence.(1)

PLACE OF SUING.

15. Every suit shall be instituted in the Court of the lowest grade competent to try it.

Court in which suits to be instituted.

"**Shall be instituted.**"—There is no provision either in the various Civil Court Acts or in the Code prescribing a minimum jurisdiction as there is prescribing a maximum jurisdiction. A superior Court is by this section forbidden from trying a suit cognizable by an inferior Court, not on account of any inherent incompetency to try it, but on grounds of public convenience and economy. It has been thought that this section prescribed a minimum limit of jurisdiction, and that, for instance, a Subordinate Judge would have no jurisdiction to try a suit which, owing to its value, was triable by a Munsif. But it has been held that this section refers to procedure only, and regulates the practice of the Courts, but does not deprive any Court of jurisdiction which it may otherwise possess.(2) The section is merely directory, and does not oust the jurisdiction of a Subordinate or District Judge; (3) and the institution of a suit cognizable by a lower Court in a Court of higher jurisdiction is merely an irregularity which does not affect the jurisdiction of the Court (4) or the merits of the case (5) and such as was covered by sect. 578 of the former Code.(6)

As to Lower Burma, see Lower Burma Courts Act, VI. of 1900; Central Provinces, sect. 16, Act XVI. of 1885; Punjab, Act XVIII. of 1884; Ajmere, sect. 25 of the Ajmere Courts Regulation, I. of 1877.

(1) Nuzhat-ud Doula Abbas Hossein *v.* Mirza Kurratulain, 31 C. 186 (1903).

(2) See following notes. The same view was taken under the Code of 1859: Russick Chunder Mohunt *v.* Ram Lall Shaha, 22 W. R. 301 (1874); Joy Kishen Das *v.* Turnbull, 24 W. R. 137 (1875) [but the plaintiff should not be allowed any more for costs than he could have recovered if he had sued in the right Court]; Sufeeoollah Sircar *v.* Begum Bibee, 25 W. R. 219 (1876) [the Judge should, however, if he find the suit to be triable by a lower grade Court, send it to that Court]; Masaoollah Khan *v.* Ram Lall Agurwollah, 6 C. 6 (1880); Hukm Chand, Res Jud. 284; Tangor *v.* Jaladhar, 14 C. W. N. 322 (1909).

(3) Nidhi Lal *v.* Mazhar Husain, 7 A. 230 (1884); Krishnasami *v.* Kanakasabai, 14 M. 183 (1890). It appears, however, to have been assumed in Velayudam *v.* Arunachala, 13 M. 273 (1889), that the jurisdiction of the Higher Court was excluded, the objection to the jurisdiction having been taken for the first time on second appeal; but see Ramayya *v.* Subbarayudu, 13 M. 25 (1889).

(4) Matra Mondal *v.* Hari Mohun Mullick, 17 C. 155 (1889); Ram Narain Singh *v.* Miria Koery, 25 C. 46, 48 (1897).

(5) Augustine *v.* Medlycott, 15 M. 241, 246 (1892).

(6) Matra Mondal *v.* Hari Mohun Mullick, 17 C. 155 (1889); Najib Beg *v.* Jodha (1888), P. R. No. 184, cited in Hukm Chand, C. P. C. 240.

Court.—The term "Court of the lowest grade" refers only to Courts to which the Civil Procedure Code is applicable.(1) It has been therefore held in Madras that Small Cause Courts had concurrent jurisdiction with Courts of Village Munsifs to hear suits which are cognizable by the latter.(2)

"**Lowest grade.**"—Throughout the country there are Courts of different grades having jurisdiction in suits of different amounts in certain prescribed local areas. The pecuniary jurisdiction must be determined with reference to the various Acts constituting the Courts and the question of the valuation of particular suits, in order to ascertain within the jurisdiction of which Court they fall, by reference to the Court Fees and Valuation Act, and the cases decided thereunder, to which reference has been made in the notes to sect. 9, *ante*, "*Pecuniary Jurisdiction.*" Sect. 144 of the Bengal Tenancy Act was held to be controlled by sects. 15 and 17 of the former Civil Procedure Code. A suit for rent is therefore to be instituted, subject to pecuniary limitations, in the Court of the lowest grade competent to try it.(3) Where there were two plaintiffs, one of whom should have sued, if sole plaintiff, in the Subordinate Judge's Court as the Court of lowest grade, and the other could, by reason of the provisions of Act XX. of 1863, only sue in the District Court, it was held that as it was competent for the plaintiffs to join, this section did not apply so as to prevent the first plaintiff from joining with the second in instituting the suit in the District Court.(4)

"**Competent to try.**"—Competency here means jurisdiction. The competency of a Court depends upon the nature or subject-matter of a suit, and upon the local and pecuniary extent of the Court's jurisdiction. As regards the first, certain Courts are Courts of special jurisdiction, inasmuch as some classes of cases involve disputes with which superior or specially experienced tribunals are particularly familiar, and which can more satisfactorily be disposed of by them: such as Revenue, Admiralty, Probate, Divorce, Patent, Insolvency Courts, and the like. Further, cases of importance affecting considerable interests or involving questions of intricacy are left to be determined by the higher grade or superior Courts.(5) So suits for damages for the infringement of the exclusive privilege to an invention or of a copyright in a design under the Inventions and Designs Act,(6) or, for damages for the infringement of the copyright in books,(7) have been specially made cognizable only by District Courts. So suits under sect. 92, *post*, can be instituted only in a High Court or District Court. Miscellaneous proceedings unconnected with suits are generally triable outside the Presidency towns by District Courts, though sometimes Subordinate Courts are empowered to

(1) Mirkhan *v.* Kadarsa, 13 M. 145 (1889).
(2) Ib.
(3) Fazlur Rahim *v.* Dwarka Nath Chowdhry, 30 C. 453 (1903); s. c., 7 C. W. N. 402.
(4) Narayana *v.* Kumarasami, 23 M. 537 1899).
(5) Hukm Chand, C. P. C. 238; Res. Jud. 281.
(6) Act V. of 1888, ss. 29, 57.
(7) Hameedoollah *v.* Mahomed Asghur Hossein, 6 C. 499 (1880); Ledgard *v.* Bull, 9 A. 191 (1886); s. 7, Act XX. of 1847, as amended by Act XII. of 1876.

dispose of them on a reference by the District Court.(1) And in Bombay the District Judge can alone take cognizance of suits in which the Government or any officer of Government in his official capacity is a party.(2) So in Madras, a suit by a zemindar for the dismissal of a *zemindari karnam* cannot be entertained by a District Munsif, such suit being cognizable only by a Subordinate or, if none, a District Judge.(3) On the other hand, cases of easy settlement and minor importance are relegated to petty tribunals or to special Courts, such as Small Cause Courts or Village Munsifs' Courts. See generally as to jurisdiction over the subject-matter and persons, the notes to sect. 9, *ante*, and the same also as to locality of jurisdiction, which is more particularly dealt with in the next four sections and the notes thereto. The present section has reference mainly to the pecuniary jurisdiction of Courts, the limitations of which, in regard to different grades of civil Courts, vary in the several provinces of British India. See notes to sect. 9, *ante*.

16. Subject to the pecuniary or other limitations prescribed by any law, suits—

Suits to be instituted where subject-matter situate.

(*a*) for the recovery of immoveable property, *with or without rent or profits*,

(*b*) for the partition of immoveable property,

(*c*) for the foreclosure, *sale* or redemption *in the case* of a mortgage of *or charge upon* immoveable property,

(*d*) for the determination of any other right to or interest in immoveable property,

(*e*) for compensation for wrong to immoveable property,

(*f*) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, *where* the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of

(1) See s. 26, Succession Certificate Act, 1889; Bengal Civil Courts Act, XII. of 1887, as regards Probate and Administration.

(2) Bombay Civil Courts Act, XIV. of 1869, s. 32, as amended by s. 15, Bombay Revenue Jurisdiction Acts, X. of 1876; s. 3, Act XV. of 1880; Act XII. of 1891; but not where the defendant official is sued as a private person: Gopi Mahableswar *v.* Sheso, 12 B. 358 (1887); as to suits against a municipality: Ahmedabad Municipality *v.* Mahamad Jamal, 3 B. 146 (1878); suits to which Collector is a party: Musa Miya Saheb *v.* Sayad Gulam, 7 B. 100 (1882).

(3) Venkatanarasimha *v.* Suryanarayana, 12 M. 188 (1888).

whose jurisdiction *the defendant* actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section "property" means property situate in British India.

"Pecuniary or other limitations."—See as to these, notes to sects. 9 and 15, *ante*.

Scope of section.—This section deals with local or territorial jurisdiction, which in the case of real actions depends on the situation of the property in litigation, and sect. 20 deals with personal actions which depend on the place of accrual of the cause of action, or the residence of the defendant. The general rule of local jurisdiction, of which this section is an embodiment, is that immoveable property is exclusively subject to the laws and jurisdiction of the Courts of the country in which it is situate. It follows from this that no other laws or Courts can affect it. As expressly stated in the *Explanation*, the Courts of this country have, subject to the proviso, no jurisdiction in respect of immoveable property situate outside British India.(1) But all property which has a foreign origin is not always outside the jurisdiction of Courts of this country.(2) Where, however, a suit was brought in the Court of the Subordinate Judge of Mirzapur for redemption of lands lying within that district, but included in the same mortgage with other lands lying within the family domains of the Maharajah of Benares, it was held that as the Court had jurisdiction to entertain the suit in respect of the immoveable property in Mirzapur, that jurisdiction could not be ousted because in the course of the trial of the suit it became necessary incidentally to decide, for the purposes of the suit, questions relating to mortgaged property held by the defendants outside the jurisdiction, in order to determine whether the plaintiff had a right to recover the mortgaged property situated in Mirzapur.(3)

This section does not apply to the original civil jurisdiction of the Presidency High Courts, which are governed by clause 12 of the Letters Patent, which empowers them to try suits for land or other immoveable property if such land or property shall be situated either wholly or, in case the leave (4) of the Court shall have been first obtained, in part, within the

(1) See Hukm Chand, Res Jud. 324, 340; Prem Chand Dey *v.* Mokhoda Debi, 17 C. 699, 703, F. B. (1890); Raghu Nath Das *v.* Kakkan Mal, 3 A. 568 (1881); Keshav *v.* Vinayak, 23 B. 31 (1897). So a Court cannot declare a charge on property wholly outside its jurisdiction: Gudri Lal *v.* Jagannath Ram, 8 A. 117 (1886); and the decree can only be given effect to as a money decree: ib.; Mahomed Khuleel *v.* Sona Kooer, 23 W. R. 123 (1874). See Baldeo Doss *v.* Mool Kooer, 2 N. W. P. 19 (1870). In Kashinath *v.* Anant, 2 B. L. R. 47 (1869), the suit was held to be excluded by the explanation, and therefore not to fall within the terms of the section.

(2) Kashinath *v.* Anant, *supra*.

(3) Girdhari *v.* Sheoraj, 1 A. 431 (1877); and see Bolakee *v.* Thakoor, 5 C. 928 (1880).

(4) As to leave generally, see the following cases: It must be obtained before the institution of the suit: Abdul Hamed *v.* Promothonath Bose, 1 Ind. Jur. N. S. 218; Rampurtab *v.* Premsukh, 15 B. 96, 97 (1890); the leave so given is in respect of the cause of action stated in the plaint and does not cover an amended plaint: Rampurtab *v.* Premsukh, 15 B. 93 (1890); and where a new defendant is

local limits of the ordinary original jurisdiction of the High Courts. The High Courts have therefore jurisdiction if the land is in part within the jurisdiction.(1) As to what suits are deemed to be "*for land*," see *post*.

Immoveable property.—As to the meaning of this expression, see notes to sects. 2, 4, *ante*. The following have been held to be such: lands; houses; and such other things as are physically incapable of being removed; incorporeal hereditaments not of a purely personal nature; rights of common, way, and other profits in *alieno solo*; rents, pensions, and annuities secured upon land, but not pensions and annuities not so secured; (2) *vaishashan* allowances charged on revenues of certain villages; (3) an easement; (4) standing crops; (5) a tree standing on land; (6) the life-interest of a widow on income arising from

added fresh leave to sue may be necessary: Rampurtab *v.* Foolibai, 20 B. 767, 772, 774 (1896); Foolibai *v.* Rampurtab, 17 B. 466 (1893); it is not a mere formal order or an order regulating procedure, but one giving jurisdiction, Rampurtab *v.* Premsukh, *supra*, at p. 97; Hadjee Ismail *v.* Hadjee Mahomed, 13 B. L. R. 91 (1871); it must be distinctly sought and obtained, and cannot be implied from the fact that the plaintiff has leave to sue *in formâ pauperis*: Juiram *v.* Atmaram, 4 B. 182 (1880); the granting of leave is a matter of discretion, and has been refused where the plaintiff, defendant, and witnesses resided at a long distance from Calcutta, and the decree, if obtained, could be satisfied from property outside the local jurisdiction: Radha *v.* Mucksoodun, 21 W. R. 204 (1874); also where as to the great bulk of the claim the cause of action arose elsewhere: De Souza *v.* Coles, 3 Mad. H. C. R. 384 (1868); Kessowji *v.* Luckmidas, 13 B. 411 (1889); leave has been given it being reserved to the defendant to move to have the order set aside: Radha *v.* Mucksoodun, 21 W. R. 204 (1874) [it was held that the plaintiff could not object as he had acted on the order]; where an order is granted giving leave and the suit is withdrawn, the force of the original order is spent: Sabhapathi *v.* Lakshmi, 24 M. 293 (1900); leave given may be rescinded: a defendant is not bound to wait for the hearing, but may apply on summons to take plaint off the file: Kessowji *v.* Luckmidas, 13 B. 404, 410, 414 (1889); or it may form the subject of an issue for trial in the suit: Nagamoney *v.* Janakiram, 18 M. 142 (1894); Rampurtab *v.* Premsukh, 15 B. at p. 99 (1890); though formerly doubted: Radha *v.* Mucksoodun, *supra*, it is now settled that an appeal lies from the order: De Souza *v.* Coles, 3 Mad. H. C. R. 384 (1868); Hadjee Ismail *v.* Rohima Bye, 13 B. L. R. 91 (1874); but an unsuccessful applicant should appeal and not make another application to another Judge: Mudelly *v.* Mudelly, 8 Mad. H. C. R. 21 (1875). As to absence of leave and *res judicata*, see Abdul Kadir *v.* Doolan Bibi, 37 B. 563 (1913).

(1) Prasannamayi Dasi *v.* Kadambini Dasi, 3 B. L. R., O. C. J. 85 (1868); Jairam *v.* Atmaram, 4 B. 482, 487 (1880); Jagadamba *v.* Padmamani, 6 B. L. R. 686 (1871); Seshagiri *v.* Rama, 19 M. 448, 450 (1896); Balaram *v.* Ramchandra, 22 B. 922 (1898) [partition]; Punchanun *v.* Shib Chunder, 14 C. 835 (1887) [id.]; the words "*or in all other cases if the cause of action shall have arisen*" should be treated as being in brackets: Land Mortgage Bank *v.* Suddurudeen Ahmed, 19 C. 363 (1892).

(2) Collector of Thana *v.* Krishnanath, 5 B. 322 (1880).

(3) Keshav Govind *v.* Vinayak, 1897, Bom. P. J. 425; s. c., 23 B. 22.

(4) Mohunt Deo Sarun *v.* Moonshee Mahomed, 24 W. R. 300 (1875); this was held for the purpose of the Limitation Act.

(5) Cheda Lal *v.* Mulchand, 14 A. 30 (1891); Maddayya *v.* Venkata, 11 M. 193 (1887); Ganga Prasad *v.* Narain, 15 A. 394 (1893); as soon as they are cut they become moveable property: Surat Lall Mondal *v.* Amar Haji, 22 C. 877, 885 (1895); Mangun Jha *v.* Dolhin, 25 C. 692 (1892); but see now in all cases, s. 2, cl. 13.

(6) Sakharam *v.* Vishram, 19 B. 207 (1894); Pandurang *v.* Bhimrav, 22 B. 610 (1897).

lands of her husband's estate ; (1) but not allowances paid in compensation for *sayer* collections from a *hat* ; (2) nor a right to be placed on the revenue register.(3) The meaning of the term, as used with regard to Hindu Law, was discussed in the under-mentioned case.(4)

Suits deemed to be for immoveable property.- In the case of the High Courts there has been considerable conflict of opinion as to the essentials of jurisdiction, for which provision has been made by the Charters ; to avoid which in regard to the practice of the Mofussil Courts the section contains detailed provisions as to local jurisdiction. The High Courts have ordinarily no jurisdiction to try suits relating to immoveable property, where such property is wholly situate without the local limits of their original jurisdiction,(5) and it would appear to be doubtful whether the Equitable jurisdiction of the High Courts in India is of the same extent as that which has been claimed by the Court of Chancery, namely, to take cognizance of any equity between persons residing within the jurisdiction respecting lands outside it.(6) Moreover, the present tendency, even in the case of English Courts, is to abstain from interfering *in personam* where the matter concerns land outside their jurisdiction.(7) It is generally agreed that a suit for partition of immoveable property is a suit for immoveable property.(8) So also is any suit seeking delivery to the plaintiff of land or other immoveable property. The Bombay High Court formerly appeared to take a view which would restrict the words "*suits for land or other immoveable property*" to suits of the last-mentioned character.(9) The other High Courts have held that that expression includes suits other than those for the possession of land ; in fact, every suit in which a decree is asked for operating directly on the land, such as to enforce a security upon it for foreclosure or redemption. Thus the decisions were conflicting upon the point whether such Courts are empowered to entertain suits for foreclosure or sale, or redemption of property beyond their local jurisdiction,(10) or for

(1) Natha *v.* Dhunbhaiji, 23 B. 1, 11 (1898).

(2) Surendro Prosad *v.* Kedar Nath, 19 C. 8 (1891).

(3) Bhikaji *v.* Pandu, 19 B. 43 (1893).

(4) Balvantrao *v.* Purshotam, 9 Bom. H. C. R. 99 (1872).

(5) Letters Patent, clause 12 ; see Hukm Chand, Res Jud. 318.

(6) See *per* Sargent, C.J., in H. H. Holkar *v.* Dadabhai, 14 B. 353, 359 (1890).

(7) Land Mortgage Bank *v.* Sudurudeen Ahmed, 19 C. at p. 367 (1892). See De Souza *v.* British South African Co., 2 Q. B. (1892) 358 ; British South African Co. *v.* Companhia de Mocambique, 1893, A. C. 602 ; Hukm Chand, Res Jud. 326. See Keshav *v.* Vinayak, 23 B. at p. 97 (1897).

(8) Ramchandra *v.* Dada Mahadev, 1 B. H. C. R. App. 76 (1861) ; Jairam *v.* Atmaram, 4 B. 482 (1880) ; Padmamani *v.* Jagadamba, 6 B. L. R. 134 (1870) ; Balaram *v.* Ramchandra, 22 B. 922 (1898) ; Panchanun Mullick *v.* Shib Chunder Mullick, 14 C. 835 (1887) ; Seshagiri Rau *v.* Rama Rau, 19 M. 448 (1896).

(9) But see Keshav Govind *v.* Vinayak Ramchandra, 1897, P. J. 425, in which Ranade, J., observed that analogy should not be pressed too far, and had been departed from in suits brought to recover money charged on immoveable property.

(10) According to the decisions of the Calcutta High Court it is settled that the Court has not jurisdiction in such cases : East Indian Railway Co. *v.* Bengal Coal Co., 1 C. 95, 100 (1875) ; Juggodumba Dossee *v.* Puddomony Dossee, 15 B. L. R. 328, 329 (1875) ; Bibee Jaun *v.* Meerza Mahomed Hadee, 1 Ind. Jur. N. S. 40 (1866) ; Lalmoney Dassi *v.* Juddomanth Shaw, 1 Ind. Jur. N. S 319 (1866) ; Blaquière *v.* Ramdhone Doss, Bourke

specific performance of contracts relating to land similarly situated.(1) In more recent cases the Bombay High Court has also taken the broader view.(2) In the Madras High Court, it was held that a "*suit for land*" includes any suit in which a decree is asked for operating directly upon the land,(3) and therefore includes any suit brought to enforce a security upon land, such as a suit for the sale of land equitably mortgaged by deposit of title deeds: Moore, J., stating that the present section of the Code was simply an amplification with details of the old section of the Act of 1859, on which clause 12 of the Letters Patent was, it appears, based, observed that he was prepared to go further, and to hold that the phrase "*suit for land or other immoveable property*," as used in the Letters Patent, includes all suits mentioned in clauses (*a*) to (*f*) of this section. If the property is situate outside the jurisdiction, the High Court cannot take cognizance of it, even if moveable property within the jurisdiction is also claimed in it; as clause 12 does not qualify the expression "*in suits for land*," etc., with the word *only*, and the words "*all other cases*" are not to be understood as including cases of suits for immoveable *plus* moveable property, but those in which immoveable property is not involved.(4) It is, however, generally admitted that every suit having any reference to immoveable property is not a suit for immoveable property.(5) It has been held that a suit to recover title deeds of certain land outside the local limits, even though it may involve a question of title to that land, is not a suit to obtain possession of, or deal in

O. C. 319 (1865); In the matter of S. J. Leslie, 9 B. L. R. 171; 18 W. R. 269 (1872); Kanti Chunder Pal Chowdhry *v.* Kissory Mohun Roy, 19 C. 364, *n.* (1887); Ebrahim Ismail Timol *v.* Provas Chander Mitter, 36 C. 59 (1908). See, however, observations of Garth, C.J., in Delhi and London Bank *v.* Wordie, 1 C. at pp. 257, 263 (1876). Contrary views were at one time held in Bombay: Sorabji *v.* Rattonji, 22 B. 701 (1898); Holkar *v.* Dadabhai, 14 B. 353 (1890); but not so now: Vaghoji *v.* Camaji, 29 B. 249 (1909); Zulekabai *v.* Ebrahim Haji Vyedina, 37 B. 494 (1912). Similar views prevailed formerly as to suits in the Mofussil: Venkoba *v.* Rambhaji, 9 B. H. C. R. 12 (1872); but the law is now altered in this respect by the express words of the section: Vithalrao *v.* Vaghoji, 17 B. 570 (1892). The Madras High Court has recently taken the same views as those of the Calcutta High Court: Nalum *v.* Kirshnasawmy, 27 M. 157 (1903); Sundara Bai Sahiba *v.* Tirumal Rao Sahib, 33 M. 131 (1909).

(1) In Ramdhone Shaw *v.* Nobumoney Dossee, Bourke, 218 (1865) [see as to this case the Delhi and London Bank *v.* Wordie, 1 C. at p. 256; Kellie *v.* Fraser, 2 C. at p. 453: Juggodumba Dossee *v.* Puddomoney Dossee, 15 B. L. R. 329; Land Mortgage Bank *v.* Sudurudden Ahmed, 19 C. 366], and H. H. Holkar *v.* Dadabhai, 14 B. 353 (1890), the Court was held to have, and in Sreenath Roy *v.* Cally Dass Ghose, 5 C. 82 (1879), not to have, jurisdiction. In Land Mortgage Bank *v.* Sudurudden Ahmed, 19 C. 358, 366 (1892), it was suggested that there is a distinction between a vendor's suit and a purchaser's suit for specific performance. This case was followed in an appeal from the Mofussil in Jagadis Chandra Deo *v.* Satrughan Deo, 33 C. 1065, 1075 (1906).

(2) See Zulekabai *v.* Ebrahim Haji Vyedina, 37 B. 494 (1912), and cases therein cited.

(3) Nalum *v.* Krishnasawmy, 27 M. 157 (1903).

(4) Jairam Narayan *v.* Atmaram Narayan, 4 B. 482 (1880); Balaram *v.* Ramchandra, 22 B. 926 (1898); Seshagiri *v.* Rama, 19 M. 448 (1896); Hara Lall Banerjee *v.* Nitambini, 29 C. 315, 322 (1901).

(5) It has been held by a Full Bench of the Bombay High Court that a Small Cause Court can entertain a suit the principal purpose of which was to determine a right to immoveable property if the relief claimed was for payment of money: Puttangowda *v.* Nilkanth Kalo, 37 B. 675 (1913).

any way with, land and is therefore cognizable by the High Court; (1) but this has been disputed.(2) So also where in a suit by a landlord for rent no relief is claimed in respect of the land, but it becomes necessary to determine what the nature of the tenancy was, that question does not make the suit one "*for land.*" (3) The High Court has also taken cognizance of an application to file an award which provided for the dissolution of a partnership in lands outside the local limits, and also that the defendant's share in the property should stand charged with the payment of a certain fund to be due by him to the plaintiff, and that the defendant should execute a mortgage of his share to the plaintiff as security for such payment, and that the tea-garden at Darjiling should be sold in Calcutta.(4)

The general Equitable jurisdiction of the High Court, on the original side, which it has inherited from the supreme Court, which in its turn administered the Chancery Rules, must also be considered (*vide post*). So the Courts of Equity will exercise their powers *in personam* in the case of trustees and others resident within their jurisdiction, to oblige such persons to perform trusts, to carry out contracts, and to obey the rules of Equity even where the subject-matter of the trust or contract or equity may be land situate out of their jurisdiction.(5) Again, there is the Equitable jurisdiction by grant of an injunction or appointment of a receiver. Thus a suit for damages to certain immoveable property by a nuisance caused on it, and for an injunction to restrain the nuisance, has been held to be a suit not for immoveable property, but exclusively *in personam*.(6) Similarly, a suit by some of the trustees of an endowment of certain lands against their co-trustees in possession, for a declaration of plaintiff's title to be *shebaits* jointly with the defendants, for the settlement of a scheme for the performance of the worship, for the appointment of a receiver, for an injunction to restrain the defendants from interfering with the property, and for an account, is not a suit for those lands.(7)

(1) Juggernauth *v.* Brijnath, 4 C. 322 (1878); foll. in Rungo Lal Lohea *v.* Wilson, 2 C. W. N. 719 (1898).

(2) Zulekabai *v.* Ebrahim Haji Vyadina, 37 B. 494 (1912). Suit for title deeds of immoveable property is a suit for immoveable property; and see Bussunt Koomaru *v.* Kumal Koomaru, 7 S. D. A. Sal. 168.

(3) Rungo Lall Lohea *v.* Wilson, *supra*; nor even though the plaintiff's title to the land in respect of which the rent is sought to be recovered may incidentally come in question: Chintaman *v.* Madhavrav, 6 B. H. C. R. 29 (1869), and the property is situate in a foreign State: Bhujbal *v.* Nanhaju, 19 A. 450 (1897). But such suits may be treated as local under special legislation, *vide post.*

(4) Kellie *v.* Fraser, 2 C. 445 (1877). The grounds of the decision were that the suit did not involve any determination of title to land, being in this respect distinguishable from Delhi and London Bank *v.* Wordie, 1 C. 249 (1876). In the case, however, of such a suit, and also others outside Presidency towns, the effect of clause (*d*) of the section will have now to be considered.

(5) See Delhi and London Bank *v.* Wordie, 1 C. 249, 252, 263 (1876); Bagram *v.* Moses, 1 Hyde, 284 (1862-3).

(6) Rajmohun Bose *v.* E. I. R. Co., 10 B. L. R. 241, 248 (1872). See also East Indian Railway Co. *v.* Bengal Coal Co., 1 C. 95, 100 (1875); Delhi and London Bank *v.* Wordie, 1 C. 249, 251, 263 (1876), and cases there cited. As to the issue of prohibitory orders, see Ramlochun Sirkar *v.* Kaminee Debee, 10 B. L. R. 63 *n.* (1868), and Woodroffe's Injunctions, 2nd ed., Ch. I.

(7) Juggodumba *v.* Puddomoney, 15 B. L. R. 318, 324, 325, 330 (1875); but see as to receiver, Hadjee Ismail *v.* Hadjee Mahomed,

An ordinary suit for administration, which raises no question of title to the property in suit, is not a suit for land.(1) But where a plaintiff sued for a declaration that he was entitled to immediate and absolute possession of properties both moveable and immoveable, the latter being wholly situated outside the jurisdiction, for the construction of a will, for an account by the executrix, for administration and other relief, it was held that the suit was one for land and that the High Court had no jurisdiction to entertain it.(2)

Passing to the present section, which governs the Provincial Courts, having regard to its full and precise language, there can hardly be any difference as to the character of the suits to which the principle of local jurisdiction must be held to apply. The insertion of the words "*with or without rent or profits*" is intended to remove any difficulty there may be where the defendant does not reside within the local jurisdiction of the Court within the jurisdiction of which the property is situate. The only clause as to which there is any room for dispute as to its application is clause (*d*), the words of which are very comprehensive, and wide enough to include various classes of suits which might not be held to be for immoveable property under the Letters Patent.(3)

The following have been held to be suits of the nature referred to: a suit to have certain lands declared liable for the satisfaction of an instalment bond; (4) to enforce a right of hypothecation by sale; (5) by vendor to enforce specific performance.(6) A bond hypothecating the structure of a house, exclusive of the land beneath, was held to create an interest in immoveable property.(7) A suit is for such an interest which is brought to enforce payment of principal and interest both as a simple contract liability and as a debt secured by a collateral mortgage of immoveable property,(8) or for a declaration of title to a share in *vaishusans* (allowances) charged on the revenues of villages.(9) A right to *balute* was held to be an interest in immoveable property within the meaning of the Provincial Small Cause Court Act, 1865.(10) A right to hold land free from Government assessment,(11) or to have a watercourse opened in one's land, was held to be an interest in land; (12)

13 B. L. R. 91, 99 (1874), and Woodroffe's Receivers; and see Mohan Lalji *v.* Gordhan Lalji Maharaj, P. C. 35 A. 283 (1913) (succession of shebait, proof of title).

(1) See cases referred to in decision cited in next note.

(2) Hara Lall Banerjee *v.* Nitambini Debi, 29 C. 315 (1901).

(3) See Hukm Chand, C. P. C. 277, Rec Jud. 340.

(4) Ram Lall Mookerjee *v.* Chettro Coomaree, 15 W. R. 277 (1871).

(5) Korny Behari *v.* Ram Narain, 2 Agra. 244; Leslie *v.* Land Mortgage Bank, 9 B. L. R. 171 (1871); Ahmedee Begum *v.* Dabee Persaud, 18 W. R. 287 (1872); Mahomed Khuleel *v.* Sona Koer, 23 W. R. 123 (1874); Buldeo Doss *v.* Must. Koer, 2 A. H. C. R. 19 (1870); Gudri Lal *v.* Jagannath, 8 A. 117 (1886); Bolakee Lall *v.* Perlam Singh, 5 C. 928 (1880); Vithalrao *v.* Vaghoji, 17 B. 570 (1892).

(6) Lachman Das *v.* Haslett, 1891, P. R. No. 39, it being held that the case fell within clause (*d*).

(7) Narayana *v.* Ramasawmy, 8 M. H. C. R. 100 (1875).

(8) Jurneswar *v.* Mahabeer, 1 C. 163, 167 (1875). See Kristna Row *v.* Hachapa, 2 M. H. C. R. 307 (1864).

(9) Keshav *v.* Vinayak, 23 B. 22 (1897).

(10) Appana *v.* Nagia, 6 B. 512 (1880).

(11) Bhujang Mahadev *v.* Collector of Belgaum, 11 B. H. C. R. 1 (1874).

(12) Oodoyessuree *v.* Huro Kishore Dutt, 4 W. R. 107 (1865).

as also a suit for the recovery of purchase-money under contract for the sale of land.(1) A suit for grazing dues by the lessee of the grass of certain Government land.(2) and a suit for the recovery of tolls by the lessee of a Government ferry,(3) involve an interest in immoveable property, and have on that ground been held to be not cognizable by a Provincial Court of Small Causes. And hypothecation of immoveable property creates an interest in that property within the meaning of that Act.(4) Clause (*c*) has now been amended to include both mortgages and charges and suits for sale as well as those for foreclosure or redemption.

A suit to enforce a foreign judgment,(5) a suit upon an agreement to grant a lease,(6) and a suit to follow the purchase-money of land taken up under the Land Acquisition Act, over which the plaintiff had a mortgage lien,(7) and a suit for a declaration that the plaintiffs were the persons in reality beneficially interested in a decree for sale on a mortgage although the decree did not run in their names,(8) are not suits of the nature mentioned in clause (*d*).

Clause (*e*) contemplates an essentially different class of suits, viz. suits for money as distinct from those for property. They have been treated as local, as the wrong forming their basis must usually take place where the property is situate, and they can also be most conveniently inquired into there.(9) A suit for compensation for wrong to immoveable property is, unless within the proviso, within the intention of the section, and a claim for damage to land cannot be said to be a claim which can be entirely obtained through the personal obedience of the defendant, even though it may be joined with a claim for an injunction.(10)

As regards clause (*f*), it has been already pointed out (11) that moveable property is generally deemed to follow the person, and the reasons why an exception is made where the property is under distraint or attachment and therefore incapable of a change of position.

It is to be observed, generally, that suits for money or moveable property may be treated as local under special legislation. Thus while, as a general rule, suits for rent are not suits for immoveable property,(12) and do not therefore fall within this section, sects. 144 and 193 of the Bengal Tenancy Act make special provisions as regards suits between landlord and tenant.(13)

Proviso.—This proviso relates to the well-known Equitable jurisdiction *in personam*. According to the maxim "Equity acts *in personam*," that is,

(1) Maturi Subbayya *v.* Kota Krishnayya, 28 M. 227 (1904).

(2) Khuda Baksh *v.* Dana, 1895, P. R. No. 13.

(3) Gokal Chand *v.* Lal Chand, 1897, P. R. No. 48.

(4) Munnoo Lall *v.* Pigue, 10 W. R. 379 (1868).

(5) Droop *v.* Focke, 9 W. R. 215 (1868).

(6) Lalla Ram *v.* Bibee Chowbain, 22 W. R. 287 (1874).

(7) Venkata *v.* Krishnasami, 6 M. 344 (1882).

(8) Ahmad Khan *v.* Abdul Rahman, 26 A. 603 (1904).

(9) See Hukm Chand, C. P. C. 279.

(10) Crisp *v.* Watson, 20 C. 689 (1893).

(11) *Vide ante*, p. 74.

(12) *Vide ante*, p. 157.

(13) Chowdhry Fazlur *v.* Dwarka Nath, 7 C W. N. 402 (1903); and as to Bengal Acts, VI. of 1862, and I. of 1879, see Nilmoni Singh Deo *v.* Nilu Naik, 20 C. 425 (1892).

it regards its decrees as commands or directions addressed to the defendant personally rather than as decisions directly affecting the subject-matter of dispute. Though the Court cannot, in the case of lands situate without the jurisdiction, give relief *in rem*, still it can enforce its judgment, which is *in personam* by process *in personam*, as by attachments of the person, lands, and goods of the defendant within the jurisdiction until the defendant complies with the order of the Court. Thus in accordance with the principle laid down in the leading case on the subject, Penn *v.* Lord Baltimore,(1) the Court of Chancery has entertained actions for account and discovery of rents and profits; for specific performance and injunction; for foreclosure of mortgages, and for the execution of conveyances and the like regarding lands situate abroad, and whether within the King's Dominions or not, though if the very title itself to the lands is in question, the Court will not assume jurisdiction.(2)

The Courts have thus compelled the performance of contracts and trusts, which were not either locally or *ratione domicilii* within their jurisdiction.(3) But in this country the power to make orders *in personam*, though the subject-matter of the suit is without the jurisdiction, which jurisdiction exists both n the case of the High Courts and the Provincial Courts, must be considered with reference to the limitations on jurisdiction imposed in the case of the ormer by the Letters Patent, and in the case of the latter by the provisions of this section. In the case of the High Courts, regard must be had to the eal object of the suit and to what are the rights and intentions of the espective parties, and those cases which are founded upon the principle laid lown in Penn *v.* Baltimore must be distinguished from those which depend not so much upon the jurisdiction generally exercised by Courts of Equity, as upon the question whether the suit is substantially one within the statutory urisdiction conferred upon the Courts.(4) So when a suit which, though in orm one brought for an injunction or relief obtained through personal obedience, s in substance a suit "*for land*," which land is situate without the local limits of the jurisdiction of the Court, the latter has no power to grant the relief prayed.(5) The Equitable jurisdiction of the High Courts is not as extensive as that which has been claimed by the Court of Chancery.(6) Though the Courts here are governed by the same principles as those which are acted upon by Courts of Equity in England, this is only so far as such principles are not at variance with express legislative enactment.(7)

The test of jurisdiction in all such cases is rather the nature of the claim

(1) 2 White and Tudor, L. C. 837, 5th ed.

(2) See Woodroffe's Injunctions, 3rd ed. 19, and cases there cited, and *ante*, p. 157.

(3) Ewing *v.* Ewing, 9 A. C. 34, cited in Kashinath *v.* Anant, 2 Bom. L. R. 47, 49 1899); but the jurisdiction has its limits, see *n re* Hawthorne, 23 Ch. D. 743, ref. to in Keshav *v.* Vinayak, 23 B. at p. 27 (1897).

(4) Delhi and London Bank *v.* Wordie, 1 C. 249, 263 (1876); Land Mortgage Bank *v.* Sudurudeen Ahmed, 19 C. 358, 367 (1892).

(5) East Indian Railway Co. *v.* Bengal Coal Co., 1 C. 95 (1875); similarly in the case of relief by receiver: Delhi and London Bank *v.* Wordie, *supra*.

(6) *Vide ante*, p. 156. So it has been pointed out that the express words of clause 12 of the Letters Patent render the principles of the decision in Paget *v.* Ede, L. R. 18 Eq. 118, inapplicable. East Indian Railway Co. *v.* Bengal Coal Co., 1 C. 95, 100 (1875).

(7) Kashinath *v.* Anant, 2 Bom. L. R. 47 (1899).

made in respect of the property in suit rather than the actual situation of the latter. If the suit is not, by reason of its substantial character and the provisions of the Charters, within the cognizance of the Court, the latter is unable to grant relief. But where the relief sought is purely *in personam* and not *in rem* the Courts are empowered to make a decree which shall be of the same character.(1)

The same rule applies in the case of Courts other than the Presidency High Courts; but in this case the provisions of this section must be considered. Under it, such Courts may exercise a jurisdiction *in personam*, but the jurisdiction seems to be of a more limited extent. Not only are they expressly deprived of power to entertain suits for foreclosure, sale or redemption, but the limitations imposed by clause (*d*) are in terms extensive, and the proviso determining their powers to act *in personam* limits the exercise of such powers to cases where the property is held by or on behalf of the defendant (2) resident within the jurisdiction,(3) when the relief sought can be entirely obtained through his personal obedience, and where the property is situated in British India.(4)

"**Actually and voluntarily resides.**"—As to the meaning of these words, see the notes to sect. 20.

Suits for immoveable property situate within jurisdiction of different Courts.

17. *Where a* suit *is* to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in *any* Court within the local limits of whose jurisdiction any portion of the property is situate: [s. 19.]

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

Scope of section.—This section gives jurisdiction to a Court to entertain a suit in respect of properties partly situate within its territorial limits and partly out of it, where the same relief is sought in respect of the whole of the properties.(5) The section corresponds to sects. 11 and 12 of the Code of 1859; as also to sect. 19 of the last Code, with the exception that the

(1) See Woodroffe's Injunctions, 3rd ed. p. 47.

(2) Crisp *v.* Watson, 20 C. 689 (1893), in which the proviso was held not to apply where the wrong for which compensation was sought was trespass to property in the plaintiff's possession. The reason of the restriction introduced by these words does not appear to be clear; but to make the proviso applicable the property must be so held at the time of the institution of the suit: Lachman Das *v.* Haslett, 1891, P. R. No. 39; Hukm Chand, C. P. C. 282.

(3) Isak *v.* Khatija, 23 B. 756 (1899); s. c., 1 Bom. L. R. 370.

(4) See Keshav *v.* Vinayak, 23 B. 22 (1897) (dist., Ratanshankar *v.* Gulabshankar, 4 B. H. C. R. 173 (1867), in which the question of title only incidentally arose), where the suit was held to fall within the substantive clause of s. 16 of the Code of 1882, and was not covered by the proviso.

(5) Mascyk *v.* Steel, 14 C. at p. 666 (1887).

last paragraph of that section relating to property situated in different districts, and the words "within the limits of a single district but" before "within the jurisdiction" in the first clause of the present section, have been omitted. The words "*to obtain relief respecting, or compensation for wrong to, immoveable property*" should not, it is submitted, be construed in any restricted sense, but embrace all suits relating to immoveable property mentioned in sect. 16.(1) The provisions of this section are intended for the benefit of litigants and to avoid multiplicity of suits. It says nothing as to one or more causes of action. And it applies to a suit in which the relief claimed is in respect of more than one cause of action, unity of cause of action in respect of which relief is claimed being immaterial.(2) Where there is but one cause of action in respect of different properties situate in different jurisdictions a plaintiff should avail himself of the provisions of this section, and if he does not a second suit will not lie.(3) Where jurisdiction has once properly vested in a Court it will not be taken away by reason of a *bonâ fide* compromise withdrawing the claim in respect of property within the jurisdiction.(4) The section, however, while it gives opportunities to the litigant, does not extend the powers of the Court, except in so far as upon the initiative of the former it obtains jurisdiction. Neither under this section, nor otherwise, has the High Court in its appellate jurisdiction power to confer jurisdiction on a Court in District A to deal with a suit commenced and prosecuted in District B relating to lands in B. Nor does the Code empower the High Court, without consent of parties, to change two suits, one of which it has itself dismissed, into one suit of a totally different description from either of them.(5)

A Scheduled District not being a district within the meaning of this section, a Court at Moradabad was held not to have jurisdiction over a suit relating to immoveable property, of which a large portion was in Tarai District, so far as that portion was concerned.(6)

The section does not apply to the Presidency High Courts, and therefore

(1) As to mortgage suits, *vide post*, and as to foreclosure: Khetter Mohun Das *v.* Chundermoney, Coryton, 125 (1864): sales of land: Ashruf Hossein *v.* Lazarus, S. D. N. W. 1861, p. 588, cited in O'Kinealy's C. P. C.; partition: Anup Shah Singh *v.* Jaswant Shah Singh, 1891, P. R. No. 10; cited in Hukm Chand, C. P. C. 330.

(2) Harchandar Singh *v.* Lal Bahadur Singh, 16 A. 359 (1894).

(3) Jumoona Dassee *v.* Bamasoonderee, 2 W. R. 148 (1865). In Sabba Rau *v.* Rama Rau, 3 M. H. C. R. 376 (1867), however, which was also decided under Act VIII. of 1859, which required the leave of a superior Court [see Harchandar Singh *v.* Lal Bahadur Singh, 16 A. at pp. 361, 362 (1864)], it was held that the section was permissive, and that separate suits for partition would lie [ref., Grish Chunder Mookerjee *v.* Ramessuree Dabee, 22 W. R. 308, 309 (1874); Pattaravy *v.* Audimula, 5 M. H. C. R. 419 (1870)]. It is submitted this is not now law. See as to suits for partial partition, Hari Narayan *v.* Ganpatrav, 7 B. 272 (1883); Chandu *v.* Kunhamed, 14 M. 324, 326 (1891); Haridas Sanyal *v.* Prannath, 12 C. 566 (1886); Mukunda *v.* Lehuraux, 20 C. 379, 383 (1892); Venkata *v.* Bhashya Karlu, 22 M. 538 (1899); Shivmurteppa *v.* Virappa, 24 B. 128 (1899).

(4) Khatija *v.* Ismail, 12 M. 380 (1889); Kubra Jan *v.* Ram Balli, 30 A. 560 (1908).

(5) Kamini Soradasi Chowdhrani *v.* Kali Prosunno Ghose, 12 I. A. 215 (1885); 12 C. 225 (1885).

(6) Ram Ratan *v.* Lalta Prasad, 17 A. 483 (1895).

when part of the immoveable property is without the jurisdiction, leave must be obtained prior to the institution of the suit.(1) The restrictive words of clause 12 of the Letters Patent apply to the case of a plaintiff; there is no similar restraining provision applicable to a case where the person seeking the exercise of the Court's jurisdiction is the defendant.(2)

Suit: Execution.—Applications for execution are proceedings in suits,(3) being but a continuation of the proceedings in the suit in which the decree was passed.(4) But they are not a suit, and the section deals with the institution of a suit. Jurisdiction over execution proceedings depended, it was held, on the provisions of sect. 223 of the last Code, and the present provisions had reference to original suits only. A decree-holder could not, it was held, therefore, take execution proceedings relating to or against immoveable property at his option under this section simply on the ground that a portion of the property was situate within the local limits of its jurisdiction.(5) *Primâ facie*, however, every Court having jurisdiction to try a suit has jurisdiction to execute its own decree in that suit.(6) If a Court has jurisdiction under this section to entertain a suit and to make a decree for sale, it follows that it has jurisdiction to sell all and every parcel of property comprised in the decree, although one or other of the parcels may be beyond the local limits of its jurisdiction.(7) And it has been recently held that while the provisions of sects. 38 and 39 indicate that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property wholly situated outside the local limits of its jurisdiction, yet there are several exceptions to this rule, as in cases of decrees for sale of mortgaged property or in cases of

(1) Prasannamoyi Dasi *v.* Kadambini Dasi, 9 B. L. R., O. C., 85 (1868); Jagadamba *v.* Padmamani, 6 B. L. R. 686 (1871); Bank of Hindustan *v.* Nundololl Sen, 11 B. L. R. 301 (1873); Jairam *v.* Atmaram, 4 B. 482 (1880); Seshagiri *v.* Rama, 19 M. 448 (1896); and *ante*, p. 154. The decision in Narain Singh *v.* Ram Lall Mookerjee, 3 C. 370 (1878), is not law. S. 19 of the last Code did not apply to the High Court.

(2) Kissory Mohun Roy *v.* Kali Churn Ghose, 24 C. 190 (1897). But see Sarat *v.* Nahapiet, 37 C. 907 (1910).

(3) S. 139, *post*.

(4) Gopi Mohan Roy *v.* Drylaki Nundun Sen, 19 C. 13, 15 (1891).

(5) In Shurroop Chunder *v.* Ameerunnissa, 8 C. 705 (1882), it was said that "the change introduced by s. 19 has been accepted as applicable to execution proceedings also." No authority was cited, however, in support of this statement, and the observation was not necessary for the decision, which is dealt with *post*, and which was to the effect that a Court should proceed with the execution of its decree as against an entire revenue paying estate, even though a part of it be situate outside the jurisdiction; it being added that the case would be different if the property consisted of different taluks or estates, the whole of any one or more of which was situate in the other districts. As regards portions of the same property the rule was independent of s. 19, having been recognized under the former Code. See Hukm Chand, C. P. C. 331, 332; Kally Prosonno Bose *v.* Dinanath Mullick, 11 B. L. R. 56 (1873); Unnocool Chunder *v.* Hurry Nath, 2 C. L. R. 334 (1877); Gunga Narain *v.* Annunda, 12 C. L. R. 404 (1883); Ram Lall Moitra *v.* Bama Sundari, 12 C. 307 (1885); Maseyk *v.* Steel, 14 C. 661 (1887); Ghose, J., held that s. 223, cl. 2, of the last Code was to be construed as if the word "wholly" was inserted after "situate." See notes to s. 38, *post*.

(6) Jagernath Sahai *v.* Dip Rani Koer, 22 C. 871, 874 (1895).

(7) Gopi Mohan Roy *v.* Doybaki Nundun Sen, 19 C. 13, 15 (1891).

attachment of salaries of public officers and of sale of entire estates situated within the local limits of the jurisdiction of more than one Court under O. XXI. r. 3.(1) It was held that sect. 223, clause (*c*) of the former Code was not mandatory, but gave a discretion to the Court.(2) So a Court which had jurisdiction to pass a decree for the sale of property comprised in a mortgage had also power to carry out its decree by selling the property, even though a portion of the property was situated outside the local limits of its jurisdiction.(3) See now notes to sect. 38, *post*.

Place of institution of suit where local limits of jurisdiction of Courts are uncertain.

18. (1) *Where* it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction:

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection *unless* in its opinion there was, at the time of the institution of the suit, *no* reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto, *and there has been a consequent failure of justice*.

Uncertainty of local limits.—This section was inserted in the Code of 1882 by sect. 6, Act VII. of 1888, with a view to avoid a difficulty as to juris-

(1) Begg Dunlop *v.* Jagannath, 14 C. L. J. 228, 231 (1911).

(2) Gopi Mohan Roy *v.* Doybaki Nundun, 19 C. 13 (1891).

(3) Tincouri Debya *v.* Shib Chandra Pal, 21 C. 639 (1894); Shurroop Chunder *v.* Ameerunnissa, 8 C. 703 (1882); Maseyk *v.* Hill, 14 C. 661 (1887); Gopi Mohan Roy *v.* Doybaki Nundun Sen, 19 C. 13 (1891); Jagernath Sahai *v.* Dip Rani, 22 C. 871 (1895), which were all cases of suits on mortgages. In Maseyk *v.* Steel, 14 C. at pp. 669, 670, Petheram, C.J., said he was not prepared to accept the view of the law laid down in some cases, that where a sale takes place under a money decree—that is, otherwise than under directions contained in the decree itself—sale of property without the jurisdiction of the executing Court was valid in consequence of the provisions of ss. 19 and 223 of the last Code. Attention is drawn to the arguments in this case, and now to s. 38, *post*, where the matter is discussed.

diction which frequently arises where the boundaries of estates or holdings are destroyed or altered by fluvial action.(1) The fact that no notification was known as laying down the boundaries of the district in which it was contended that a suit should have been brought was held to create a reasonable uncertainty in the matter.(2) In the same suit it was held that a suit for rent of a fishery was a suit for immoveable property within the meaning of this section.(3) The italicized words have been added in order still further to restrict the taking of technical objections as to jurisdiction.

19. *Where a* suit *is* for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, *the suit may be instituted at the option of the plaintiff* in either of the said Courts. [s. 18.]

Suits for compensation for wrongs to person or moveables.

Illustrations.

(*a*) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

(*b*) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

Suits for compensation.—This section creates a special jurisdiction in the case of actionable wrongs, but in the cases of tort, to which it does not apply, resort may be had to the next section, which is of general application in all cases.(4) Thus the section appears only to contemplate Courts in British India, and therefore to be restricted to cases in which both the wrong is done and the defendant resides, etc., in British India.(5) Inasmuch also as it refers to suits for compensation only, it would appear to exclude suits for an injunction against disturbance of rights, such as rights of patent, trade-mark, etc., which will fall within the general words of sect. 20. Whether the cause of action in such suits be the right disturbed or the disturbance caused to it, or both, has not been judicially settled.(6) In cases, however, falling within this section, the Court where the wrong is done will have jurisdiction quite apart from all considerations of the place where the right violated by the wrong came into existence or existed.

"Wrong done."—The word "wrong" in this section means an actionable wrong. It is essential to an action on tort that the act complained of should

(1) *Vide* Mr. Scoble's speech, Legislative Council, 10th March, 1888.

(2) Shiba Haldar *v.* Gopi Sundari, 24 C. 449 (1897).

(3) Ib.; s. c., 2 C. W. N. 169.

(4) *Vide ante*, p. 159.

(5) Hukm Chand, C. P. C. 329.

(6) Ib., 327; for a suit for infringement of copyright and injunction, see MacMillan *v.* Zaka, 19 B. 557 (1895).

be legally wrongful, that is prejudicially affecting the complainant in some legal right, such as rights of reputation, bodily safety, freedom and property.(1) The words "wrong done" are, however, not altogether free from difficulty; a wrong consists of an act or omission, and both are often complex notions involving a series of acts or omissions, and sometimes extending over a lengthened period, and comprising their voluntary and involuntary consequences, as to which, as explained in Mr. Hukm Chand's work on Consent,(2) no sharp line can be drawn between those which may and which may not be considered a part of the act itself. Causing a person to be falsely charged with a criminal offence is an actionable wrong, but where the only act done within the jurisdiction pursuant to a conspiracy formed in a native State was the giving of false evidence, which is not in itself an actionable wrong, it was held that a suit for the injury caused in consequence of giving false evidence could not be instituted in the High Court, as no cause of action arose within its jurisdiction.(3)

[s. 17.] **20.** Subject to the limitations aforesaid, *every* suit shall be instituted in a Court within the local limits of whose jurisdiction—

Other suits to be instituted where defendants reside or cause of action arises.

(*a*) the defendant, *or each of the defendants, where there are more than one*, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(*b*) any of the defendants, *where there are more than one*, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain, provided that *in such case* either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(*c*) the cause of action, *wholly or in part*, arises.

Explanation I.—Where a person has a permanent dwelling at one place and also a *temporary residence* at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary *residence.*

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

(1) Templeton *v.* Laurie, 2 Bom. L. R. 244, 249, 251 (1900).

(2) At p. 201; and see same author's C. P. C. 327, 328, where the subject is discussed.

(3) Templeton *v.* Laurie, *supra.*

Illustrations.

(*a*) A is a tradesman in Calcutta. B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(*b*) A resides at Simla, B at Calcutta, and C at Delhi. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot *proceed* without the leave of the Court.

"**Subject to the limitations aforesaid.**"—These limitations are those referred to in sect. 16 as "pecuniary or other limitations prescribed by any law," and, by implication, sect. 15.(1) See Notes to that section. The jurisdiction is subject to special Acts, such as the Provincial Small Cause Court Act, but inasmuch as a plaintiff may select the forum in which to bring his suit, if a suit may be brought at either A or B, and at A there is no Small Cause Court having jurisdiction, though there is one at B, the jurisdiction of the District Munsif's Court at A in which the suit is brought is not ousted by the fact that there was in existence at the date of suit a Small Cause Court at B. To hold otherwise would be to compel the plaintiff to sue at B, and thus to deprive him of his choice of forum. If, however, there had been a Small Cause Court at A, the suit would, if the plaintiff selected A as his forum, have to be instituted in the Small Cause Court.(2)

"**Every suit.**"—The words in the last Code were "*all other suits*," which was held to mean all suits other than those mentioned in sect. 16.(3)

"**Shall be instituted.**"—This section lays down the rule as to the forum of personal actions, which may be either that of the place of accrual of the cause of action, or the place of the defendant. As already observed, where a suit may be filed in more than one of several Courts it is a general principle of law that the plaintiff may select the forum in which to bring the suit.(4) The section mentions several independent grounds of jurisdiction, and, where several of such grounds exist giving jurisdiction to different Courts, the plaintiff may select which of these Courts he chooses. Thus, the cause of action may arise in the case of suits arising out of contracts in the three different places mentioned in the third Explanation to this section under the last Code, and the defendants may reside in a fresh place, and a plaintiff may choose either of such places as the forum of his suit.(5) *Vide post.*

(1) Fazlur Rahim *v.* Dwarka Nath, 30 C. 453, 456 (1903); s. c., 7 C. W. N. 402.

(2) Ratnagiri Pillai *v.* Ravuthan, 19 M. 479 (1896).

(3) Fazlur Rahim *v.* Dwarka Nath, *supra.*

(4) Ratnagiri Pillai *v.* Ravutham, 19 M. 477 (1896).

(5) Ratnagiri Pillai *v.* Ravuthan, 19 M. 477 (1896). But see as to the limitations on such power, s. 22, *post*, and Geffert *v.* Ruck-

Forum of the defendant.—Where the cause of action wholly arises in the jurisdiction of a Court other than that in which the suit is brought, the plaintiff must show (the onus being upon him (1)) such a residence, carrying on business, or working for gain of the defendant,(2) which is within the terms of this section, or in the case of the Presidency High Courts (to which this section does not apply), within the terms of clause 12 of the Letters Patent. In either case there is no question that the term "defendant" includes a foreigner when that foreigner dwells or resides or personally works for gain within the jurisdiction.(3) It is well settled also that the carrying on of business need not be personal, but may be by means of an agent.(4) There is, however, a conflict upon the point whether the Court has jurisdiction in the case of a foreigner who is non-resident and carries on business through an agent.(5)

As regards several defendants, the section makes express provision. Either all the defendants must reside, etc., or there must be leave by the Court or absence of objection by the defendants. If the defendants who do not reside, etc., within the local jurisdiction did not apply under sect. 21 of the last Code, they were held to have acquiesced, the intention of the Legislature being that objection should be raised on the first opportunity.(6) Under the last Code it was held that the acquiescence must be by the defendant who resides, etc., outside the jurisdiction. Where, therefore, the cause of action in a suit against three defendants was held to have arisen outside the jurisdiction, and one of such defendants resided outside the jurisdiction but did not acquiesce in the suit, it was held that if there were any acquiescence on the part of other defendants residing within the jurisdiction, it did not give the Court jurisdiction to try the suit.(7)

chand, 13 B. 178 (1888). If on the other hand the suit is not for immoveable property, and none of the facts mentioned in this section exist, the Court has no jurisdiction: Sieveking *v.* Focke, 9 W. R. 215 (1868).

(1) Shri Goswami *v.* Shri Govardhanlalji, 14 B. 541, at p. 552 (1890). In an early case a bond reciting the obligor to be "of Calcutta" was held *prima facie* evidence of residence: Ramram Dutt *v.* Ramnaram, 1 Mor. 369 (1837).

(2) Modhu Soodun Chowdhry *v.* Cochrane, 6 C. L. R. 417 (1880).

(3) Kessowji Damodar *v.* Khimji, 12 B. 507, 518, 519 (1888). And see Agha Gholam Hussein *v.* Sassoon, Bom. Gaz., 26th Jan., 1897; Badrudin *v.* Karimbhai, 1898, Bom. P. J. 29; cited in Hukm Chand, C. P. C. 286.

(4) Girdhar Damodar *v.* Kassigar, 17 B. 662, 665 (1893), which was a decision on the Small Cause Court Act (XV. of 1882); and Muthaya Chetti *v.* Allan, 4 M. 209 (1880); Kessowji Damodar *v.* Khimji, 12 B. 507, 521 (1888), decisions on the Letters Patent. In Annamalai Chetty *v.* Murugasa, 26 M. 544 (1903), it was held that the manager of a joint family was not an agent. As to agency in insolvency law, see *In re* Dhunput Singh, 20 C. 771 (1893); diss. from *In re* Huruck Chand Golicha, 5 C. 605 (1880).

(5) In Kessowji Damodar *v.* Khimji, 12 B. 507 (1888), it was held that there was no jurisdiction. In Girdhar *v.* Kassigar, 17 B. 662 (1893), it was held that there was jurisdiction, the word defendant having the same meaning in all cases. In Annamalai Chetty *v.* Murugasa, 26 M. 544 (1903), the Privy Council left the point open; s. c., 5 Bom. L. R. 491; 7 C. W. N. 754, and in lower Court, 23 M. 458. There will be jurisdiction in such cases if the cause of action arises within the jurisdiction: Bavah Meah *v.* Khajee Meah, 4 M. H. C. R. 218 (1869).

(6) Viraragava *v.* Krishnasami, 6 M. 344, 349 (1882). See Ismail Peer Ambalam *v.* Neelamagani, 8 M. L. J. R. 38.

(7) Babaji *v.* Lakshmibai, 9 B. 266 (1884).

The rule contained in clause (*b*) is based on the now generally recognized principle of the connection of the cause of action; (1) but there is nothing corresponding to it in the Letters Patent. It was held under the last Code (2) that the proviso following clause (*c*) in that Code applied only to that clause and not to clauses (*a*) and (*b*). The reconstruction of the section, as also the addition of the words "in such case," makes this clear.

In the case of clause 12 of the Letters Patent it has been held that the word "defendant" in that clause means all the defendants, if there are several defendants to a suit. It is not sufficient that one of the defendants should dwell or carry on business within the jurisdiction.(3)

"**Actually.**"—The residence is required to be actual, both to exclude what is merely colourable and collusive, and therefore no residence at all; and to emphasize what has been a growing tendency, viz. to substitute for mere domicile or constructive residence the actual state of affairs at the institution of the suit. This does not mean that the defendant must be personally present within the jurisdiction at the date of the suit. Although a defendant may be temporarily absent from his dwelling, yet if he retains it and intends to return to it, he will be held to dwell there.(4) Actual residence does not, of course, require a continual actual presence every day and every hour in the place of residence, or exclude temporary absence from the locality in which it lies (5) What is required is that the place should be the actual residence of the defendant when the suit is instituted. So a person who had dwelt and carried on business in Bombay for twenty years and had only occasionally visited Ahmadabad, where was the family home, was held to be actually residing in Bombay.(6) And where a person is in service at any place, whether of the Government (7) or of a private person,(8) he has been held not to dwell at another place where he has a family house in which his father lived, and which he occasionally visited; even though the service be of a domestic character.(9) The decision in the last-cited case proceeded on the ground that the word "dwell" must be used in the sense of actual residence, and the place where a servant is in service of a domestic character cannot be looked upon as a lodging for a temporary purpose only, but as a dwelling-place, although he may have the intention of returning at some future time to another dwelling where his family resides.

(1) Hukm Chand, C. P. C. 325.

(2) Zamiran *v.* Fatch Ali, 32 C. 146, 150 (1904).

(3) Hadjee Ismail *v.* Hadjee Mahomed, 13 B. L. R. 91 (1874). In Bhukandas *v.* Lallubhai, 17 B. 562 (1892), the liability being both joint and several, the suit was decreed against the defendant resident in Bombay and dismissed as against the rest, who were subsequently sued elsewhere, there being, it was held, no *res judicata* as against them.

(4) Madho Doss *v.* Sita Ram, 3 N. W. P. 121 (1871). Dwelling or residence means that place where a person has his fixed permanent home to which whenever he is absent he has the intention of returning: Fatima *v.* Sakina, A. 51, 52 (1875).

(5) Hukm Chand, C. P. C. 313, citing Narinjan Das *v.* Ramkishen, 1879, P. R. C. 91.

(6) Ugarchand *v.* Surajmull, 2 Bom. L. R. 605 (1900).

(7) Dwarka Das *v.* Shorlal, 1 S. D. A. C. at p. 410 (1810).

(8) Gendu *v.* Govind, 10 B. H. C. R. 409 (1873).

(9) Pirgash Paray *v.* Hachim, 7 W. R. 417 (1867).

"**Voluntarily.**"—Under the Code of 1859 a person was held to reside for the purpose of jurisdiction even where he was lawfully confined.(1) It is, however, a general principle that a person's compulsory residence at any place is not deemed sufficient to give jurisdiction over him to the Courts of that place; and the word "voluntarily" appears to have been used to give legislative sanction to that view.

"**Resides.**"—The corresponding expression used in the Code of 1859 and in the Small Cause Court Act was "dwell," the word which still exists in clause 12 of the Letters Patent of the Presidency High Courts.(2) The first point to be determined is whether there is any difference between the meaning of the two expressions, and secondly, what the meaning is. In an early case,(3) Levinge, J., said: "I consider that the word 'dwell' has a more extended signification than the word 'reside,' and means a permanent, as opposed to a mere temporary, residence. A traveller putting up at an hotel may be said in one sense to reside there; but a man can only be said to dwell, in the sense in which that term is used as giving jurisdiction, in the place where he ordinarily and permanently resides." It has, however, been said that little or no distinction can be drawn between the two words and the meaning implied in them, and that, if any distinction can be drawn, it would appear that "dwell" has a more extended signification than "reside."(4) In other cases it has been said that the terms are synonymous and express the same thing, the only difference being that they are perhaps in ordinary usage applied to different classes of society; (5) and that "dwell" is of Saxon and "reside" of Latin origin.(6) In a legal sense, neither term has any meaning which can be precisely defined. In the first place, the word need not necessarily have the same meaning in different enactments, nor even in different sections of the same enactment. The terms must be construed according to what may be supposed to have been the intention of the Legislature in using it.(7)

(1) See cases cited in notes to s. 16 of O'Kinealy's C. P. C., and Hukm Chand, C. P. C. 314, 315.

(2) The Supreme Courts had jurisdiction over the *inhabitants* of the Presidency towns, the word *inhabitant* for the purpose of jurisdiction meaning *resident:* Ram Narain Tanker *v.* Chederaulah Narsiah, 1 Mor. 371 (1837). As to the length of time necessary, see Madoo *v.* Bulloo, 1 Mor. 370; Punchanand Bose *v.* Davison, 1 Mor. 371.

(3) Emritloll *v.* Kidd, 2 Hyde, 117 (1864). To dwell in a place is to have one's permanent abode there: Madho Doss *v.* Sita Ram, 3 N. W. P. 121 (1871).

(4) Everet *v.* Frere, 8 M. 205, 206 (1885).

(5) Mahomed Shuffli *v.* Laldin Abdula, 3 B. 227, 229 (1878).

(6) Shri Goswami *v.* Shri Govardhanji, 14 B. 541, 547 (1890), and see Encyclopædia Dictionary in which "reside" is defined "to *dwell permanently* or for a *length* of time; to have one's home or settled abode; to abide continuously or for a lengthened period." Synonymous meanings are given also in Webster's and Latham's Dictionaries cited ib. at pp. 548, 549. And see Pirgash Paray *v.* Hachim, 7 W. R. 417 (1867), in which it was pointed out that the term "dwell" is ambiguous and in it was interpreted as meaning actual and usual place of residence. The expressions are elastic: Shri Goswami *v.* Shri Govardhanlalji, 14 B. at p. 548. The words dwelling or residence are synonymous with domicile or home: Fatima *v.* Sakina, 1 A. 52 (1875). As to the meaning of condition of residence in a will, see Tagore *v.* Tagore, 14 B. L. R. 60 (1874).

(7) Ramchandra *v.* Keshav, 6 B. 100, 101 (1881); Shri Goswami *v.* Shri Govardhanlalji, 18 B. at p. 292 (1891).

According to this supposed intention, the terms may receive a larger or more restricted meaning.(1) It is necessary to consider, in determining this intention, what the object of the enactment was. So it has been held that sect. 382 of the former Code (corresponding with O. XXV. r. 1 of this Code) shows the intention of the Legislature to have been that "residence" should be residence under such circumstances as will afford reasonable probability that the plaintiff will be forthcoming when the suit is decided.(2) And it has been held that under O. V. r. 9 the place where a defendant "resides" is the place where he eats, drinks and sleeps, or where his family and servants eat, drink and sleep.(3) Bare residence has been considered sufficient under sect. 648 of the former Code (corresponding with sect. 136 of this Code), so as to render a party liable to arrest, presumably because such an interpretation will best give effect to the intentions of the Legislature.(4) The term non-resident in sect. 37 of the last Code (or O. III. r. 2 of this) should be construed broadly and favourably to the enforcement of legal rights, so as not to prevent a creditor from enforcing his claims against his debtor.(5) The object of the Insolvent Act being to extend its benefit to those who could be said to be *bonâ fide* residents for the time being within the jurisdiction at the time they filed their petitions, there is nothing to show that the residence contemplated by sect. 5 of that Act (11 & 12 Vict. c. 21) must necessarily be a permanent residence. The term is used to distinguish the position of such persons from that of one who merely comes in and uses his presence within the jurisdiction as the means of obtaining the benefit of the Act, and it also has the effect of excluding persons merely in the position of visitors.(6) As to jurisdiction in the case of infants, see below.(7)

As regards the construction of these terms, as used in reference to jurisdiction, it has been variously said that when they are used to give jurisdiction they must be taken to be used in their strictest sense; (8) that they are to be construed broadly, so as to prevent a debtor from evading the claims of his creditors, the intention of the Legislature being favourable to the enforcement of legal rights; (9) and that they are to be used in their usual and ordinary acceptation, neither strained to amplify the jurisdiction of the Court nor narrowed to minimize it.(10) It is, however, submitted that in consulting the

(1) Mahomed Shuffii *v.* Laldin, 3 B. 227, 229 (1878).

(2) Ib.

(3) Kumud *v.* Jotindra, 38 C. 394 (1911); 13 C. L. J. 221.

(4) Everet *v.* Frere, 8 M. 205 (1885), in which case an officer proceeding from Burmah to England on leave resided a few days in Madras on the way and the residence was held sufficient.

(5) Ramchandra *v.* Keshav, 6 B. 100, 102 (1881).

(6) In the matter of De Momet, 21 C. 634 (1894), dist., *In re* Tietkins, 1 B. L. R., O. C. 81 (1868), in which the insolvent had a permanent residence outside the jurisdiction, and In the matter of Ram Paul Singh, 8 C. L. R. 14 (1881), where the insolvent merely came to Calcutta to file his petition and his family residence was at Bhagalpore.

(7) *In re* Meakin, 21 B. 137 (1896); and see Nusserwanjee Pestonjee Wadia *v.* Eleonora Pestonjee, 38 B. 125 (1913).

(8) Emritloll *v.* Kidd, 2 Hyde, 117, 118 (1864).

(9) Ramchandra *v.* Keshav, 6 B. 100, 102 (1881).

(10) Shri Goswami *v.* Shri Govardhanlalji, 14 B. 511, 518 (1890).

grounds upon which jurisdiction is given on account of residence a guide will be found to the true interpretation of the term, and the grounds upon which such jurisdiction is given are the convenience not of the plaintiff but of the defendant and his witnesses, and the advantage which may accrue to the former by enforcing the judgment of the Court within its own jurisdiction.(1) These connote a residence of a more or less permanent character.

Nextly, even in the case of the same enactment and the same portion of it there can be no fixed rule for all cases. Each case must depend upon its own particular circumstances.(2)

It is necessary, in the first place, that the residence be actual and *bonâ fide*, and not merely colourable or collusive, for in such case there is no residence at all. Assuming this, it cannot, however, be laid down with precision how long a person must stay in a place, and in what way, so as to be deemed to reside there. A very short period of actual living has been held sufficient in some cases.(3) Firstly may be considered those cases where a man has no permanent residence. Great stress is laid in the cases on the fact as to whether or not the person said to reside within the jurisdiction had at the time any other residence elsewhere.(4) When a man has no permanent residence he must be taken to dwell where he is actually staying.(5) So in such cases a stay of a month was held sufficient in the case of a man who had no other residence;(6) the stay of a ship's captain in port,(7) and even ten days.(8)

The other case is that in which a person has a permanent residence elsewhere. A person may, however, dwell or reside at more places than one.(9) But in order to afford foundation for jurisdiction the residences must be of a permanent character and be visited from time to time.(10) When the defendant has a fixed and permanent residence elsewhere, to give jurisdiction on the ground of residence, something more than a temporary stay within the local limits of the Court is required.(11) So a temporary residence of ten days;(12) a residence for the temporary purpose of attending a trial of a suit in which the party was a defendant; (13) staying in a place with a definite object

(1) Emritloll *v.* Kidd, 2 Hyde, 117, 119 (1864).

(2) Ib. at p. 119; Mahomed Shuffli *v.* Laldin, 3 B. 227, 229 (1878).

(3) In the matter of De Momet, 21 C. 634, 638 (1894).

(4) Ib.

(5) Shri Goswami *v.* Shri Govardhanlalji, 14 B. at p. 549 (1890).

(6) Morris *v.* Baumgarten, Coryton, 152 (1865); foll., Mayhew *v.* Tulloch, 4 N. W. P. 25 (1872). The decision would probably have been the other way if the defendant had had a permanent dwelling elsewhere: Shri Goswami *v.* Shri Govardhanlalji, 14 B. at p. 549 (1890).

(7) The Judges of the Small Cause Court, 2 Tayl. & Bell, 4: ref., Emritloll *v.* Kidd, 2 Hyde, 117, 118 (1864).

(8) In the matter of De Momet, 21 C. 634 (1894), a case under the Insolvent Act.

(9) Orde *v.* Skinner, 3 A. 91 (1880); Fatima *v.* Sakina, 1 A. 51, 52 (1875); in Nishadmey Dossee *v.* Kally Kristo Ghose, Coryton, 24 (1864), jurisdiction was upheld, as Calcutta was the usual residence for part of the year.

(10) Shri Goswami *v.* Shri Govardhanlalji, 18 B. 290, 293 (1891).

(11) Ib. at 14 B. p. 550 (1890); Zalem Tewarree *v.* Gobindgeer Gossain, 1 Ind. Jur. 85 (1862).

(12) Cowasjee Framjee *v.* Wallace, 1 B. H. C. R. 113 (1863).

(13) Emritloll *v.* Kidd, 2 Hyde, 117 (1864); see Saminatha *v.* Varisai, 2 M. H. C. R. 304 (1865).

or fixed purpose for a short and limited period,(1) will not, in the case of a man who has a *bonâ fide* and permanent abode elsewhere, give jurisdiction. So where an officer attached to a regiment at Vellore went on medical leave to Madras, where he resided in a rented house and finally returned to Vellore, the latter was held to be the place where he dwelt.(2)

In conclusion, it may be said that while neither "dwell" nor "reside" necessarily implies a permanent state of things,(3) yet when it is desired to speak of residence for a limited time a limiting adjective is applied, and when there is no such qualifying adjective permanent residence is understood.(4) The residence contemplated by the Letters Patent,(5) and (subject to Explanation I.) the Code, must be of a more or less permanent character, of such a nature as to show that the Court in which a defendant is sued is his natural forum.(6) The Court will not snatch a jurisdiction which was not intended to be conferred.(7) As regards Explanation I., *vide post*. Sect. 265 of the Contract Act is permissive and does not prohibit a suit elsewhere than at the place where the partnership was carried on, if a sufficient ground of jurisdiction exists.(8)

Explanation I.—The term residence is here applied to the temporary residence of a defendant in respect of a cause of action arising at the place where he has such temporary residence. That is an enlarging explanation for a limited purpose, and not an interpretation or definition of the word as usually understood.(9) The Explanation is identical with Explanation (*a*) to sect. 8 of the Small Cause Courts Act, XI. of 1865.(10) In respect of any cause of action arising at the place of permanent dwelling, he must be sued there.(11) The change in the Explanation appears to be of a verbal character.

(1) Shri Goswami *v.* Shri Govardhanlalji, 14 B. at p. 550 (1890). So the Supreme Court refused jurisdiction in the case of a person having daily employment in Calcutta but residing outside it: Goculchund Banerjee *v.* Camdeb Mookerjee, 1 Mor. 371; but not when he often slept in Calcutta: Haberley *v.* Bason, 1 Mor. 371; or outside when the sole purpose was to avoid jurisdiction: Martindell *v.* Toman, 1 Mor. 371; Bhano *v.* Hossein Ali, 1 Mor. 371.

(2) Kissun Sing *v.* Sturt, 5 M. H. C. R. 171 (1870).

(3) Shri Goswami *v.* Shri Govardhanlalji, 14 B. at p. 549 (1890); Mahomed Shuffli *v.* Laldin, 3 B. 227 (1879).

(4) Shri Goswami *v.* Shri Govardhanlalji, *supra*.

(5) Ib., at p. 552.

(6) Ib. It was not the intention of the Letters Patent to give jurisdiction in cases of temporary residence only: Shri Goswami *v.* Shri Govardhanlalji, 18 B. at p. 292 (1891); jurisdiction is given on the score of residence when that residence is substantially the ordinary residence or dwelling of the defendant: Emrtloll *v.* Kidd, 2 Hyde, at p. 119 (1864); and see Nusserwanjee Pestonjee Wadia *v.* Eleonora Pestonjee, 38 B. 125 (1913).

(7) Shri Goswami *v.* Shri Govardhanlalji, 14 B. at p. 554 (1890).

(8) Ramasami *v.* Thiruvengadasami, 1 M. 340 (1877).

(9) Shri Goswami *v.* Shri Govardhanlalji, 14 B. at p. 549 (1890); the purpose is to avoid the rule (see Macdougall *v.* Paterson, 11 C. B. 755) that a person having a permanent residence at a place cannot be said to reside at any other place where he has a lodging for a temporary purpose only, or, to use the words of the present Code, a temporary residence.

(10) See Ugarchand *v.* Surajmal, 2 Bom. L. R. 605, 606 (1900).

(11) See Pirgash Paray *v.* Hachim, 7 W. R. 417 (1867).

Explanation II.—This is in general conformity with the English decisions, though under the Indian rule the carrying on of business is not only a circumstance for determining the residence of a company, but an independent ground of jurisdiction also.(1) The Secretary of State in Council is not a body corporate, though he may be used as such.(2) Foreign corporations or companies have their domicile in the country where they are incorporated, and thus come into existence. But they may also be deemed to reside in the country in which they have their seat and principal place of business.(3)

"Carries on business."—This phrase is of varying import, and must be interpreted according to the context and the apparent purpose of the Legislature.(4) In the first place this expression here connotes more than being busy or doing business merely, and more than mere service, employment, or occupation. A man who busies himself about science or politics, though he may have a great deal of business to transact in respect of these matters, does not "*carry on business*"; nor does a domestic servant, a clerk, or assistant in a trading or mercantile concern. The words mean the carrying on of business by the person whose business it is, and mean to describe a person managing or conducting his own, and not somebody else's, business. He must either manage or conduct a business of his own, or the business which is managed or conducted for him must be his own. The servant or employee is not carrying on his own business, but his master's. A person carries on business when he controls or directs it.(5)

The term "*business*" is not limited to commercial business. So where a person was in daily attendance on his patients as surgeon, apothecary, and accoucheur within a certain district, he was held to be carrying on business there.(6) It has, however, been held that zemindary business is not within the rule; (7) nor the receipts of presents or offerings.(8) There is a conflict of opinion as to whether the Government can (9) or cannot (10) be said to carry on business.

(1) See the English cases, which will be found cited in Hukm Chand, C. P. C. 315, 324, where it is also pointed out that the Explanation settles a number of points upon which there is a conflict of opinion in the English Courts.

(2) Doya Narain Tewary *v.* Secretary of State, 14 C. 256, 271 (1886).

(3) See Hukm Chand, C. P. C. 317, where the question is discussed.

(4) Gocouldas *v.* Ganesh Lal, 4 B. 416, 422 (1880).

(5) Graham *v.* Lewis, 22 Q. B. D. 5.

(6) Mitchell *v.* Hender, 23 L. J. Q. B. 273.

(7) Anonymous, 23 W. R. 223 (1875). See Nobin Chunder *v.* Buroda Kant Shaha, 19 W. R. 341 (1873).

(8) Shri Goswami *v.* Shri Govardhanlalji, 14 B. 541, 552 (1890); s. c., in appeal, 18 B. 290 (1891).

(9) Biprodas Dey *v.* Secretary of State, 14 C. 262, *n.* (1885); Subbaraya *v.* Government, 1 M. H. C. R. 286 (1862). It is also pointed out in Hukm Chand, C. P. C. p. 321, that several suits have been decided in the High Courts and Presidency Small Cause Courts in which the cause of action did not accrue within the local limits of their jurisdiction; and those Courts could have jurisdiction only if the Government could be held to carry on business within those limits: see Ross Johnston *v.* Secretary of State, 2 Hyde, 153 (1864); P. & O. S. N. Co. *v.* Secretary of State, 5 B. H. C. R. App. 1 (1861); Brito *v.* Secretary of State, 6 B. 251 (1881); Hari Bhanji *v.* Secretary of State, 4 M. 344 (1879).

(10) Rundle *v.* Secretary of State, 1 Hyde, 37 (1863), in which it was said that Government should be sued where the cause of

In the under-mentioned case (1) the Court of first instance, whose judgment was reversed on appeal,(2) held that the carrying on of business must involve pretty much the same element of permanency as is necessary to convert a mere "staying" into "dwelling." But it does not seem to be necessary that the business should be carried on permanently, and each case must be decided on its own facts.(3) Thus a person who had no regular office, but went once or twice a week from the Mofussil to a friend's house in Calcutta, and saw people there on business, and contracted there with some man for the hire of cargo-boats, was held to carry on business or personally work for gain at Calcutta.(4)

The business need not be one carried on personally.(5) This is shown by the omission of the term "personally" before the words "carry on business," and its introduction before the words "work for gain." The defendant must, however, carry on some independent regular business in person, or at an office or other fixed place of business, either personally or by clerks or servants employed by the defendant, and conducting the business under his control, and in his individual or partnership name.(6) So in the last-mentioned case it was held that the defendant had no place of business in Madras, the sales being effected by another person, X, in *his* independent business or trade of a general broker for a commission received from the purchasers. In such case it was X, and not the defendant, who was carrying on business in Madras.

A person may carry on business at the same time at several places by means of different agents, as is often really the case. The employment, however, of a person as one's commission agent, or simply consigning goods to a commission,(7) or general,(8) agent for sale by him in the exercise of *his own* calling, does not constitute carrying on business at the place where that person or agent may be residing or carrying on his own business, or

action arises: Doya Narain Tewary *v.* Secretary of State, 14 C. 256 (1886) [the words "carry on business or personally work for gain" are inapplicable to the Secretary of State].

(1) Haydar Das *v.* Bhajwan Das, 7 B. L. R. 102, 112 (1871).

(2) 7 B. L. R. 535.

(3) In Bill No. 2 of the Code of 1877 an Explanation was added to provide that the business contemplated must be carried on at a fixed place for at least a certain time, but the Explanation was omitted from Bill No. 3.

(4) Grish Chunder *v.* Collins, 2 Hyde, 79 (1862); and so does a captain of a foreign ship trading to this port: R. *v.* Judges of Small Cause Court, 2 Tayl. & Bell, 7 (1851).

(5) Muthaya Chetti *v.* Allan, 4 M. 209 (1880); Kessowji *v.* Khimji, 12 B. 507, 521 (1888); Girdhar *v.* Kassigar, 17 B. 662 (1893); Chinnammal *v.* Tulu Kannatammal, 3 M. H. C. R. 146 (1866); in which Scotland, C. J., modified his opinion to the contrary, in Subbaraya *v.* Government, 1 M. H. C. R. 286 (1862); which last case was followed as regards the jurisdiction of the Small Cause Court in Chundee Churn Dutt *v.* Eduljee Cowasjee, 8 C. 678 (1882). In addition to actual inhabitancy the Supreme Court had jurisdiction by constructive inhabitancy on the ground of trading. As to factors, however, see Sunker Doss *v.* Manickram, Fulton, 334 (1843).

(6) Chinnammal *v.* Tulu Kannatammal, 3 M. H. C. R. 146 (1866).

(7) Khimjee *v.* Forbes, 8 B. H. C. R., O. C. 102 (1871); Gopee Mohun *v.* Protab Chunder, 11 W. R. 530 (1869).

(8) Chinnammal *v.* Tulu Kannatammal, 3 M. H. C. R. 146 (1866).

doing or selling what he may have been employed to do or sell. In the undermentioned case (1) it was held that a defendant does not carry on business at a place, though he may have an agent there for certain purposes connected with his business, where that which is the essential ingredient in his business does not take place within the local limits of the jurisdiction of the Court. In delivering judgment, Sausse, C.J., said: "To determine whether a defendant is carrying on business, it must first be ascertained what his particular trade, calling, or occupation is, and then we can examine whether the facts proved amount to a carrying on of that particular trade, calling, or occupation within the jurisdiction. The present defendant is admittedly a retail vendor in European goods, and obtains his livelihood by the profit which he makes upon his sales; without 'sale' he could not make profit; or, in other words, he could not carry on business for the purpose of gaining a livelihood. 'Sale' is an essential ingredient in carrying on this defendant's business, and in the present case, to give this Court cognizance of suit upon that ground, it must be shown that 'sale' by the defendant in the way of a retail dealer has taken place within our territorial limit. The place of sale, in the present case, is the true place of the defendant's carrying on business."

As to the question whether jurisdiction in regard to foreigners is limited to those who personally carry on business, *vide ante*, p. 174.

"**Personally works for gain.**"—These words were inserted to give the Courts jurisdiction over persons who, though dwelling out of the local limits, personally worked for gain within them.(2) So a person residing at Ghoosery, outside Calcutta, who habitually and constantly came to Calcutta for the purpose of making contracts as part of his business as a contractor, was held to carry on business and work for gain in Calcutta.(3) An advocate of the High Court residing out of the local limits, but who holds himself out as ready to practise in the High Court and who goes whenever he is engaged to appear, personally works for gain within the local limits.(4) In order that jurisdiction should attach on the ground of working for gain, such working should be habitual.(5) Further, to constitute work there must be some mental or physical effort. To take advantage of an innate holiness as a reason for accepting presents or offerings as your natural due is not work; nor is the blessing which the defendant invokes upon the dwellings which he visits.(6) As to whether Government can be said to personally work for gain, *vide ante*, p. 180.

"**Cause of action.**"—The meaning of this term has been the subject of considerable controversy, which, however, so far as this section is concerned, is now settled, and it is not proposed to do more than to give the references to the somewhat numerous decisions in which the question was discussed prior

(1) Framjee *v.* Hormasji, 1 B. H. C. R., O. C. J., 220 (1865).

(2) Shri Goswami *v.* Shri Govardhanlalji, 14 B. 541, 553 (1890).

(3) Greeschunder Bonnerjee *v.* Collins, 2 Hyde, 79 (1862).

(4) Rai Narain Das *v.* Newton, 6 N. W. P. 43 (1873).

(5) Shri Goswami *v.* Shri Govardhanlalji, 14 B. 541, 553 (1890).

(6) Ib., at p. 554; s. c., in appeal, 18 B. 290 (1894).

to the amendment of the section in 1888. Sometimes these words have been given the restricted sense of immediate occasion of the action, which itself means the right to have recourse to the Courts; in other and perhaps the greater number of cases, the wider sense of necessary conditions of its maintenance. In the former sense it is the mere matter of fact, the failure of the defendant to do, or forbear from doing, to give or make good, that which the plaintiff's right entitles him to insist upon—in other words, the infraction of the right, as, in the case of a contract, its breach. In the latter sense it is this matter of fact *plus* the right resident in the plaintiff, or, to take the example chosen, both the making of the contract and its breach.(1) In this last sense, "cause of action" therefore means every fact which is material to be proved to entitle the plaintiff to succeed; (2) and everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action; (3) though the term does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.(4) In this view of the case, the cause of action (which must exist at the date of the action (5)) is composed of several parts, which must, of course, necessarily include as one of such parts the infraction (6) of the right claimed.

The next question is, whether in order to give jurisdiction the whole cause of action should have arisen within the jurisdiction or whether it is sufficient that a part of such cause of action should have so arisen. As regards the Presidency High Courts, it is well settled that the term "cause of action," as used in clause 12 of the Charters (which, and not this section, governs such Courts) means the whole cause of action, and not a material part of it: (7)

(1) See the learned judgment of Holloway, J., in De Souza *v.* Coles, 3 M. H. C. R. 384, 406 (1868), as also the judgments in Gopi Krishna Gossami *v.* Nilcomul Bannerjee, 13 B. L. R. 461 (1874), and Kalidhun Chuttapadhya *v.* Shiba Nath Chuttapadhya, 8 C. at p. 488 (1882), in which the English cases will be found collected. Whatever meaning be attached to the term, it does not depend upon the relief claimed: Thakur Shankar *v.* Dya Shankar, 15 I. A. 66 (1887), and has no relation whatever to the defence, but refers entirely to the grounds set forth in the plaint, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour: Mt. Chand Kour *v.* Partab Singh, 15 I. A. 156 (1888).

(2) Cooke *v.* Gill, 8 C. P. 107. So in a suit for a legacy against an administrator, the grant of administration (Fuller *v.* Mackey, 2 E. & B. 573), for a reward for apprehension and conviction of a thief, the conviction (Hernaman *v.* Smith, 10 Ex. 659), on a life policy, the death of the assured (Cailland *v.* Champion, 7 T. R. 295), are parts of the respective causes of action. The fact must be both necessary and material to be proved. If not it is no part of the cause of action: London, Bombay and Mediterranean Bank *v.* Badee Beebee, 5 B. 42 (1880).

(3) Read *v.* Brown, 22 Q. B. D. 128.

(4) Ib. at p. 132. See Pragdas *v.* Doulatram, 11 B. 257 (1886).

(5) Gulzar Singh *v.* Kalyan Chand, 15 A. 399 (1893), in which case, though the plaintiff was not entitled at the commencement of the suit to possession, it was held that if the suit had been brought a fortnight later the other party would have been without a defence.

(6) Nurdin *v.* Alavudin, 12 M. 134 (1888).

(7) De Souza *v.* Coles, 3 M. H. C. R. 384 (1868); Mothoor Mohun Roy *v.* Jadoomoney Dossee, 10 B. L. R. 122 (1872); Hills *v.* Clark, 14 B. L. R. 367, 369 (1874); Jummoonah Persad *v.* Zaibunessa, 5 C. L. R. at p. 276 (1879); Mulchand *v* Suganchand, 1 B.

though, if a part of the cause of action shall have arisen within the jurisdiction, a suit will lie in the High Court if leave have been previously obtained. For the purposes of the Letters Patent, the expression "cause of action" means the bundle of facts which it is necessary for the plaintiff to prove before he can succeed in his suit. It does not include irrelevant or immaterial facts, but embraces material facts without which the plaintiff must fail. If any of these material facts have taken place within the jurisdiction of the Court, then leave can be given under clause 12. But if no such material facts have taken place within the jurisdiction, and leave is given there, then it is open to the defendant to contend at the hearing that the Court has no jurisdiction.(1)

Prior to the amendment of the corresponding section of the last Code, in 1888, it was held that the words therein used did not mean the whole cause of action, but any material portion of the nature stated in Explanation III. to that section, which was added in the year mentioned. And therefore the Courts governed by the Code were held to have jurisdiction if such a material portion of the cause of action arose within their jurisdiction.(2) Sect. 7, Act VII. of 1888, gave effect to these decisions by adding the third Explanation to the former section, which rendered further discussion in the case of suits arising out of contract unnecessary (*vide post*). The rule, moreover, has been reaffirmed recently to be of general application in all suits.(3) And now the section expressly gives jurisdiction where the cause of action, wholly *or in part*, arises. No leave is required in the latter case.

Under the Code, British Courts are empowered to pass judgment against a non-resident foreigner, provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment.(4) The Court in whose local jurisdiction the funds of an endowment, received from a foreign

23 (1875); Dhunjesha *v.* Fforde, 11 B. 649 (1887); Kalidhun *v.* Shibanath, 8 C. at p. 493 (1882); Rampurtab *v.* Premsukh, 15 B. 93 (1890); Doya Narain Tewary *v.* Secretary of State, 14 C. 256 (1886). In Muhammad Abdul Kadar *v.* E. I. Railway, 1 M. 375 (1878), where it was admitted that "cause of action" meant the whole cause of action, it was held that the breach of the contract constituted the whole cause—a view which has been dissented from by the Calcutta High Court, Doya Narain Tewary *v.* Secretary of State, 14 C. at p. 270 (1886), and the Bombay High Court, Rampurtab *v.* Premsukh, 15 B. at p. 102 (1890).

(1) Motilal *v.* Surajmull, 6 Bom. L. R. 1038 (1904).

(2) Gopi Krishna Gossami *v.* Nilcomul Bannerjee, 13 B. L. R. 461 (1874); Hills *v.* Clark, 14 B. L. R. 367 (1874); Llewhellin *v.* Chunni Lal, 4 A. 423 (1882); Bishunath *v.* Ilahi Baksh, 5 A. 277 (1883); Kalidhun *v.* Shibanath, 8 C. 495 (1882); Laljee Lall *v.* Hurdey Narain, 9 C. 105 (1882), which also dealt with the effect to be given to the Illustrations, the first of which is taken from Winter *v.* May, 1 M. H. C. R. 200 (1863), and the second from De Souza *v.* Coles, 3 M. H. C. R. at p. 397 (1868). *Contra*, Jummoonah Persad *v.* Zarbunessa, 5 C. L. R. 268 (1879).

(3) Banke Behari Lal *v.* Pokhe Ram, 25 A. 48 (1902), which was a suit asking that a compromise and decree founded thereon might be declared void, and for an injunction restraining execution.

(4) Rambhat *v.* Shankar Baswant, 25 B. 528 (1901); s. c., 3 Bom. L. R. 82. So also under the Charters, Barah Meah Saib *v.* Khajee Meah, 4 M. H. C. R. 218 (1869); *contra*, Kessowji *v.* Khimji, 12 B. 507 (1888), which was dissented from in Gudhar *v.* Kassigar, 17 B. 662 (1893), *vide post*, p. 186.

territory, are expended by the parties residing there, has full power to determine questions as to the management of the funds, quite apart from the title to the grant, which may not be in dispute.(1) As to residence, etc., giving jurisdiction in case of foreigners, see *post*; and as to cases in which the cause of action arises below low-water mark and within three miles of it, the case undermentioned.(2)

Whatever the cause of action may be, the jurisdiction created at the place of its accrual is not affected by the death of the person originally liable, and it is a general principle that the representative of a deceased person may be sued in that Court within the jurisdiction of which the cause of action with the deceased person arose.(3) The accrual of a cause of action within the local limits of a Court's jurisdiction will not give the Court jurisdiction over a suit in which any other cause of action arising out of those limits is joined; it being, in fact, a pre-requisite of the right to join in one suit more than one cause of action against a defendant that the Court to which the plaint is presented should have jurisdiction over all the causes of action.(4)

The term "*cause of action*" as used in the Code applies to torts as well as contracts.(5) Reading clauses (*a*), (*b*), and (*c*) with the words "*every suit*," it appears that all suits of whatever nature, subject to the limitations in the preceding sections, are referred to. Sect. 19 contains special provisions with regard to suits for compensation for wrong done, but suits on tort not within the words of that section will fall under this. In India, the cause of action has been always held to furnish the forum not only of suits in contracts, but in its broader sense to apply also to suits on torts.

As already stated, the words "*cause of action*" in this section do not mean necessarily the whole cause of action, but a suit to which the section applies may be instituted where some portion of the cause of action arises.(6) So in a suit praying that a fraudulent compromise and decree founded thereon might be declared void, and for an injunction restraining execution, it was held that though the decree was made and compromise entered into in Calcutta (where in respect of them the cause of action arose), yet a material part of the cause of action, namely, the infringement of the plaintiff's right by executing the decree, having taken place in Cawnpore, the suit lay in that district.(7)

Though a special provision as to jurisdiction over suits on torts has been made in sect. 19, there is nothing in the general words of the present one to exclude them from its operation. The Courts will therefore have jurisdiction

(1) Kashinath *v.* Anant, 2 Bom. L. R. 47 (1899).

(2) Baban Mayacha *v.* Nagu, 2 B. 19 (1876).

(3) Ladd *v.* Parbutty, 2 Hyde, 18 (1862); Hargopal *v.* Abdul Khan, 9 B. H. C. R. 129 (1872).

(4) Khimji Jivragu *v.* Purushotam, 7 M. 171 (1883). And if the main relief cannot be granted, a right which is only ancillary to the principal right cannot be enforced: Trimbak *v.* Lakshman, 20 B. 495, 500 (1895).

(5) Kalidun Chuttapadhya *v.* Shiba Nath, 8 C. at p. 491 (1882).

(6) Banke Behari Lal *v.* Pokhe Ram, 25 A. 48 (1902). Under the last Code, as regards suits arising out of contract, the matter was made plain by Explanation III., and now clause (*c*) shows that is so in all cases.

(7) Ib.

when the cause of action arises within their jurisdiction or the defendants reside, etc., there. And it is not necessary that both the constituents of jurisdiction should exist in British India.(1) The provisions of this section are independent of the general principles of international law; but there is nothing even in these principles to restrict the jurisdiction of the Courts of any country to cases in which the cause of action should have arisen in that country. In England it is settled that an action will lie there against a defendant there upon a transaction in a place in another country.(2) Explanation III. to the former section had no reference to torts. But the term "*cause of action*" was, under the last Code, independently of that explanation, construed to mean not the whole cause of action - if such cause of action involves more than the mere commission of the delict - in suits to which the Code applies.(3) Probably, the cause of action will usually be construed in a restricted sense, so as not to involve the right violated, but to denote only the violation or the breach of a duty which entitles the plaintiff to relief.(4) In any case, a large number of cases in tort will come within the special provisions of the preceding section. In a recent English case dealing with the effect of a judgment in the Calcutta High Court in divorce proceedings condemning in damages a defendant, a British subject, who though formerly resident in India, had left this country before the petition was issued, and was now domiciled in England, it was argued on his behalf that the Calcutta High Court had no jurisdiction over him; but it was held that the power to give damages was ancillary to the judgment on status concerning the marriage, which judgment, being *in rem*, would bind the world.(5)

A Court may entertain a suit to set aside a decree on the ground of fraud, provided that the requirements of this section or of the Charter, as the case may be, are satisfied.(6) In the case of a libel, the suit will lie where it has been published.(7) In a suit to set aside a release executed in Calcutta of the plaintiff's interest in certain property in Bombay, it was held that the cause of action included the effect of the release on the property in Bombay, and did not wholly arise in Calcutta.(8) This section, in the case of suits between

(1) See Baban Mayacha *v.* Nagu Shravucha, 2 B. 19 (1876).

(2) Hukm Chand, C. P. C. 310; Machado *v.* Fontes, 1897, 2 Q. B. 235.

(3) *Vide* p. 184.

(4) See Hukm Chand, C. P. C. 311; Laljee Lal *v.* Hardey Narain, 9 C. 105 (1882); Gopi Krishna *v.* Nilcomal, 13 B. L. R. 461 (1874); Hills *v.* Clark, 14 B. L. R. 367 (1874); Llewhellin *v.* Chunni Lall, 4 A. 423 (1882); Bishanath *v.* Ilahi Baksh, 5 A. 277 (1883); Ram Pertab Singh *v.* Bholabutty, 9 W. R. 486 (1868). See as to different parts of cause of action in suits on torts: Kartic Churn *v.* Gopal Kisto, 3 C. 264 (1877) [Pledge; Fraud]; Hadjee Ismail *v.* Hadjee Mahomed, 13 B. L. R. 391 (1874) [Fraudulent representations; suit to set aside release]; Luddy *v.* Johnston, 6 B. L. R. 141 (1870) [Malicious prosecution]. The matter is not of practical importance so far as suits in the High Courts are concerned, as in all cases of doubt leave is usually asked for and given; and as to other Courts, see now clause (c).

(5) Phillips *v.* Batho, 17 C. W. N. cclxi.

(6) Nistarini Dassi *v.* Nundo Lal Bose, 30 C. 369 (1902); s. c., 7 C. W. N. 353. A suit to set aside a consent decree of the High Court on the ground of fraud may be brought without previous leave to sue having been obtained, though all the defendants dwell without the jurisdiction: Bibee Soloman *v.* Abdul Aziz, 4 C. L. R. 366 (1879).

(7) Geffert *v.* Ruckchand, 13 B. 178 (1888).

(8) Hadjee Ismail *v.* Hadjee Mahomed, 13 B. L. R. 91 (1874)

landlord and tenant, is controlled by sect. 144 of the Bengal Tenancy Act.(1) In cases instituted under Act IX. of 1861, the Court is to be guided by the Code, and where there is an objection to jurisdiction this section will be considered.(2) As regards Probate jurisdiction, see Act V. of 1881.(3)

Explanation III. of former section.—This has been omitted, as its relation was considered unnecessary owing to the addition made to sub-clause (*c*) of the words "*wholly or in part*" in reference to the cause of action. Though omitted, the Explanation gave a correct statement of what is still the law (4) and is therefore here dealt with. This Explanation settled the signification of the term "*cause of action*" in the case of suits arising out of contract. Its language was wide enough to include all cases of contract, though not obligations in the nature of *quasi* contracts,(5) though it is said (6) that the corresponding rule of *locus solutionis* in other countries does not apply to contracts already executed or creating personal status. Certain relations, such as those of marriage and adoption, though originally based on contract, are not themselves sources of rights and duties on account of the grounds of contract.(7) While a suit may be arising out of contract within the meaning of the Explanation, it does not follow that all the clauses of that section will be applicable to it; as in the case of a suit arising out of contract claiming a sum payable not in performance of the contract, but as damages for its breach.(8) It may be a question whether the language of the Explanation is explicit enough to include suits for the cancellation of contract, the *forum contractus* in Roman law being generally held to apply to actions arising out of the natural development of the obligation, and, therefore, leading to its fulfilment. A suit for the cancellation of a contract must, however, always be for some cause; and the nature of the cause and the place of its accrual, and not necessarily the place of the contract, will furnish the forum for such suits.(9) But whether it does or not the suit will be within the section.

In suits arising out of contract the cause of action is deemed to arise, according to the omitted Explanation, at three places:—

(a) *The place where the contract was made.* The determination of this question belongs to the law of contracts. This will be the place of meeting where there is a personal meeting of the parties—except, perhaps, where the validity of a contract is made to depend upon the observance of a particular form, in which case the place at which that form is completed is the true place of the contract, because until such completion no party is bound.(10)

(1) Fazlur Rahim *v.* Dwarka Nath, 30 C. 453, 456 (1903); s. c., 7 C. W. N. 402.

(2) Sarat Chandra Chakarbati *v.* Forman, 12 A. 213 (1890) [removal of minor from plaintiff's custody].

(3) And see Bhanrao *v.* Lakshmibai, 20 B. 607 (1895); Fardunji *v.* Navaghai, 17 B. 689 (1892). As to suits to set aside certificate of heirship granted by Political Resident, see Ammunni *v.* Krishna, 16 M. 405 (1892).

(4) Saligram *v.* Chaha Mal, 34 A. 49 (1911).

(5) See Hukm Chand, C. P. C. 298-309.

(6) Ib., 298.

(7) As to the cause of action in suits for restitution of conjugal right, see ib., p. 299; Lalitagar *v.* Bai Suraj, 18 B. 316 (1893). A suit for the recovery of dower is a suit on a contract: Shankar Dial *v.* Muhammad Mujtaba, 18 A. 400 (1896).

(8) Kamisetti *v.* Katha, 27 M. 355 (1903).

(9) See Hukm Chand, C. P. C. 299.

(10) Ib.

In the case of contract by correspondence, it has been held that the contract is considered made where the letter of acceptance is posted, and not where it is received by the proposer.(1) Where a balance was struck and an agreement to repay the balance was drawn out at Cawnpore, it was held that the Cawnpore Court had jurisdiction to entertain a suit on the agreement, and its jurisdiction was not affected by the fact of the transaction, in respect of which the agreement was given, having happened elsewhere.(2) Where the suit was brought upon the defendant's breach to deliver in the terms of the contract, and it did not appear where the contract, if any, was made, it was held that the mere fact that an advance on account of the contract was made within the local jurisdiction of a Court would not give the Court jurisdiction in such suit.(3) In the under-mentioned case it was held that, assuming that in the account for the balance of which the plaintiff sued there were some items which if they could be separated from the suit would give a cause of action within the jurisdiction of the Court at B., it was never the intention that the transactions should be disconnected so as to give separate causes of action, but that the items should be joined together so as to form the subject of one demand, and that the suit had been brought in the wrong Court.(4) As to the making, endorsement, and acceptance of negotiable instruments, see the cases below.(5)

(b) *The place where the contract was to be performed or performance completed;* or (c) *where in performance any money to which the suit relates was expressly or impliedly payable.* The determination of this question is also part of the law of contracts and the rules for their interpretation. The rule of the *forum loci solutionis*, as it is called, is applicable only where a particular place for performance can be fixed, and not therefore where the contract may be performed anywhere.(6) In some cases the place of performance is expressly fixed by the contract, in others by the nature of the act to be done in performance; as, for example, where the obligation is to build a house, or to do other work on real property.(7) Thus, also, in a suit to have a mortgage-deed registered, the cause of action was held to accrue at the place where the deed had to be registered under the law. From the nature of the act to be performed this was the place of the fulfilment of the obligation.(8) In some cases, provisions of

(1) Muhammad Shafi *v.* Karamat Ali, 1896, P. R. No. 76; Kamisetti *v.* Katha, 27 M. 355 (1903).

(2) Haim Raj *v.* Ram Bux, 1 Agra, 115 (1866).

(3) Ajoodhya Proshad *v.* Gobind Ram, 2 Agra, 188 (1867).

(4) Atmakuri *v.* Selli, 3 M. H. C. R. 222 (1866).

(5) Ramgopal *v.* Blacquière, 1 B. L. R., O. C. 35 (1867); Joan Mull *v.* Munmoo Lall, 1 Ind. Jur. N. S. 219 (1866); Dhanraj *v.* Gobindaram, 1 B. L. R., O. C. 76 (1868); Issur Chunder Sein *v.* Cruz, 1 Ind. Jur. N. S. 233 (1866); Winter *v.* Round, 1 M. H. C. R. 202 (1867); Mothoormohun Roy *v.* Jadoomoney Dossee, 10 B. L. R. 122 (1872); Haydan Das *v.* Bhagwan Das, 7 B. L. R. 102 (1871); s. c., on appeal, at p. 535; Pragdas *v.* Dowlatram, 11 B. 257 (1886); Rampurtab *v.* Premsukh, 15 B. 93 (1890); Mulchand *v.* Suganchand, 1 B. 23 (1875); Rampurtab *v.* Foolibai, 20 B. 774 (1896).

(6) Rajendra Rau *v.* Sama Rau, 1 M. H. C. R. 436 (1863).

(7) See the subject more fully treated in Hukm Chand, C. P. C. 300–309.

(8) Sami *v.* Gopal, 7 M. H. C. R. 176 (1873).

positive law must be consulted.(1) Where no place for the performance is prescribed in the agreement, or exacted by the necessities of the case, or fixed by or in accordance with statutory law, the place where it should appear that the parties intended that the contract should be fulfilled ought to supply the *forum*.(2) In most such cases, the course of the business to which the contract relates, or in which anything will have to be done or any money to be paid, will determine the place of performance or payment.(3) In some cases, where no actual intention can be inferred, recourse may be had to presumptions—such as that under which performance is deemed to have been intended at the place where business was carried on by the person entitled under the contract; (4) or, where neither party has a fixed place of business, wherever (at any rate, in the case of contracts for payment of money) the creditor happens to be.(5) In the absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of sale; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or, if not then in existence, at the place at which they are produced.(6) The place of accrual of cause of action in suits for an account and balance due from an agent must be determined by a reference to the circumstances under which the situation of agency is contracted, and the promise to pay at a particular place must be implied where not expressly

(1) See Contract Act, ss. 48, 49.

(2) See Hukm Chand, C. P. C. 303; and see Sheriff *v.* Manners, 7 C. W. N. 912 (1903); Nirban Singh *v.* Kumla Sahoy, 17 W. R. 345 (1872); Deokee Nundun *v.* Oomrao Singh, 2 Agra. 218 (1867); Chunilal *v.* Mahipatrav, 5 B. H. C. R., A. C. 33 (1868); Dadabhai *v.* Diogo, 18 B. 13 (1892); Dhunjisha *v.* Fforde, 11 B. 649 (1887); Dobson *v.* Bengal S. & W. Railway, 21 B. 133 (1896); A. T. Bhuttacharya *v.* Cawnpur Woollen Mills, 16 C. W. N. 325 (1911).

(3) See Hukm Chand, C. P. C. 304; and see Llewhellin *v.* Chunni Lal, 4 A. 123 (1882); see Orde *v.* Skinner, 3 A. 91 (1880). In a suit for salary which had always been paid at Surat, the latter Court was held to have jurisdiction: Beg Mahomed *v.* Kavasji, 2 Bom. L. R. 524 (1900); see next note. On a somewhat similar principle the endorser of a hundi is liable to pay at place of endorsement and not where the hundi is payable: Suganchand *v.* Mulchand, 9 B. H. C. R. 270 (1872).

(4) Ib. The forum arising from course of business is held to apply generally to partnerships. See Luckmee Chand *v.* Zorawar Mull, 8 M. I. A. 291 (1860); foll. in Jagna *v.* Gainda Mal, 1897, P. R. No. 62; dist., Barah Meah Saib *v.* Khajee Meah Saib, 4 M. H. C. R. 218 (1869); De Souza *v.* Coles, 3 M. H. C. R. 384 (1868). In Beg Mahomed *v.* Kavasji, 2 Bom. L. R. 514 (1900), the salary sued for was held to be impliedly payable at the place where the plaintiff worked and resided: Darragh *v.* Purshotam, 4 M. 372 (1881).

(5) The ordinary rule is that the obligor is bound to seek the obligee: Gopi Krishna *v.* Nilcomal, 13 B. L. R. 461 (1874); Hills *v.* Clark, 14 B. L. R. 367 (1874). The Eider, L. R. 1893, P. D. 119. In Sheriff *v.* Manners, 7 C. W. N. 912 (1903), it was held that the price of the goods sold was payable at the residence of the plaintiff. In the case of a suit for a legacy the cause of action was held to arise where the heir and not the legatee resided: Ashootosh Bose *v.* Huree Churn Nag, 16 W. R. 305 (1871).

(6) Act IX. of 1872, s. 94. See as to goods sold, Winter *v.* Way, 1 M. H. C. R. 200 (1863); De Souza *v.* Coles, 3 M. H. C. R. 384, 405, 406 (1868); Chunilal *v.* Mahipatrav, 5 B. H. C. R., A. C., 33 (1868). Ram Lall Shaw *v.* Okhoy Kumar, 2 C. W. N. 61 (notes). If the suit is for balance of account for goods sold the mere circumstance that some payment was made by a hundi would not affect the locality of the cause: Rampurtab *v.* Premsukh, 15 B. 100 (1890).

stipulated for, according to the terms of the agency.(1) The words "*the contract*" do not mean the whole of the contract. It is sufficient if some part of the contract is to be performed within the jurisdiction, and if there is a breach of that part within the jurisdiction, the jurisdiction depends on the seat of the obligation sought to be enforced in the suit.(2) Clause 3 of the Explanation was applicable where the amount claimed was payable not in performance of the contract, but as damages for the breach.(3)

[s. 16 A. (2).]

Objections to jurisdiction.

21. *No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice.*

Objections to jurisdiction.—See notes to sect. 9, *ante*.

[ss. 22, 23, 24.]

Power to transfer suits which may be instituted in more than one Court.

22. *Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.*

To what Court application lies.

23. *(1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.*

(1) Hukm Chand, C. P. C. 307; Khimji Jivraju *v.* Purushotam, 7 M. 171 (1883); Karm Chand *v.* Dari Das, 1874, P. R. No. 22; Prasanna Chunder *v.* Prasanna Chunder, 7 B. L. R. App. 35 (1871); Kessowji Damodur *v.* Luckmidas, 13 B. 404 (1889). In Hadjee Ismail *v.* Hadjee Mahomed, 13 B. L. R. 91 (1874), the Court observed that the proper place for taking the account would certainly be where the property was situated. In a suit against a commission agent, who delays to send goods ordered, the cause of action for the recovery of the money advanced for the articles will have arisen at the place of business of the commission agent: Muhammad Shafii *v.* Karamat Ali, 1896, P. R. No. 76. Where the suit is for damages and the contract was accepted by letter, the cause of action arises at place of acceptance: Kamisetti *v.* Katha, 27 M. 355 (1903); and see as to this, Sitarum Marwari *v.* Thompson, 32 C. 884, 889, 890 (1905).

(2) See Rein *v.* Stein (1892), 1 Q. B. 753; Hukm Chand, C. P. C. 301.

(3) Kamisetti *v.* Katha, 27 M. 355 (1903).

(*c*) *Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.*

(*d*) *Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.*

Power to stay and transfer.—Sect. 20 of the last Code referring to stay of proceedings has been omitted.(1) The last paragraph of sect. 20 of the last Code had special application, if to any section, to sect. 20 (*b*).(2) But there appeared to be no reason or authority for restricting the general words of this section to sect. 17 of the last Code (corresponding with sect. 20 of this), or to any particular clause of it. The words "*the defendant*" would have had no meaning if the corresponding section of the Code of 1882 applied only to sect. 17, clause (*c*) of that Code, and, if it were so, the option of making the application would have been vested only in "*any defendant not residing, carrying on business, or working for gain within the local limits of the Court's jurisdiction.*" The section, it was rightly said, appeared to be very comprehensive and to refer to all the preceding sections which provide for an alternative jurisdiction over suits.(3) The jurisdiction given by this sect. 20 was of an exceptional character, and should, it was held, be cautiously exercised and only upon very clear cause shown, there being no mention of mere convenience or expediency.(4) The section contemplated applications by different defendants, but it was hardly possible that after the rejection of an application by one defendant another application might be presented by another defendant on the same ground.(5) The present sections remodel and embody the provisions of sects. 22–24 of the last Code. Several difficulties have been removed by the altered phrasing. Thus sect. 22 omitted to qualify the words "*another Court*" by the words "*having jurisdiction,*" which appeared in sects. 23

(1) See Broughton's Commentary on the Code of 1877; O'Kinealy's Civ. Pr. Code, where, however, it is also said, citing Haggard *v.* Pelicier, A. C. (1892) 61, that possibly it does not limit the inherent right of every Court to protect itself from an abuse of its own procedure by staying or dismissing actions which it holds to be vexatious.

(2) Viraragavayyangar *v.* Krishnasami, 6 M. 344 (1883), the reference to s. 17 (b), appears to be a clerical error: Ismail Peer Ambalam *v.* Neelamegam, 8 M. L. J. R. 38.

(3) Hukm Chand, C. P. C. 333, 334. The decision in Meckjee *v.* Kasowjee, 4 C. L. R. 282 (1879), appears to show that the Court's power to stay proceedings is very extensive, applying to different suits covering similar ground, and that on an application by a party to a suit, a cross suit may be stayed. Nothing, however, in the Code enables a Court to stay proceedings because costs in a previous litigation in a foreign Court have not been paid: Bowles *v.* Bowles, 8 B. 571 (1884).

(4) Kheta *v.* Ganga Ram, 1894, P. R. No. 8; following, 1893, All. W. N. 58; Geffert *v.* Ruckchand, 13 B. 178 (1888). In the first-mentioned case it was held that the circumstance that the points for decision in the case were analogous to those in a suit pending in a Court in another district was not sufficient reason for holding that justice was more likely to be done by compelling the plaintiff to sue in that district.

(5) O'Kinealy's Civ. Pr. Code, note to s. 20; Hukm Chand, C. P. C. 330.

and 24. Again, it was not clear why the words "*may determine*" were used in sect. 23, and "*shall determine*" in sects. 22 and 24. Another difficulty was as to the nature of the application under sect. 24 of the last Code, as to which, see *post*.

"**After notice.**"—The section does not provide for any requisites of the notice. But a Court may, in order to give effect to the manifest intention of the section, adjourn the hearing of an application and direct that proper notice should be served. Notice must be given to the "*other parties*"—*i.e.* not only parties on the opposite, but those on the same side—so that if one defendant only applies he must serve the other defendants with notice. In the under-mentioned case,(1) application was made in the presence of the other parties and was assumed to be with sufficient notice.

"**Apply.**"—*Primâ facie* the plaintiff as the *arbiter litis* has a right to bring his suit in any Court which the law allows; and these sections are only intended to provide for those cases where, on the ground of expense or convenience or some other good reason, the Court thinks that the place of trial ought to be changed. Parties who desire to have a case transferred from one *forum* to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence and what the issues are; they should state what evidence will be required, and then satisfy the Court that either on the ground of expense or convenience or otherwise the place of trial ought to be changed.(2) There was no indication in sect. 24 of the last Code of the nature of the application to be made to the High Court, the words "*to transfer*," etc., occurring in sects. 22 and 23 of that Code, being omitted. On this ground it was held that the section must be construed as intending something short of transfer, and that the section did not empower a High Court to transfer a suit, but only to declare in which Court it should proceed, and, if necessary, to stay proceedings within its own jurisdiction.(3) The words of the present sections, which apply to all the cases mentioned in sects. 22-24 of the last Code, remove any difficulty on this head.

"**Objections.**"—If these are not put in on the first day, as they ought to be, a certain fixed time may be given for putting them in.(4)

"**Shall determine.**"—The determination of the Appellate Court under sect. 23, clause (1), and of the High Court under clauses (2), (3), may be arrived at, not only on the grounds urged by the parties, but also on any grounds which may occur to the Court itself, which under those clauses would appear to have a discretion much like what it had under sect. 24 of the last Code.(5) The ground that the portion of the property in the local jurisdiction of another Court is of larger value has been considered not a sufficient ground for transfer to it.(6)

(1) Purrungote *v.* Deon Panday, 2 C. L. R. 352 (1878).

(2) Khatija Bibi *v.* Taruk Chunder Dutt, 9 C. 980 (1883).

(3) Tula Ram *v.* Harjivan Das, 5 A. 60 (1883). See remarks of P. C. as to absence of power of transfer in Skinner *v.* Orde, 2 A. 241, 247 (1879); 6 I. A. 126.

(4) Purrungote *v.* Deon Panday, 2 C. L. R 352 (1878).

(5) Hukm Chand, C. P. C. 337.

(6) Purrungote *v.* Deon Panday, 2 C. L. R. 352 (1878).

"**Appellate Court.**"—Sect. 23, clause (1), shows that subordination for administrative purposes is immaterial, the sole test for the determination of the Court to which the application must be made will be that of appeals lying to it from the decisions of the Court in which the suit may have been instituted.

In some cases appeals lie from the decisions of a Court in different classes of suits to different Courts, and the Appellate Court in such cases will be the Court to which an appeal would lie in the class to which the suit instituted belongs.(1)

24. (1) On the application of any of the parties *and* after notice to the parties and *after* hearing such of them as desire to be heard, or of its own motion without such notice, *the High Court or the District Court may at any stage*— [s. 25.]

General power of **transfer** *and withdrawal.*

(*a*) *transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or*

(*b*) *withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and*

(*i*) *try or dispose of the same; or*

(*ii*) *transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or*

(*iii*) *retransfer the same for trial or disposal to the Court from which it was withdrawn.*

(2) *Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.*

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit *transferred or* withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

"**On the application.**"—A separate application is required for the transfer of each suit.(2) In the case of a minor a next friend may apply where no guardian *ad litem* has been appointed.(3)

(1) Hukm Chand, C. P. C. 336.

(2) Kishoree Lal *v.* Luchmun Doss, 2 N. W. P., H. C. R. 147 (1870).

(3) Jotendronath Mitter *v.* Raj Kristo Mitter, 16 C. 771 (1889).

"**Of any of the parties.**"—A person who has received a notice of an application made by a judgment-debtor to be declared an insolvent, and whose name is on the record as an opposing creditor, is a party on whose application a transfer may be made under this section.(1) The section permits transfer upon the application of parties as well as of the Court's own motion without such application.(2)

"**Notice.**"—The present section, unlike the two previous sections, requires notice to be given by the Court and not by the party. Where the order was made without notice having been given to the plaintiffs it was set aside.(3) The provision as to notice is one of procedure and practice, and the requirements as to notice may be waived.(4)

"**At any stage.**"—These words have been added to the first paragraph to remove the difficulty created by the view that a suit cannot be transferred after the hearing has once commenced, as to which there was a conflict of decision. See note, *post*, "*Pending.*"

Power of High Court to transfer.—Besides the powers conferred by this section, the High Court, under clause 13 of the Letters Patent, has power to transfer to itself only when it thinks proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reasons for doing so being recorded in the proceedings of the High Court. No statement of the grounds on which the Court will act can be exhaustive. Transfers have been granted on the following grounds: That the parties and witnesses reside in Calcutta; that it would be cheaper to try the suit there; that all parties desired a transfer; (5) that $\frac{19}{35}$ of the property claimed was in Calcutta, and that it was undesirable that an *amin* of a Mofussil Court should partition such property; that the suit might be tried more cheaply and expeditiously in Calcutta; (6) that difficult questions of law were involved, and the conduct of the Judge towards the plaintiff made it impossible that he should be able to deal with the suit with impartiality or freedom from prejudice; (7) that the questions involved were of importance or difficulty; the balance of convenience or cheapness of trial; the residence of parties really interested and witnesses either in Calcutta or its immediate neighbourhood; the advance of money and presence of books in Calcutta; the defendant's want of means to go herself or take her

(1) Nassarvanji *v.* Kharsedji, 22 B. 778 (1897).

(2) Id., at p. 783 (1897).

(3) Janardhan *v.* Dahya Vallabh, 1898, P. J. 11.

(4) Sankumani *v.* Ikoran, 13 M. 211 (1889).

(5) Payn *v.* Administrator-General, 5 C. 766 (1880); 6 C. L. R. 221.

(6) Jotendronanath *v.* Raj Kristo, 16 C. 771 (1889).

(7) Kapilnauth Sahar *v.* Government, 10 B. L. R. 168 (1872). Courjon *v.* Courjon, 9 B. L. R. App. 10 (1872), proceeded on the ground that there was no reason to suppose that any very specially difficult questions of law would arise in that case. In Doucett *v.* Wise, 1 Ind. Jur. N. S. 94, transfer was granted on the ground that difficult points of law arose, and it generally appeared that the case should not be tried in the Mofussil, provided that the interests of the applicant will be prejudiced if there be no transfer: Borrodaile *v.* Gregory Bourke, Part II. Ex. O. C. J. 1 (1865).

witnesses to a Mofussil Court; the refusal to transfer placing difficulties in the way of the defence; and that the prayers for injunction and receiver rendered the case eminently one to be tried in the High Court.(1) It has also been held that the mere fact that it would be less expensive to try the case in the High Court was not sufficient of itself for the Court to act upon and order the case to be transferred, and that to justify transfer it must be shown that the trial in the Court in which the suit had been instituted would be unsatisfactory.(2)

The application should be made to a Judge sitting on the original side of the Court (3) The substantive law applicable to the case will be the law of the Court from which it has been transferred.(4) The words "*to remove and try and determine*" in the Letters Patent have a wide signification. They are not limited to any particular period or stage of the suit, considered as a regular series of steps in procedure. After the commencement of a suit between parties, as long as the proceedings in the Court of first instance are in such a condition that the party is entitled to ask that Court to raise and judicially determine any question material to the final result of the suit as between himself and the other party, so long is the suit in existence in the first Court, and capable of being removed under clause 13 in order that such questions may be determined in the High Court.(5)

District Court.—In the Punjab, Central Provinces, and Burmah, the Courts of the Divisional Judge and Commissioner are by the Courts Acts of those provinces given the powers conferred on the District Court by this section, which has not been drafted with reference to the system of judicial administration prevailing in the provinces mentioned.(6) An order of transfer made by a District Court under this section, transferring a suit in which an appeal would lie from a decree made therein, was held not subject to revision.(7) And the principle was considered to apply where a District Judge had transferred a suit from a Subordinate Court to his own file, and before his hearing it an application was made to the High Court for its transfer to some other Court.(8) The High Court refused in its extraordinary jurisdiction to interfere, except under circumstances of a very special nature, with the discretion of a Judge who had transferred, under the provisions of the last Code, execution proceedings under a decree from one Subordinate Court to another.(9) It was held, under the Code of 1859, that where a District Court had jurisdiction to try a suit and the defendant made no application to the Judge or communication

(1) Harendra Lall *v.* Sarvamangala Debee, 24 C. 183, 186 (1896); 1 C. W. N. 109.

(2) Ojooderam *v.* Nobinmoney Dossee, 1 Ind. Jur. N. S. 396 (1866).

(3) Doucett *v.* Wise, 4 W. R. Misc. 7 (1865).

(4) Grose *v.* Amirtamayi Dossee, 4 B. L. R., O. C. J., 1 (1869).

(5) In the matter of the Decree Suits in the Court of the Munsif of Dibroghur, 7 B. L. R. 308, 312 (1871).

(6) As to the Punjab, see ss. 34, 37, 38, Act XVIII. of 1884. As to Village Munsifs in Madras, see Lakshmakka *v.* Babi, 8 M. 500 (1885). Ajmere and Marwara, ss. 2 and 26, Reg. I. of 1877.

(7) Farid Ahmad *v.* Dulari Bibi, 6 A. 233 (1884).

(8) Muhammad Safdar Husen *v.* Puran Chand, 20 A. 395 (1898); s. c., 1898, A. W. N. 89.

(9) Krishna *v.* Bhau, 18 B. 61 (1893).

to the plaintiff with a view to its being tried in a different district, the case was not one for the exercise of any special power by the High Court for that purpose.(1)

"**Transfer or withdraw.**"—This section, which corresponds with sect. 25 of the last Code, is clearly worded to show that it applies both to the transfer and withdrawal of suits, covering also transfers to a Court newly established. There is no restriction as to the grounds on which a transfer or withdrawal may be ordered under this section, which applies to the High Court, whose powers under the Letters Patent have already been considered. A usual ground is personal disqualification on account of pecuniary or other personal interest of the presiding Judge.(2) A transfer has been ordered on the ground that serious questions of law were likely to arise in connection with winding-up proceedings, which it would be difficult to discuss in the absence of the necessary authorities, and that the proceedings were such that they would ultimately go before the High Court in a variety of appeals from orders; (3) also of execution proceedings "in order to do equity between the judgment-creditors according to the spirit of the Civil Procedure Code"; (4) also on the ground that the transfer would tend to the convenience of both parties, and more especially to the applicant.(5) The fact, however, that the Judge of the Court was not sufficiently acquainted with the character in which the disputed signatures were written was held not to be sufficient ground, as in such a case it would be open to the parties to call experts.(6)

The section does not make it obligatory in a Court to record the reasons for its order, and though it is desirable that the reasons should be recorded, yet a failure to do so will not vitiate the order or the subsequent proceedings.(7) Nor is the transfer invalid if the order has been made under a misconception of facts.(8) As to the presumption where there is no order on the face of the proceedings, see note; (9) as to jurisdiction to transfer, see note, "*Pending.*" *post*.

"**Suit, appeal, or other proceeding.**"—The term "suit" in the earlier Code should, it was held, be construed in its broadest sense.(10) The section itself shows that it is applicable to appeals; a power which was not given to the High Courts by the Letters Patent.(11) or appeals. The case law under the Code of 1882 was as follows:—As regards miscellaneous proceedings, this

(1) Kristo Dass Koondoo *v.* Issur Chunder Chowdhry, 11 W. R. 189 (1869).

(2) Loburi *v.* Assam R. & T. Co., 10 C. 915 (1884), in which case the transfer was refused only on the ground that the Judge had meantime been replaced by another officer, and in which the principles on which transfers on this ground are made are discussed.

(3) *In the matter of* The West Hopetown Tea Co., Ld., 9 A. 180, 184 (1886).

(4) Krishna Vĕlji *v.* Mansaram, 18 B. 61 (1893).

(5) Kadambini *v.* Madan, 3 C. W. N. 247, 248 (1898).

(6) Muhammad *v.* Puran Chand, 20 A. 395 (1898).

(7) Tarucknath *v.* Gouree Churn, 3 W. R. 147 (1865).

(8) Rambux *v.* Girdharilall, 2 Agra, 178 (1867).

(9) Sheo Prasad Singh *v.* Kastura Kuar, 10 A. 119 (1887).

(10) *In the matter of* The West Hopetown Tea Co., 9 A. at p. 182 (1886).

(11) As to Bengal Civil Courts, see s. 22, Act XII. of 1887.

section, taken with sect. 647 (corresponding with sect. 141), was held to authorize the transfer of a claim under sect. 331;(1) and of winding-up proceedings under the Indian Companies Act, 1882, by the High Court from a District Court to itself, the Act providing for their transfer from one District Court to another.(2) There was a conflict of opinion whether the word "*suit*" in the section which this replaces included execution proceedings or not. The Allahabad (3) and Bombay (4) High Courts held that it did. It is to be observed that sect. 223 of the former Code related to transfer of applications for execution. The Madras High Court appears to have been of opinion that the word "*suit*" in this section in the last Code was used in its restricted sense of proceedings before decree, but that even assuming that it included execution proceedings, the limitation as to jurisdiction contained in the section, which authorized the transfer to a Subordinate Court competent to try the suit, could only be imported into sect. 223 of the Code of 1882, so far as it was consistent with that section.(5) The Calcutta High Court held, both under the corresponding provisions in the Code of 1859,(6) as also under the Code of 1882,(7) that there was no power under this section of that Code to transfer execution proceedings. The present section extends the Courts' power over miscellaneous proceedings other than suits or appeals.

"**Pending.**"—The word used in the corresponding section of the Code of 1859 was "*instituted*." It was accordingly held that the transfer could take place only on the institution of the suit, and that it was not intended that a case in progress of trial might be transferred.(8) The substitution of the word

(1) Sithalakshmi *v.* Vythilinga, 8 M. 548 (1884).

(2) *In re* West Hopetown Tea Co., 9 A. 180 (1886).

(3) Gava Parshad *v.* Bhup Singh, 1 A. 180 F. B. (1876), a decision under the Code of 1859.

(4) Balaji *v.* Ranchoddas, 5 B. 680 (1881); Krishna Velji *v.* Bhau Mansaram, 18 B. 61; Nassarvanji *v.* Kharsedji, 22 B. 778 (1897), in which this section was held to apply to the transfer of an application to be declared an insolvent, as such an application was a proceeding in execution, and therefore a suit.

(5) Shanmaga *v.* Ramanathan, 17 M. 309 (1893). The preceding decision, Muttalagiri *v.* Muttayar, 6 M. 357 (1883), appears to favour the other view. See Nassarvanji *v.* Kharsedji, 22 B. at p. 782 (1897).

(6) Kedarnath *v.* Bungshee, 17 W. R. 45 (1871); Shaikh Hamidooddeen *v.* Bhadae, 18 W. R. 345 (1872); Abdool Hye *v.* Macrae, 23 W. R. 1 (1874); cf. Anund Mohun *v.* Grija Kant, 13 W. R. 222 (1870) [s. 20, Act VI., B. C., of 1862]; Chowdhry *v.* Mutteeoonissa, 15 W. R. 574 (1871) [s. 19, Act XVI. of 1868]. It is to be observed, however, that s. 6 of the Code of 1859 has been considerably modified by the present Code. See Hukm Chand, C. P. C. 343.

(7) Kishori Mohun Sett *v.* Gul Mahomed Shaha, 15 C. 177 (1887), in which, however, adherence was given to previous decisions chiefly as a rule of practice, and in which no reference was made to the substitution of the word "pending" for "instituted."

(8) Ram Nath *v.* Gowhur, 2 N. W. P. H. C. R. 230 (1870); Yakoob Ali *v.* Luchmun Das, 6 N. W. P. 80 (1874); Asmedh Koonwar *v.* Taylor, 1864, W. R. 14; Dumree Sahoo *v.* Jugdharee, 13 W. R. 398 (1870); Soorendro Pershad Dobey *v.* Nundun Misser, 21 W. R. 196 (1874); but see Tarucknath Mookerjee *v.* Gouree Churn Mookerjee, 3 W. R. 147 (1865), in which it was held that when a Judge transfers a case to his own file, he is at liberty to amend the issues first laid down, and to frame additional issues and to go into the whole case except upon any question upon which there has been a judicial finding. And as to remand, see this case and Mahomed Zahoor *v.* Thakooranee Rutta, 2 N. W. P. 481 (1870).

"*pending*" bars any such construction in future; a construction which is further prohibited by the insertion of the words "*at any stage.*" So it has been held, that the High Court had jurisdiction under this section to make a transfer to a Subordinate Judge, though the case was in part heard.(1) Even now, however, the section will not authorize a transfer affecting any special exclusive jurisdiction conferred by law.(2) So as the Court which pronounced the judgment is the only Court which can review it, proceedings on an application for a review of a Court's decision cannot be transferred to another Court.(3) Nor may a District Court exercise its powers to transfer so as to oust any Court of a jurisdiction over any particular suit which may have been referred to it by order of a High Court or other Supreme Court.(4) Thus, it has been held that the terms of the section are inapplicable to a suit which the Subordinate Court had received by an order of remand from a Court to which the District Court was itself subordinate.(5)

The word "*pending*" denotes, it is said, duly pending. The suit, therefore, to be transferred must, it has been held, be pending in a Court of competent jurisdiction, and an order made under this section will have no effect if the Court in which the suit is pending has no jurisdiction over it.(6)

"**Subordinate.**"—A transfer may be made only from or to a Court to which the Code applies. In the under-mentioned case,(7) Hutchins, J., considered that the District Judge would have the power of transferring a case pending before one village munsif to another, not under this section, which he considered questionable, but under general principles, as some one must have the power, and it would be best vested in the munsif's official superior, the District Judge. The subordination contemplated is apparently not that

(1) Palanisami *v.* Thondama, 26 M. 595 (1902). See Bandhu Naik *v.* Lakhi Kuar, 7 A. 342 (1885), though as to the decision that if a case is part heard and transferred it cannot be determined on the evidence taken in the first Court, see O. XVIII. r. 15, cl. 2, *post*. See also cases in paragraph on the term "*Suit*," *ante*. The observations in Kishori Mohun *v.* Gul Mahomed, 15 C. 177, which decided that the section did not apply to execution proceedings, overlooked the change which has been effected in the section, and are, it is submitted, neither binding nor good law.

(2) See Hukm Chand, C. P. C. 344.

(3) Ram Nath *v.* Gowhur, 2 N. W. P. 230 (1870).

(4) Hukm Chand, C. P. C. 344.

(5) Mahomed Zahoor *v.* Thakoorance Rutta, 2 N. W. P. 481 (1870). As pointed out in Hukm Chand, C. P. C. 344, the decision in Hamedoollah *v.* Mutecoonissa, 15 W. R. 574 (1874), also turned to some extent on the same principle; stress having been laid in it on the circumstance that a transfer made in such a case might be inconsistent with the order of remand, and change the Court to which the appeal from the final order would lie in the case. But see also Tarucknath Mookerjee *v.* Gouree Churn Mookerjee, 3 W. R. 147 (1865). In Sita Ram *v.* Nanni Dularija, 21 A. 230 (1899), it was considered that s. 25 was not applicable to a case remanded under s. 562 of the last Code.

(6) Peary Lall *v.* Komal Kishore, 6 C. 30 (1881); Motilal *v.* Jamnadas, 2 B. H. C. R., A. C. 40 (1865); Jagjivan *v.* Magdum, 7 B. 487 at p. 489 (1883); Ledgard *v.* Bull, 9 A. 191 (1887); s. c., 13 I. A. 134; R. *v.* Mangal Tekchand, 10 B. 274 (1886); Pachaoni Awasthe *v.* Ilahi Buksh, 4 A. 478 (1882); Ram Narain *v.* Parmeswar Narain, 25 C. 39 (1897). Waiver will not avail where the Court has no inherent jurisdiction; otherwise in cases of mere irregularity: Sankumani *v.* Ikoran, 13 M. 211, 213 (1889).

(7) Lakshmakka *v.* Bali, 8 M. 500 (1885) See Hukm Chand, C. P. C. 348.

for the purposes of appeal as in sect. 23, clause (1), *ante*, but of an administrative character.(1) It was formerly held that once a Court withdrew a suit and transferred it to its own files for trial, it exhausted all its powers under this section, and it is not competent to retransfer it again to a Subordinate Court.(2) The section, however [see (1) (*b*) (iii)], now authorizes a Court after withdrawing a case to retransfer it for trial or disposal. The Subordinate Court must be competent to try the suit—that is, must have jurisdiction.(3) A District Judge can transfer a probate case for trial to a Subordinate Judge under clause (*d*), sub-sect. (2), sect. 23, Act XII. of 1887.(4) Where in a recent case a suit was filed as a Small Cause Court suit in the Court of a Subordinate Judge who had both Small Cause and regular jurisdiction, and he transferred it to the file tried by him as ordinary Judge, and passed a decree deciding a question of title to immoveable property, it was held that there was no substantial irregularity, and that the decree was not final, but appealable, since it could not have been passed by a Small Cause Court.(5) As to the power of District Judges, under the Bombay Civil Courts Act, to refer to Assistant Judges applications under special Acts for disposal, see note.(6)

"**Try or dispose of.**"—The word "*trial*" includes every recognized method of procedure laid down in the Code, and it is not necessary for the transfer that the Court transferring should not contemplate a reference of the case to arbitration (7) The present section adds the words "*dispose of.*" which will often be applicable in the case of the miscellaneous proceedings to which the section is extended.

"**Court of Small Causes.**"—The expression "*a Court of Small Causes*" in the last clause of this section means a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes.(8) The High Court, in the exercise of its appellate jurisdiction, has the power to transfer a suit from the Calcutta Court of Small Causes to any other Court having equal or superior jurisdiction.(9) The Court to which a suit is transferred will not become a Small Cause Court, but only the suit transferred

(1) See Hukm Chand, C. P. C. 349.

(2) Amir Begum *v.* Prahlad Das, 24 A. 304 (1902); Fatima Bibi *v.* Abdul Majid, 14 A. 531 (1892); Sukharam *v.* Gangaram, 13 B. 654 (1889); Sita Ram *v.* Nanni Dulary, 21 A. 230 (1899) [remand]; Nandan Prasad *v.* Kenney, 24 A. 356 (1902) [transfer of pauper suit]. The first and third cases were distinguished with reference to the provisions of Act XII. of 1887 [Bengal Civil Courts] in Gappu Lal *v.* Mathura Das, 25 A. 183 (1902).

(3) Nidhi Lal *v.* Mazhar Husain, 7 A. 239 (1884); Haji Umar *v.* Goostadji, 34 B. 411 (1910).

(4) Kunjo Behari Gossami *v.* Hem Chandra Lahiri, 25 C. 340 (1898).

(5) Hari Balu Gackawad *v.* Ganpatrao Lakhurjirao Gackawad, 38 B. 190 (1913).

(6) First Assistant Collector *v.* Ardesir Framji, 16 B. 277 (1891).

(7) Hukm Chand, C. P. C. 349, citing Banarsi Das *v.* Ram Kishan, 1889, P. R. No. 167.

(8) Ramchandra *v.* Ganesh, 23 B. 382 (1898); diss. from Mangal Sen *v.* Rup Chand, 13 A. 324, which was also dissented from in Dulal Chandra Deb *v.* Ram Naram Deb, 31 C. 1057 (1904).

(9) Kadambini Baiji *v.* Madan Mohan Basack, 3 C. W. N. 247 (1898). See as to this case, Shamsher Mundal *v.* Ganendra Narain Mitter, 29 C. 498, 500 (1902).

will be tried as a Small Cause Court suit.(1) In the case under-mentioned,(2) a Small Cause Court suit was instituted before a Judge invested with jurisdiction to try it. He retired from office, and the District Judge directed his successor, who had no Small Cause Court jurisdiction, to try it; it was held that the order must be considered as passed under this section, and no appeal lay from the decision to the District Court.

Power of Governor General in Council to transfer suits.

25. (*1*) *Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor General in Council, who may, by notification in the Gazette of India, transfer such suit, appeal or proceeding to any other High Court.*

(*2*) *The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.*

INSTITUTION OF SUITS.

[s. 48.]

Institution of suits.

26. Every suit shall be instituted by the presentation of a plaint *or in such other manner as may be prescribed.*

"**Plaint.**"—A plaint means a private memorial tendered to a Court in which the person sets forth his cause of action; the exhibition of an action in writing.(3) It answers to the "statement of claim" in England. In India a plaintiff may present a written statement also. O. VII. rr. 1–6 prescribe the contents of the plaint, which is the document with which every suit is instituted in this country, its object being to invoke the Court's assistance for the declaration, preservation, or enforcement of the plaintiff's right. A suit, according to this section, must commence with a plaint; and a proceeding which is capable of terminating in a decree or an order having the force of a decree cannot, on that ground alone, be deemed to be a suit within the meaning of the Code, if it has not commenced with a plaint. Such a proceeding is, in strictness, only a proceeding in a suit.(4)

Presentation: (*a*) **Time.**—The only question which arises as to this, is whether a plaint may be presented on a Sunday or holiday, or out of Court hours. It has been enjoined that, without the consent of parties and in the

(1) Krishna Velji *v.* Mansaram, 18 B. 61 (1893).

(2) Kauleshwar Rai *v.* Dost Mahomed Khan, 5 A. 274 (1883).

(3) Assan *v.* Pathamma, 22 M. at p. 502.

(4) Venkata Chandrappa *v.* Venkata Rama, 22 M. 256 (1898).

absence of urgent necessity, no civil trial should proceed on Sundays or gazetted holidays.(1) In India, however, Sunday is not a *dies non*,(2) and the holding of a judicial proceeding on a close holiday, though it may be an irregularity which, if prejudice be shown, would entitle a party to have the proceedings set aside, is such an irregularity as can be waived.(3) It has been expressly provided in the Bengal, N.W.P., and Assam Civil Courts Act, and the same will probably be held, on general principles, to be the case, that a judicial act done on a close holiday is not invalid by reason only of its having been done on that day.(4) A plaint may be received and admitted on a Sunday(5) or other holiday.(6) There is, however, no necessity to do so; for under the Limitation Act, if the period expires when the Courts are closed, the suit may be admitted on the day that the Court re-opens; and so may any application.(7)

(*b*) **To whom.**—The former section required that the plaint should be presented to the Court, or such officer who was specially appointed in that behalf. This will be so now, though the words have been omitted. Ordinarily, the plaint is presented to the Court. A delivery to the clerk of a Small Cause Court has been held sufficient; (8) but not to a *nazir* (9) or *moonserim*.(10) A plaint under Act X. of 1859, presented to an Assistant Collector and not to the Collector, was held not to be properly filed.(11)

(*c*) **Place.**—Ordinarily, the plaint is presented in open Court. The placing of a petition of appeal on a table when the officer is not present is not a presentation to him.(12) The Allahabad High Court held that the presentation of a plaint at the private residence of the Munsif was not a sufficient institution.(13) But in Bengal a plaint delivered at the private residence of a clerk of a Small Cause Court has been held to have been properly filed.(14) Where a plaint sent by post was accepted, the institution was considered

(1) C. H. C. Gen. Rules, No. 2.

(2) *Aliter* in England. 29 Car. II. c. 7, s. 6; but other holidays are periods of vacation only and proceedings are not suspended, Petersdorff's Abridgment, 2nd ed. vol. v., p. 50, n. (1). The term appears not to have been used in its strict sense by Davies, J., in Sambasiva *v.* Ramasami, 22 M. at p. 181 (1898).

(3) Ram Das *v.* Official Liquidator, 9 A. 66 (1887).

(4) Act XII. of 1887, s. 15 (3). A sale of property in execution on a close holiday has been held not to be illegal: Bisram *v.* Sahib-unnissa, 3 A. 333 (1880). A local inquiry on Sunday was, however, set aside chiefly because the defendant's vakil stated he could not attend, and no other notice was given: Subhoo *v.* Jusoda, 17 W. R. 230 (1872).

(5) Umunto *v.* Protab, 16 W. R. 230 (1871).

(6) Ib.; Gobind *v.* Hargopal, 3 B. L. R. Ap. 72 (1869); in the latter case, however, the holiday was in accordance with a circular which had no legal force.

(7) Peary Mohun *v.* Anunda Charan, 18 C. 631 (1891); Sambasiva *v.* Ramasami, 29 M. 179 (1898).

(8) Mudden Mohun *v.* Fakeer Biswas, Suth. S. C. C. Rep. 36.

(9) Raj Chunder *v.* Joogul, 18 W. R. 172 (1872).

(10) Taj Uldeen *v.* Ghafoor-ul-nissa, 3 A. H. C. R. 341 (1871).

(11) Musumat Roopa *v.* Sheikh Anwar, 4 A. H. C. R. 35 (1871): but the proceedings are voidable only at the instance of the defendant: Mackintosh *v.* Kashee Nath, 21 W. R. 450 (1874).

(12) Taj Uldeen *v.* Ghafoor-ul-nissa, 3 A. H. C. R. 341 (1871).

(13) Jai Kuar *v.* Heera Lall, 7 A. H. C. R. 5 (1874).

(14) Mudden Mohun *v.* Fakeer Biswas, Suth. S. C. C. Rep. 36.

sufficient by the Madras High Court.(1) Where a plaintiff presented a plaint to the District Court, the Subordinate Judge's Court in which he ought to have presented it being then temporarily closed, it was held that the District Court could not be considered a Court of first instance competent to receive the plaint.(2)

Date.—The Code does not provide that the plaint should be dated, but it is generally provided by rules framed by the High Courts that the actual date of presentation should be endorsed on the plaint by the officer receiving it. Where a plaint was presented on the 29th and the endorsement stated that it was accepted on the 31st, the former and not the latter date was held to be the date of institution.(3) Where two suits are filed on the same day it must be presumed, until the contrary is proved, that they were presented and admitted in the order in which the numbers appear in the Register of Civil Suits.(4) The Code does not ordain or imply that, in the absence of a sufficient stamp, there can be no presentation, nor does the Limitation Act. There is no warrant for inferring that a plaint means a plaint duly stamped. So where a plaint was presented on the 14th September with an insufficient stamp, but the deficient stamp duty was paid on the 18th September, it was held that the suit was instituted on the 14th September.(5) The date of institution should be reckoned from the date of presentation, and not from that on which the requisite court-fees are subsequently put in so as to make it admissible as a plaint.(6)

Registration.—Sect. 17 of the Registration Act (III. of 1877) does not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or orders made by the Court.(7)

SUMMONS AND DISCOVERY.

[s. 64.] **Summons to defendant.**

27. *Where a suit has been duly instituted,* a summons may be issued to *the* defendant to appear and answer the claim *and may be served in manner prescribed.*

Summons.—See notes to O. V. r. 1.

(1) Sankaranarayana *v.* Kunjappa, 8 M. 411 (1885), approving Moparti *v.* Vappala, 6 M. H. C. R. 136 (1871); but had it not been accepted, the presentation would not have been considered valid.

(2) Ramaya *v.* Muhamadbhai, 10 B. H. C. R. 495 (1873); Motilal *v.* Jamnadas, 2 B. C. R. 40 (1865).

(3) Young *v.* MacCorkingdale, 19 W. R. 159 (1873).

(4) Murti *v.* Bhola Ram, 16 A. 165 (1893).

(5) Dhondiram *v.* Taba Savadan, 27 B. 330 (1902), in which it was stated that this view was in accord with the decisions of the Calcutta High Court cited in the report and with the judgment of Subramania Ayyar, J., in Assan *v.* Pathamma, 22 M. 494 (1899) (who dissented from the decision, Venkatamayya *v.* Krishnayya, 20 M. 319 (1897), which was approved and distinguished by Davies, J.), though not with the decisions of the Allahabad High Court cited in the first-mentioned case.

(6) Moti Sahu *v.* Chhatri Das, 19 C. 280 (1892). The case of Yakut-un-nissa *v.* Kishoree, 19 C. 747 (1891), was distinguished and explained in Surendra Kumar *v.* Kunja Behary, 27 C. 814 (1900).

(7) Bindesri Naik *v.* Ganga Saran, 20 A. 171 (1897); s. c., L. R. 22 I. A. 4.

28. (*1*) *A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.* [s. 85.]

Service of summons where defendant resides in another province.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court *of* issue together with the record (if any) *of its proceedings with regard thereto.*

"**Service in another province.**"—See notes to O. V. rr. 21, 23, *post*.

29. Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts: [s. 650A.]

Service of foreign summonses.

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor General in Council, or that the Governor General in Council has, by notification in the Gazette of India, declared the provisions of this section to apply to such Courts.

Foreign summons.—The words "*or continued*" were inserted by sect. 62, Act VII. of 1888. For Courts in Gwalior, Indore, Bundelkhand, Bhopal, Mulwa, Bhagelkhand and Bhopawar Agencies, see the "Gazette of India," March 16th, 1912, Part I., pp. 349-352.

30. *Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—*

Power to order discovery and the like.

(*a*) *make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;*

(*b*) *issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;*

(*c*) *order any fact to be proved by affidavit.*

Discovery.—See Orders XI., XII., XIII., XVI., XIX., and notes thereto. The section is new.

Summons to witness.

31. *The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.*

Penalty for default.

32. *The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—*

(*a*) *issue a warrant for his arrest;*

(*b*) *attach and sell his property;*

(*c*) *impose a fine upon him not exceeding five hundred rupees;*

(*d*) *order him to furnish security for his appearance and in default commit him to the civil prison.*

JUDGMENT AND DECREE.

[s. 193.]

Judgment *and decree.*

33. The Court, after the *case has* been heard, shall pronounce judgment, *and on such judgment a decree shall follow.*

Judgment and decree.—See notes to O. XX., *post.*

INTEREST.

[s. 209.]

Interest.

34. (*1*) *Where and in so far as* a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

Interest.—Act XXIII. of 1861, sect. 10. The words "*when a decree is for the payment of money,*" and the second paragraph of sect. 209 of the last Code which the present section replaces, were introduced by sect. 20, Act. VII. of 1888. It only deals with interest after suit. As regards interest up to the

date of suit, this is a question of substantive law.(1) Ordinarily and subject to the exceptions recognized by that law, the rate agreed upon must be awarded up to the date of suit.(2) Interest after date of suit is, according to the opinion of the Calcutta,(3) though not of the Madras High Court,(4) in the discretion of the Court, notwithstanding that a fixed rate of interest is mentioned as payable "up to realization." No additional Court fee is required on account of the claim for interest from the date of institution of suit till payment.(5) There is no analogy between interest awarded under this section and mesne profits under O. XX. r. 12, *post*.(6)

Sect. 86 of the Transfer of Property Act (now O. XXXIV. r. 2) excludes the discretion given by this section, and binds the Court to decree the rate of interest provided by the mortgage, if not illegal, down to the date fixed by the Court according to the terms of the second paragraph of the section.(7) After this period, interest will run at the Court rate up to date of payment according to the practice and rules of the Calcutta High Court.(8) This section relates to a decree for money, and a mortgage decree, until it reaches the stage shown by sect. 90 of the Transfer of Property Act, cannot be so termed.(9)

(1) Some decisions on the Interest Act (XXXII. of 1839), and others relating to the question of interest, such as the doctrine of penalties (see Contract Act, s. 74, as amended by Act VI. of 1899) which does not apply to stipulations in consent decrees [Shiro Kuli Timapa *v.* Mahablya, 10 B. 435 (1886) *contra* Nagappa *v.* Venkatras, 24 M. 265 (1900), ref. to Rai Balkishen Dass *v.* Raja Run Bahadoor Singh, 10 C. 305 (1883), and see Run Bahadoor Singh *v.* Roy Narain Dass, 7 C. L. R. 82 (1880)]; the rule of damdupat [as to which also see *post*]; payment of interest after due date and interest payable according to mercantile usage and other cases, will be found in the notes to O'Kinealy's Civ. Pro. Code. A recent decision is Rani Sundar Koer *v.* Rai Sham Krishen, 34 I. A. 9 (1906). For payments of interest by instalments and limitation, see Abdul Ahad *v.* Mahtab Bibi, 35 A. 378 (1913); distinguishing Kallu *v.* Halki, 18 A. 295 (1896); and Anwar Husain *v.* Lalmi Khan, 26 A. 167 (1903).

(2) See O'Kinealy's Civ. Pro. Code. The matter is not here dealt with as being beyond the scope of the Commentary.

(3) Mangniram Marwari *v.* Dhowlal Roy, 12 C. 569, F. B. (1886), and the same was held in Bombay under the Code of 1859, Carvalho *v.* Nurbibi, 3 B. 202 (1879). But it has recently been held in Calcutta that the Court is bound to award interest from the date of suit to date fixed for redemption unless the rate is penal: Kali Prosonno *v.* Protab, 17 C. W. N. 991, 996 (1913).

(4) Ramachandra *v.* Devu, 12 M. 485 (1889).

(5) Vithal Hari *v.* Govind Vasudeo, 17 B. 41 (1892); it stands on the same footing as future mesne profits, *ib.*

(6) Dwarka Nath Biswas *v.* Debendra Nath Tagore, 33 C. 1232 (1906).

(7) Surya Narain Singh *v.* Jogendra Narain Roy, 20 C. 360 (1892); Subbaraya Ravuthaminda *v.* Ponnusami Naddar, 21 M. 364 (1897); Chaturbhai Karsan *v.* Harbhamji, 20 B. 744 (1895). See in this connection the distinction drawn in Umes Chunder Sircar *v.* Zahar Fatima, 18 C. 164 (1890); Kali Prosonno *v.* Protab, 17 C. W. N. 221 (1912), and for case where no interest is stipulated for in a mortgage bond, see Makbub Ali *v.* Ali Ahmed, 40 C. 514 (A. C.) (1913) (none is recoverable, for being a charge in the nature of a mortage, it should have been in writing and registered); following Kuttiumma *v.* Madhava Menon, 11 M. L. J. 186 (1901); distinguishing Imdad Hasam Khan *v.* Badri Prosad, 20 A. 401; Rajwanta Kunwar *v.* Shiam Narain Singh, 36 A. 220 (1914); Rameswar Koer *v.* Mahomed Mehdi, 26 C. 39 (1898); Maharaja of Bartpur *v.* Ranni Kanno Dei, 23 A. 181 (1900); Bakar Sajjad *v.* Udit Narain Singh, 21 A. 361 (1899).

(8) Jogendra Nath Mookerjee *v.* Methana Abraham, 6 C. W. N. 769 (1902). See other cases cited in this.

(9) Hargoandas Girdharlal *v.* Mohanbha. Mahasukhabhai, 2 Bom. L. R. 225 (1900) See Giriya *v.* Sabapathy, 29 M. 65 (1905).

The Court has also a discretion to award interest after decree. The contract becomes merged in the decree, and the plaintiff recovers only such interest as, according to the course and practice of the Court, is allowed on debts for which the creditor has the security of its decree.(1) Interest if not given in the decree is taken to have been refused,(2) but a party may by his conduct be estopped from objecting that execution cannot issue for a higher rate than that provided in the decree.(3) If a decree-holder gives up a portion of his claim and verbally agrees to receive the remainder by instalments, he does not thereby give up interest to which he is entitled under the decree.(4) The rule of *damdupat* exists only so long as the contractual relation of debtor and creditor exists, but not when that relation has come to an end by reason of a decree.(5) Thus where a decree has been passed on a mortgage the rule does not apply to the interest accruing after the date fixed for redemption.(6) The rule of *damdupat* is not applicable if it was not applicable at the time when the decree became final and binding.(7) The discretionary powers conferred by this section may be exercised without reference to the law of *damdupat*.(8)

"**In the decree.**"—A Court is not empowered by this section merely to embody in a decree interest which has been adjudged payable in the suit, for it is said that such a reading of the section would make it surplusage, as it does not require a rule of procedure to enable a Court to decree a relief which it has adjudged in its judgment.(9) It has therefore been held that the Court may in the decree order payment of interest from the date of the suit onwards, although the judgment awards interest for the period prior to the institution of the suit only.(10) But where a Judge in adjudging a specific sum, principal and interest, in terms dismissed "the rest of the claim," it was held that as the claim for interest after the institution of the suit was part of "the rest of the claim," and with it stood dismissed, the Court could not give interest by way of amendment of its decree.(11) Where a district Judge gave no interest from the date of the suit, and there was nothing to show that this was an over-

(1) Bishessur Surmah *v.* Kaleekanath Surmah, 11 W. R. 455 (1869). the consolidated sum bears interest from and after decree, but this is not compound interest, but interest on a fixed sum declared to be due by the decree, Jodoonath Roy *v.* Dwarkanath Chatterjee, 1 W. R. Misc. 15 (1864); and see Jaleshar Rai *v.* Amrut Rai, 35 A. 302 (1913).

(2) See Kallooram Baboo *v.* Doorganath Taloorkdar, 10 W. R. 175 (1868). In Madhub Lal Khan *v.* Noyan Ghose, 6 C. L. R. 231 (1880), the decree gave interest but did not specify the rate, and the usual Court rate was allowed.

(3) Sheo Golam Lall *v.* Bani Prasad, 4 C. L. R. 29 (1879); s. c., 5 C. 27.

(4) Mohammed Mojoomdar *v.* Purtab Chunder Singh, 6 W. R. Misc 121 (1866).

(5) *In re* Hari Lall Mullick, 10 C. W. N. 884 (1906).

(6) Nanda Lal Roy *v.* Dhirendra Nath Chakravarti, 40 C. 710 (1913); following *In re* Hari Lall Mullick, *supra*; not following Ram Kanhye Audhicary *v.* Cally Churn Dey, 21 C. 840.

(7) Lall Behary Dutt *v.* Thacomoney Dassee, 23 C. 899 (1896).

(8) Dhondshet *v.* Ravji, 22 B. 86 (1896).

(9) Hasan Shah *v.* Sheo Prasad, 15 A. 121, 122 (1893).

(10) Kolai Ram *v.* Pali Ram, 7 A. 755 (1885), in which it was held that there was no variance between the judgment and decree.

(11) Hasan Shah *v.* Sheo Prasad, *supra*.

ight or mistake on his part, the High Court treated the matter as if he had withheld such interest in the exercise of his discretion under this section, and this view was approved by the Privy Council.(1)

COSTS.

35. (*1*) *Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.*

Costs.

(*2*) *Where* the Court directs that *any* costs shall not follow the event, the Court shall state its reasons in writing. [s. 220.]

(3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, *and such interest shall be added to the costs and shall be recoverable as such.* [s. 222.]

Costs generally.—The present section replaces sects. 218-222 of the last Code. The first clause is with some additions taken from s. 5 of the Judicature Act of 1890, and in effect embodies the provisions of sects. 218-220 of the last Code. As regards the subject of execution, see sect. 36 of this Code. Sect. 221 has been transferred to O. XX. r. 6, where it appears as the third clause of that rule. Sect. 222 is incorporated in the third clause of this section, the direction as to the payment of costs being paid out of or charged upon the subject-matter of the suit being omitted. The power to order this is contained in the first clause of this section. As regards this, it has been held that a mortgagee having had the benefit of a partition, and having accepted and approved of it as part of his title, was, though not a party to the partition suit, bound by the equities attaching to the mortgaged property as incidents of the partition, and was therefore liable in respect of a proportionate share of the charge for costs created by the order of the Court made in that suit under this section, and such proportionate share of these costs should be deducted in priority out of the proceeds of the sale of the mortgaged property.(2) Under the circumstances stated, the cases decided under the former sections are here given.

Disposal of costs.—Sect. 218 of the last Code enacted that "When disposing of any application under this Code, the Court may give to either party the costs of such application, or may reserve the consideration of such costs

(1) Majmundar Hiralal *v.* Desai Narsilihal, P. C., 37 B. 326 (1913).

(2) Khetterpal Sriterutno *v.* Khelal Kristo, 21 C. 904 (1894).

for any future stage of the proceedings." When costs of an interlocutory proceeding have been disposed of, the award of general costs of the suit does not interfere with that interlocutory order.(1) A Court finally determining a suit is bound to decide by which of the parties before it the costs shall be borne; it is not at liberty to declare that the costs shall be borne by the unsuccessful party in a suit to be hereafter brought.(2) A decree drawn strictly in accordance with the provisions of sect. 88, of the Transfer of Property Act, directs the costs to be recovered out of the mortgaged property.(3) An omission to award costs cannot be considered a mere clerical error, but must be rectified by way of review within the prescribed time.(4)

Parties paying or receiving costs.—The person who receives the costs must, of course, be a party to the suit. As regards the person who may be ordered to pay, the general rule in English Courts has been said to be,(5) that Courts have no power except over parties to the record, though an exception has been made where the party before the Court is a mere puppet in the hands of a stranger to the suit. The Courts here have, in some cases, ordered persons not party to the record to pay costs.(6) But under the last Code only parties could be made liable. This appeared from the words, "any other party *to the suit*" in sect. 102 of that Code.(7) Where, however, there has been a contempt of Court, as where strangers were the real though hidden plaintiffs, and had executed a false lease in favour of the nominal plaintiff, who had brought the suit on the strength of such false lease, it was held that though the Code gave no power, yet that the High Court, inheriting the powers of the Supreme Court, could order such strangers to pay the costs of the suit.(8) Persons interested, on behalf of whom a suit is brought under O. I. r. 8 (formerly sect. 30), but not joining or joined as parties, should not be made to pay costs.(9) Where

(1) Radhapersad Singh *v.* Ram Parmeswar Singh, 9 C. 797 (1882); S. C. 10 I. A. 113.

(2) Kashee Chunder *v.* Bungshee Buddun, 23 W. R. 89 (1874).

(3) Maqbul Fatima *v.* Lalta Prasad, 20 A. 523 (1898), in which a direction in the decree was held to be merely formal compliance with the Code and was not intended to make the costs recoverable personally from the judgment-debtor. As to mortgagor's personal liability, see Rutnessur Sein *v.* Jusoda, 14 C. 185 (1886); ref. Damodar Das *v.* Budh Kuar, 10 A. 179 (1888).

(4) Ram Sahoy Singh *v.* Rookhoo Singh, 15 W. R. 414 (1871). The Court has refused to interfere where the applicant has delayed too long: Oodoy Tara *v.* Syud Jonab, 17 W. R. 358 (1872), or the judgment has been appealed against and a final decree passed by the Superior Court: Bilas Singh *v.* Salig Ram, S. D. N. W. (1861), p. 466.

(5) Bevis *v.* Turner, 7 B. 484, 486 (1883); but as to whether the Supreme Court, whose powers are inherited by the High Court, would have been bound by Hayward *v.* Gifford, 4 M. & W. 194, see judgment of Peacock, C.J., in Jointee Chunder Sein *v.* Anundo Lall Doss, 14 W. R. 1 (1865) (appeals from original jurisdiction).

(6) See cases cited in Goolam Hoosein *v.* Fatmabai, 8 B. 391, at p. 392 (1884), though in Watson *v.* Hurgobind Sookul, 22 W. R. 35 (1874), it was held that persons who, without their consent, had been made parties, could not be made liable for costs simply because they had encouraged the plaintiff to bring the suit and provided him with funds.

(7) Bevis *v.* Turner, 7 B. 484, 486 (1883); Jointee Chunder *v.* Anundo Lall Doss, 14 W R. 1, A. O. J. (1865).

(8) Jointee Chunder Sein *v.* Anundo Lall Doss, 14 W. R. 1, A. O. J. (1865).

(9) Syedur Raj *v.* Baidya Nath Deb, 1 C. N. W. 65 (1896).

a party is made defendant without cause of action his co-defendant of course should not be made to pay his costs, which should be paid by the plaintiff.(1) But the Court may, in a proper case, order one defendant to pay the costs of another defendant.(2) So where a defendant has colluded with the plaintiff and induced him to bring the suit, he may not only be made to pay his co-defendant's costs, but refused his own.(3) And in a suit brought against several parties, some of whom admitted the debt and partnership and others denied them, the defendants who disputed the claim were made to pay the costs of those who admitted it.(4)

Sect. 219 of the last Code provided that, "the judgment shall direct by whom the costs of each party are to be paid, whether by himself or by any other party to the suit, and whether in whole or in what part or proportion."

As to the liability of minors, next friends, and guardians *ad litem* for costs, see notes to O. XXXII. If the Official Assignee defends a suit he is liable, in the event of failure, to be ordered to pay the plaintiff's costs in the same way as any other defendant, and if the estate be insufficient to pay the costs, he will have to bear them personally.(5) As regards executors,(6) administrators,(7) trustees,(8) and mortgagees, (9) the English O. 65, r. 1 provides that nothing in it shall be held to deprive any of these persons who has not unreasonably

(1) Ram Chunder *v.* Kisto Kaminee, 10 W. R. 194 (1868).

(2) Rudow *v.* Great Britain, etc., Assurance Society, 17 C. D. 608; Sanderson *v.* Blyth Theatre Co., (1903) 2 K. B. 533. [The costs of a successful defendant sued in the alternative may be ordered to be paid by the unsuccessful co-defendant.] As to suits for contribution for costs paid under a joint decree, see Kisto Coomar *v.* Anund Moyee, 7 W. R. 300 (1867).

(3) Bhyroo Raoot *v.* Anooroodeb Deo, Marsh, 608 (1864).

(4) Juggat Chunder Roy *v.* Roop Chand Shaw, 6 C. 811 (1881).

(5) Bevis *v.* Turner, 7 B. 484 (1883).

(6) In the goods of Taramoni Dasi, 25 C. 553 (1898) [executor of will obtained probate; subsequent will; application by another executor]. Dayabhai Tapidas *v.* Damodardas Tapidas, 21 B. 75 (1896) [fund liable for costs of obtaining probate]. Trustees, executors, and administrators are entitled to costs out of estate except in cases of vexatious conduct or where by neglect or misconduct they have occasioned institution of suit: Simpson *v.* Bathurst, 5 Ch. App. 193; *In re* Chennell, 8 C. D. 492; *Ex parte* Wainwright, 19 C. D. 140. In suits for construction of wills, where reasonable doubt exists, costs usually come out of the estate; see Kristoromoney *v.* Norendra Krishna, 161 A. 29, 43 (1888), 16 C. 383; Tarachurn Chatterjee *v.* Suresh Chunder Mookerjee, 161 A. 166, 174 (1889); 17 C. 123; not so where the construction of the will was not so difficult as to have required the assistance of the Court: Narayani Doss *v.* Administrator-General, 21 C. 683 (1894); or where plaintiff sued to oust a person from possession of property, resting his title upon construction of a will: Lala Ramjewan Lal *v.* Dal Koer, 24 C. 406, 412 (1897). Where the estate was not before the Court, an agreement as to costs could not be carried out: Malchus *v.* Broughton, 13 C. 193 (1886).

(7) See last note and Ford *v.* Chesterfield, 21 Beav. 426 [estate or fund administered; costs of all necessary parties first charge]; Sharp *v.* Lush, 10 C. D. 468 [cost of appearing in chambers in administration suit]; as to costs of administrator-general, see Amir Jan *v.* Rivett Carnac, 10 B. 350 (1886).

(8) See last note but one, *ante*, and as to right of dissenting trustee to have bill of costs taxed even after payment, see Jijibhoy *v.* Byramji, 18 B. 189 (1893).

(9) Maqbul Fatima *v.* Lalta Prasad, 20 A. 523 (1898); Rutnessur Sein *v.* Jusoda, 14 C. 185 (1886); Damodar Das *v.* Budh Kuar, 10 A. 179 (1888). As to attorney and client costs, see Obhoy Churn Sen *v.* Debendronath Mullick, 8 C. L. R. 437 (1881).

instituted or carried on or resisted proceedings of any right to costs out of a particular estate or fund to which he would be entitled under the Chancery practice. And this will be so here.

As to costs in matrimonial causes,(1) and in guardianship proceedings,(2) see cases cited: as also as to costs and taxation of costs of the Government solicitor; (3) costs in case of excessive bail in salvage actions; (4) and cases of set-off.(5)

The Court has refused a witness his costs of appearing by counsel.(6)

Power of Court as to costs.—Sect. 220 of the last Code provided as follows: "(1) The Court shall have full power to give and apportion costs of every application and suit in any manner it thinks fit, and the fact that the Court has no jurisdiction to try the case is no bar to the exercise of such power: Provided that if the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reason in writing. (2) Every order relating to costs made under this Code and not forming part of a decree may be executed as if it were a decree for money."

The discretion to award costs was subject to other provisions, and was thus limited in the case of certain suits instituted in the High Court, but cognizable by the Presidency Small Cause Courts.(7) Where A demanded a particular sum as due to him from B, and the latter tendered a less amount, saying that that was all he owed, it was held in an action brought in the High Court that A was entitled to full costs, not being under any obligation to accept the lesser sum and sue for the balance in the Small Cause Court.(8) For sections of the Code affecting the discretion, see O. XI. r. 3 and O. XXI. r. 72. The power, however, given, though a full power, was subject to the control of the Court of Appeal.(9) The discretion as to the award of costs which a Court has is not taken away by the fact that a party to a suit is protected under the provisions of the Judicial Officers Protection Act.(10)

As regards apportionment, the general rule is that if a plaintiff recovers a less amount than he claimed in his plaint, his costs should be apportioned

(1) Fowle *v.* Fowle, 4 C. 260 (1878); Proby *v.* Proby, 5 C. 357 (1879) [dist. Natal *v.* Natal, 9 M. 12 (1885)]; Thomson *v.* Thomson, 14 C. 580 (1887); Mayhew *v.* Mayhew, 19 B. 293 (1894); A. *v.* B., 21 B. 77 (1896).

(2) In re Fakaruddin Mahomed Chowdhry, 26 C. 133 (1898).

(3) Azimullah Saheb *v.* Secretary of State, 15 M. 405 (1892); Mahammed Alim Oollah *v.* Secretary of State, 17 M. 162 (1893).

(4) In the matter of the ship Champion, 17 C. 84, 114 (1889).

(5) Notes to O. VIII. r. 6 and Brijnath Dass *v.* Juggernath Das, 4 C. 742 (1879) [set-off of costs against mortgage money]; and as to pre-emption suits, see notes to Rule 130.

(6) *In re* Brown & Co., 14 C. 219 (1886).

(7) See s. 22 of Act XV. of 1882, amended by s. 11 of Act I. of 1895. Ismail Ariff *v.* Leslie, 24 C. 399 (1896); 1 C. W. N. 188; dissented from in Yonosuke *v.* Ookerda, 21 B. 779 (1897); Sabapati Mudaliyar *v.* Narayansvami Mudaliyar, 1 M. H. C. R. 115 (1862) [clause 37 of Letters Patent does not give the High Court an uncontrolled discretion as to costs]. The section has, of course, no application where the suit is not within the jurisdiction of the S. C. C.: Mirtunjoy Dutt *v.* Kameenee Dassee, 1 Ind. Jur. N. S. 95 (1867).

(8) Chunder Kant Mookerjee *v.* Judoo Nath Khan, 1 C. L. R. 470 (1877).

(9) Tara Prosunno *v.* Satish Chandra, 4 C. W. N. 90 (1896); Pratap Chandra *v.* Kali Bhanjan, 4 C. W. N. 600 (1900).

(10) Ganesh Mahadev *v.* Narayan Balshet, 4 Bom. L. R. 109 (1902).

according to the amount recovered and not to the sum claimed.(1) Costs thus follow the result of the case unless there are reasons to the contrary; so that where the plaintiff has failed in part and succeeded in part, the costs are apportioned so as to give each party the costs applicable to the matter upon which he has succeeded.(2) It is, however, not correct to say that costs must be invariably awarded in proportion to the amount decreed and dismissed. The Court has a discretion, and if a plaintiff has an honest claim in which he mainly succeeds he may be allowed full costs.(3) As to costs of particular issues, see *post*, "Follow the event." The Court is given a wide discretion, but that discretion must be exercised on legal principles. It is a power to be exercised according to law and not according to mere caprice.(4) The law as to the award of costs has been laid down by Jessel, M.R., in Cooper *v.* Whittingham,(5) in a passage which has been cited and adopted by the Madras High Court.(6) An Appellate Court will not interfere with an exercise of discretion by the lower Court unless it has proceeded upon a manifestly wrong ground.(7) See *post*.

"Follow the event."—This means the result of the decision.(8) The second paragraph of the section indicates that costs must follow the event, unless there be good cause to the contrary. If a plaintiff succeeds he is ordinarily entitled to his costs.(9) If a defendant succeeds he is ordinarily entitled to his costs.(10) A plaintiff thus cannot get costs against a person against whom he has no cause of action.(11) And a successful defendant cannot be made to pay the costs of the plaintiff.(12) If a party substantially succeeds and proves his case against the defendant he is entitled to his costs, although he has not got the precise form of relief which he wanted.(13) The mistakes of the opposite party are no reason for departing from the general

(1) Mudhun Mohun Doss *v.* Gokul Doss, 10 I. A. 563 (1866); Velu Pillai *v.* Ghose Mahomed, 17 M. 293, 296 (1893).

(2) Tarachand Mookerjee *v.* Jadoonath, Marsh, 79 (1864).

(3) Sheo Dyal Tewaree *v.* Judoonath Tewaree, 9 W. R. 61 (1868). On the other hand, costs have been disallowed to a special appellant who failed on certain points, even though the decree was modified in appeal. Meera Ram *v.* Ashruf Ali, 9 W. R. 103 (1868).

(4) Gridhari Lall Roy *v.* Sundar Bibi, 3 L. R. Sup. Vol. F. B. 496, 497 (1866); Sri Dantuluri *v.* Surappa Razu, 3 M. H. C. R. 113 (1866).

(5) 15 Ch. D. 501, 504.

(6) Kuppuswami Chetty *v.* Zamindar of Malaharti, 27 M. 341 (1903).

(7) Parshram *v.* Dorabji, 2 Bom. L. R. 254, 255 (1900).

(8) See Ann. Pr. 1905, O. 65, r. 1, p. 943.

(9) Ghanasham Nilkant *v.* Moroba Ramchandra, 18 B. 474 (1894).

(10) Monohur Dass *v.* Romanauth Law, 3 C. 473, 481 (1878). So also a person who shows that he has been wrongly made a party, Bishen Dayal *v.* Bank of Upper India, 13 A. 290, 295 (1890); or respondent, Sheo Pershad *v.* Lalljee, S. D. N. W., July, 1863, p. 1. Kashernath Sein *v.* Chunder Monee, 9 W. R. 288 (1868). Collector of Dacca *v.* Kamalakant, 2 W. R. 33 (1865); Collector of 24 Pergannahs *v.* Wilkinson, 12 W. R. 444 (1869); Government *v.* Sanoola, 3 W. R. 23 (1865); Shunt Buksh *v.* Lalla Nund, 11 W. R. 48 (1869).

(11) Bunwaree Lall *v.* Chowdhry Drup Singh, 19 C. 179 (1885).

(12) Sri Dantuluri *v.* Surappa Razu, 3 M. H. C. R. 113 (1866); Moshingan *v.* Mozari Sajad, 12 C. 271 (1885).

(13) Ghanasham Nilkant *v.* Moroba Ramchandra, *supra*.

rule of law that a successful party is entitled to his costs.(1) The word "*event*" may, however, be read distributively, and where there are distinct causes of action the general costs of the cause follow the judgment, but the costs of the particular issues should be taxed in favour of the party who has succeeded on them.(2) And the same rule is commonly applied in all cases where several issues are raised, and the party fails as to some and is successful as to others.

The same general principles apply in the case of appeals,(3) though the cost of an appeal may be severable from the general costs of the suit.(4) It is a general, but not a universal rule, that the discretion of the Court below as to costs is not altered when there is no substantial alteration made in the decree itself.(5) The respondent will not be deprived of costs on the dismissal of the appeal on the ground that the appellant had no previous notice of the preliminary objection which has prevailed.(6) In his appeal from the Judge's order passed in favour of the plaintiff, and disallowing his own claim for costs, a defendant unnecessarily made a co-defendant a respondent. As this respondent could not be injured in any way in the appeal, it was held by Sir Barnes Peacock (Mitter, J., dissenting) that although the appeal was dismissed, the co-defendant was not entitled to costs simply because he had been present watching the case.(7) When an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree.(8) A decree for "usual costs and interest" means all costs which the successful party has incurred from the commencement of the suit until the date of the final decree with interest at (now) 6 per cent. from the date of the decree.(9) A direction in a decree that "the respondent should pay to the appellants the costs incurred by them in the Lower Court" means the costs specified in the decree appealed against as the costs incurred by the appellants.(10) Where a decree under which costs have been recovered is set aside in appeal, an express order is not needed for a refund of the costs with interest.(11)

The same principles are applied in appeals to the Privy Council where

(1) Bishen Dayal *v.* Bank of Upper India, 13 A. 290, 295 (1890).

(2) Myers *v.* Defries, 5 Ex. D. 180; Ellis *v.* De Silva, 6 Q. B. D. 521; Goutard *v.* Carr, 13 Q. B. D. 598 n.; Lund *v.* Campbell, 14 Q. B. D. 821; Hawke *v.* Brear, ib., 841.

(3) See Mohendro Chandra *v.* Ashutosh Ganguli, 20 C. 762 (1893); Parmanandas *v.* Venayekrao, 7 B. 19, 33 (1878); Monohur Dass *v.* Romanauth Law, 3 C. 473, 484 (1878); Ghanasham Nilkant *v.* Moroba Ramchandra, 18 B. 474 (1894). In Ramji Morarji *v.* Standard Oil Co., 20 B. 167 (1895), it was held that the assignee of a decree who was made respondent in an appeal from it, but had taken no steps actively to support it, ought not to be ordered to pay costs.

(4) Mohendro Chandra *v.* Ashutosh Ganguli, *supra*.

(5) Parmanandas *v.* Venayekrao, *supra*.

(6) Imtiaz Bano *v.* Latafat-un-nissa, 11 A. 328 (1889).

(7) Collector of 24 Pergunnahs *v.* Wilkinson, 12 W. R. 444 (1869).

(8) Shaikh Mahomed *v.* Ram Kant Chowdhry, 16 W. R. 266 (1871).

(9) Broughton *v.* Perhlad Sein, 19 W. R. 152 (1873); see Madhublal Khan *v.* Noyanghose, 6 C. L. R. 231 (1880).

(10) Ram Chunder Sen *v.* Durga Nath Roy, 1 Shome, 143.

(11) Dorab Ally Khan *v.* Abdul Azeez, 4 C. 229 (1878); Watkins *v.* Zohoorooddeen, 1 C. W. N. cxcvii (1897).

the successful appellant is, as a rule, entitled to his costs.(1) But where an appeal was affirmed upon wholly different grounds from those relied upon by the Court below, the dismissal was ordered to be without costs.(2) And where a partial alteration was made by the Appellate Court in the decree of the Court below, as to the rate of interest awarded, but in other respects the decree was affirmed, both parties were directed to pay their own costs of appeal.(3) No costs have been given where the parties maintained pleas far in excess of their respective legal rights; (4) or where the appellant has failed as to part of his appeal; (5) or where the appellant has used forged documents.(6) Costs occasioned by the introduction of unnecessary and irrevelant matter into the record have been disallowed.(7)

A Court may, however, direct that costs shall not follow the event, but if it does, it must be for good cause, and its reasons must be stated in writing; a provision enacted both to secure a proper exercise of discretion and in order that the Court of Appeal may be in a position to control the order. It is not possible to define what is good cause. The rule laid down in Cooper *v.* Whittingham (8) that "where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, the Court cannot take away his right to costs," has been adopted in this country (9) and by the Court of Appeal in England. But the same Court has held (10) that misconduct was not necessary to constitute good cause for depriving a successful plaintiff of costs. "Everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly 'good cause' for depriving the plaintiff of his costs." (11) The Court may consider not merely the conduct of the party in the actual litigation, but may take into consideration matters which led up to it.(12) Where a defendant has by his mis-statements, made under circumstances imposing an obligation on him to be truthful, brought litigation on himself, and rendered an action against him reasonable, there is good cause for depriving him of his costs.(13) If the action is frivolous or vexatious, the

(1) Kali Krishna Tagore *v.* Secretary of State, 15 I. A. 186, 194 (1888).

(2) Fischer *v.* Kamala Naicker, 8 M. I. A. 170 (1860); s c., 3 W. R. P. C. 33.

(3) Mirtunjoy Chuckerbutty *v.* Cochrane, 10 M. I. A. 229 (1865).

(4) Ramcoomar Ghose *v.* Kali Krishna Tagore, 13 I. A. 116, 122 (1886); s. c., 14 C. 99.

(5) Maharani Rajroop Koer *v.* Syed Abul Hossein, 7 I. A. 240, 249 (1880); s. c., 6 C. 394.

(6) Coomari Rodeshwar *v.* Manroop Koer, 13 I. A. 20, 21 (1885); similarly a respondent guilty of fraud got no costs: Bhubaneswari Debi *v.* Nilkomul Lahiri, 12 I. A. 137, 141 (1885); s. c., 12 C. 18.

(7) Bishenmun Singh *v.* Land Mortgage Bank, 12 I. A. 7 (1884); s. c., 11 C. 244; Rajah of Pittapur *v.* Rajah Row Buchi, 12 I. A. 16, 22 (1884).

(8) 15 C. D. 501.

(9) Kuppuswami Chetty *v.* Zamindar of Kalahasti, 27 M. 341, 342 (1903), where the passage, which explains the meaning of misconduct, will be found cited.

(10) Forster *v.* Farquhar, 1893, 1 Q. B. 564.

(11) Huxley *v.* West London Extension Ry. Co., 14 App. Cas. 32, *per* Halsbury, L.C. See also judgment of Lord Watson at p. 33.

(12) *Per* Lord Russell, C.J., Bostock *v.* Ramsay Urban District Council, 1900, 1 Q. B. 360; 1900, 2 Q. B. 616.

(13) *Per* Fry, L.J., Sutcliffe *v.* Smith, 2 Times R. 881.

plaintiff may be deprived of costs.(1) If the Court thinks that the suit is a vexatious one and that no real damage has been sustained, it may give nominal damages to the plaintiff and award costs to the defendant, as in substance in such a case the defendant succeeds.(2) Costs have been disallowed where a party acted with malice and malevolence,(3) as distinguished from mere hardness, in exercising a civil right,(4) and where the defence was found to be false and unscrupulous.(5) A party has been refused costs where he induced plaintiff to sue him; (6) or did not raise the plea of jurisdiction on which he succeeded until special appeal.(7) It has been held that the fact that a defendant has, previously to a suit being filed, admitted that the money sued for was due was not a ground for depriving plaintiff of his costs.(8) This would be so if, though making an admission, a defendant was unwilling or refused to pay. But if not so, *aliter*, for the Court may deprive a plaintiff of costs where his suit is needlessly launched.(9) See also cases cited *ante* in connection with appeals to the Courts of this country, or the Privy Council. It is not possible to formulate any precise rules. As has been well said, "We can get no nearer to a perfect test than the enquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success." (10)

Separate Costs.—Where the interests of the parties are separate and distinct and they have different defences, separate costs should be allowed to each (11), as where the defendants are *zemindar* and *patnidar*, whose defences were not necessarily identical; (12) or where, in a suit to recover possession of land, one of the defendants pleaded successfully that he had nothing to do with the land, and the other defendants claimed title, and also succeeded in their

(1) Macgregor *v.* Clay, 4 Times R. 715.

(2) Futeck Parooee *v.* Mohender Nath Mozoomdar, 1 C. 385-388 (1876). In England the fact that only a farthing's damages is given, though not conclusive, is *primâ facie* good cause; Moore *v.* Gill, 4 Times Rep. 738; Myers *v.* Financial News, 5 Times Rep. 42; O'Connor *v.* Star Newspaper, 68 L. T. 146. Similarly as to smallness of damage and recovery of small sum upon a large claim, Wood *v.* Cox, 5 Times R. 272; Forster *v.* Farquhar (1893), 1 Q. B. 564. In Mt. Bibee Mosechun *v.* Mt. Bibee Munoorun, 24 W. R. 69 (1879), a plaintiff who secured nominal damages was given his costs.

(3) Kalee Pershad *v.* Ram Pershad, 18 W. R. 14 (1872), *sed qu.* the defendant having been found entitled to do what he did.

(4) Muddun *v.* Alopeedeen, S. D. N. W. 1861, p. 569, cited in O'Kinealy, C. P. C. notes to s. 220.

(5) Ram Gopal *v.* Bhoobun Mohun, Coryton, 126 (1864-5).

(6) Bhugwan Doss *v.* Syed Akbar, 1 Ind. Jur. N. S. 390 (1867).

(7) Nobeen Kishen *v.* Shib Pershad, 7 W. R. 490 (1867).

(8) Kuppuswami Chetty *v.* Zamindar of Kalahasti, 27 M. 341 (1903).

(9) Parshram *v.* Dorabji, 2 Bom. L. R. 254, 256 (1900), where without contest a plaintiff obtained a declaratory decree, but was ordered to pay the defendant's costs.

(10) *Per* Bowen, L. J., in Forster *v.* Farquhar (1893), 1 Q. B. 569.

(11) As appears to have been the case in Koncila Koer *v.* Behari Patuck, 12 W. R. 70 (1869); and see Choonee Lal *v.* Gopal Chunder, S. D. N. W. (1859), p. 1, where the defendants represented separate interests and lived so far from each other that it could not be expected that they should employ the same pleader.

(12) Gobindnath Roy Bahadoor *v.* Luchmee Koomaree, 11 W. R. 36 (1869).

defence; (1) or where the defendants were charged with falsely misappropriating property and some of them might have failed in their defence and others succeeded.(2) But where the interests of the defendants are the same, as is ordinarily the case with joint holders; (3) or several representatives of the same original mortgagees; (4) or persons are sued for damages on a cause of action common to all; (5) in short, where the defences are common and identical and not separate, or from any cause defendants file separate defences unnecessarily,(6) only one set of costs should be awarded.

Calculation of Costs.—In the High Courts, rules exist under which there is a regular scale of costs, and the parties' costs are taxed according to this scale. Pleaders' fees must also be calculated according to the rules governing them.(7) The scale on which costs should be awarded to a defendant depends on what the plaintiff claims against him; (8) and so where in a suit for partition two widows who had a claim for maintenance only were made parties, their pleaders were held entitled to percentage only on the amount claimed by them for maintenance.(9) When a suit contains several distinct claims against separate defendants, the amount of costs to be allowed to each depends on the claims against him.(10) Where co-sharers were made defendants in order to plaintiff obtaining a complete decree, the plaintiff must, it was held, pay costs sufficient to cover expenses of appearance.(11) As against his own clients, in the absence of any rule or express agreement, a pleader is only entitled to reasonable remuneration for his work and labour.(12) Costs in an application for revocation of probate have been assessed as in a miscellaneous proceeding.(13) The costs which a defeated plaintiff should be required to pay are those necessarily incurred by the successful party in the defence in the suit. Costs cannot be deemed necessary if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could be avoided.(14) Among items which have been allowed are salary of accountant,(15) expenses in

(1) Ram Chunder Gossain *v.* Mutty Lall Bagchee, 11 W. R. 19 (1869).

(2) Nilkanth Surmah *v.* Soosela Debia, 6 W. R. 324 (1866).

(3) Brindabun Chunder *v.* Ram Coomar Chowdhry, 1 W. R. 139 (1864).

(4) Shah Makhun Lall *v.* Sree Kissen Singh, 12 M. I. A. 157, 201 (1868).

(5) Kasee Nauth Roy *v.* Hullodhur Roy, 2 W. R. 60 (1864).

(6) Francisco de Assis *v.* Anjos, 17 W. R. 188 (1872); Juggu Lall *v.* Beharee Lall, S. D. N. W., 1859, p. 349. Bhup Sing *v.* Zain-ul-Abdin, 9 A. 205 at p. 210 (1886).

(7) Amirtonath Jha *v.* Roghoonath Pershad, 6 W. N. Misc. 35 (1866) [irrespective of any private arrangement between pleader and client.]

(8) Kashcenath Sein *v.* Chunder Monee, 9 W. R. 288 (1868).

(9) Ramchandra Parsharam *v.* Bhagabai, 21 B. 42 (1895).

(10) Rajah Roodur Narain *v.* Coomar Narain Patnaik, 13 W. R. 320 (1870).

(11) Ramputty Koer *v.* Kalee Churn Singh, 14 W. R. 94 (1870).

(12) Mt. Ameeroonissa *v.* Chapman, 6 W. R. 108 (1866) [pleader employed by several defendants in same interest not entitled to separate fee from each].

(13) Pratap Chandra Shaha *v.* Kali Bhanjan Shaha, 4 C. W. N. 600 (1900); Garabini Dasi *v.* Pratap Chandra Shaha, 4 C. W. N. 602 (1900).

(14) Seeta Patta *v.* Suryudamma, 18 M. 128 (1894); so it was held that plaintiff should not be saddled with the costs of three pleaders if two were sufficient, Sukeena Bibee *v.* Usud Ali, S. D. N. W., 1861, p. 338.

(15) Macnair *v.* Hogg, 2 Hyde 89 (1864).

connection with attachment of defendant's property when suit is dismissed,(1) and stamp for plaint.(2)

Execution for Costs.—The portion of sect. 220 as relating to execution is omitted. See now sect. 36. If the order for costs forms part of a decree, such decree is executed in the ordinary way. Where, in a partition suit, the plaintiff, after decree, took no steps, but the estate was partitioned at the instance of one of the defendants, it was held that he must first obtain an order for payment, and if payment be not obtained then apply for execution.(3) If the order does not form part of the decree it may be executed *as if* it were a decree for the payment of money. But such an order is not a decree.(4) A mamlatdar has the same power to levy costs decreed by the High Court as he has regarding costs decreed in his own court.(5) No separate suit lies for the recovery of costs awardable under the Code, a remedy in execution being given.(6) But where a Court is not entitled to order costs and costs are incurred, they may be made the subject of consideration in a subsequent suit.(7) If it can order costs and does not do so, no separate suit will lie.(8) An objection as to costs is a matter which should be raised in the shape of an application to amend or review the original decree, and failing that, by way of regular appeal against the decree, but no objection can be raised in execution of it.(9) A summary remedy for payment of costs against his client has been given to solicitors, but they cannot under the rule of Court so giving it enforce payment against the client's representatives.(10)

Set-off of costs.—O. XX. r. 6 enacts that: "*The Court may direct that the costs payable to one party by the other shall be set-off against the sum which is admitted or found to be due from the former to the latter.*" This rule, which is a re-enactment of sect. 221 of the last Code, is one of those sections in which the general equitable principle of set-off is recognized. See notes to O. VIII. r. 6, *post*. A mortgagor is entitled to set off or deduct the amount of costs payable to him under the decree against or from the mortgage debt payable by him.(11) The section has been applied by analogy to the

(1) Sewa Ram *v.* Tandy, S. D. N. W. 1856, p. 514.

(2) Madhub Chunder *v.* Ram Lochun, 14 W. R. 143 (1870). It does not, however, appear why the plaintiff was required to pay this amount in.

(3) Brojo Lall Sen *v.* Mohendro Nath Sen, 18 C. 199 (1891).

(4) Shanks *v.* Secretary of State, 12 M. 120, 122 (1889); Rama Kisoor Dossji *v.* Suranga Charlu, 21 M. 421 (1898).

(5) Nemava *v.* Devandrappa, 16 B. 238 (1891).

(6) Mahram Das *v.* Ajudhia, 8 A. 452, 461 (1886), and cases there cited. As to limitations in the case of an order for costs, see Hurbunslall *v.* Sheo Narain, 21 W. R. 391 (1874).

(7) Ib., and see Venkata Vigaya *v.* Timmayya Pantulu, 22 M. 314 (1898). [Suit to recover money advanced to guardian *ad litem* for costs.]

(8) Referred case, 3 M. H. C. R. 341 (1867).

(9) Hurcenath Banerjee *v.* Doybo Chunder Bannerjee, 5 W. R. Misc. 4 (1866).

(10) Assur Purshotam *v.* Ruttonbai, 16 B. 152 (1891); the order may be executed under the execution provisions of the Code: *In re* Premji Trikumdas, 17 B. 514 (1892). As to solicitor's lien for costs, see Devkabai *v.* Jefferson, 10 B. 248 (1886).

(11) Sidu *v.* Bali, 17 B. 32 (1892).

deduction of costs from the purchase-money in pre-emption suits.(1) A set-off cannot be allowed for costs not actually awarded, and a decree which is incapable of being enforced cannot be set off against a decree which is alive.(2)

Interest on costs.—Interest cannot be allowed on costs where the decree itself is silent on the point, unless submission is made by the parties to the discretion of the Court.(3) The view once taken that sect. 222 and sect. 209 of the last Code did not affect the special provisions as to allowance of interest in the Transfer of Property Act (4) has been dissented from and overruled.(5).

Appeal as to costs.—It was proposed to enact in sect. 96, *post*, that: "*No appeal shall lie on a matter of costs only where by law such costs are left to the discretion of the Court, except by leave of the Appellate Court, obtained on an application accompanied by a memorandum of appeal.*" As, however, objection was taken, the clause has been omitted, with the result that the matter is still regulated by the previous case-law. Under the Code of 1859 it was held that a regular appeal would lie on a mere question of costs, although as the lower Court had a discretion in the matter, any interference with its order ought also to be exercised with discretion. Though, however, an improper exercise of discretion might be matter of regular appeal, no special appeal would lie unless the award of costs was contrary to law.(6) A similar rule was laid down (7) under the Code of 1877. Under the last Code first appeals were given not merely from decrees but also from any part of the decrees,(8)

(1) Ishri *v.* Gopal Saran, 6 A. 351 (1884); see notes to Rule 130.

(2) Huro Pershad *v.* Foolkishore, 16 W. R. 308 (1871). [As where (in regard to the first point) a decree of the High Court gave the successful appellant costs of that Court and of the lower Appellate Court, but omitted to award the costs of the first Court.]

(3) Bhoza Rughbur *v.* Bhoza Raj, 3 A. H. C. R. 319 (1871); Forester *v.* Secretary of State, 11 A. 137 (1877); s. c., 3 C. 161.

(4) Amolak Ram *v.* Lachmi Narain, 19 A. 175 (1896).

(5) Achalabala Bux *v.* Surendro Nath Dey, 24 C. 766 (1897); Subbaraya *v.* Ponnusami, 21 M. 364 (1897); Maharajah of Bhartpur *v.* Rani Kanno, 23 A. 181, 191 (1900) P. C.

(6) Gridhari Lal Roy *v.* Sundar Bibi, B. L. R. Sup., vol. F. B. 496 (1866) [for earlier cases, see Doucett *v.* Wise, 1 W. R. 322 (1864); Collector of Dacca *v.* Kamalakant, 2 W. R. 33, 34 (1865); Choonee Lal *v.* Patroo, 6 W. R. 19 (1866)]; Futeek Parooee *v.* Mohender Nath Mozoomdar, 1 C. 385, 387 (1876); Desaji Lakhmaji *v.* Bhavanidas Narotamdas, 8 B. H. C. R. 100 (1871); A. C. J. So the P. C. refused to interfere on a matter of discretion. Mt. Keemee *v.* Luchman Das, 5 W. R. P. C. 59 (1837). In Sri Dantuluri *v.* Surappa Razu, 3 M. H. C. R. 113 (1866), the Court interfered in second appeal as a question of principle was involved, as the lower Court made a defendant pay costs to a plaintiff whose suit was dismissed for want of cause of action. In Shunt Buksh *v.* Lalla Nund, 11 W. R. 48 (1864), the Court interfered as a person, unnecessarily made a party, had been deprived of his costs; and in Ram Chunder Gossain *v.* Mutty Lall Bagchee, 11 W. R. 19 (1869), where the lower Court disallowed separate costs to the defendants. As to early cases on second appeals, see Khoda Bux *v.* Mowla Bux, 14 W. R. 255, 766 (1870); Ooma Churn *v.* Girish, 25 W. R. 22 (1875); Achumbit *v.* Kanhaya Lal, 7 W. R. 208 (1867); Beer Pershad *v.* Doorga Pershad, W. R. 215 (1864); Amir Saheb *v.* Jamshedji, 4 Bom. H. C. R. A. C. J. 941 (1867); Mt. Bibee Moseehun *v.* Mt. Bibee Munoorun, 25 W. R. 69.

(7) Balkissen Das *v.* Lutchmeeput Singh, 8 C. 91, at p. 94 (1881).

(8) Therefore, that part which relates to costs is appealable if the decree is appealable. See Vasudev *v.* Bhavan, 16 B. 241 (1891); Balkissen Das *v.* Lutchmeeput Singh, 8 C. 91, 94 (1881).

and necessarily therefore against the part of the decree awarding costs. But such an award was then, as before, a matter of discretion, and the Court of Appeal would generally only interfere where a matter of principle was involved,(1) whether in first appeal from a decree (2) or order,(3) or in second appeal.(4) The Court has also held its interference justifiable in first appeal where, though strictly speaking no question of principle is involved, there has either been misapprehension as to facts or no real exercise of discretion at all.(5)

The Bombay High Court,(6) citing certain English decisions, has held that the principle to be deduced from them is that Appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any violation of any established principle,(7) misapprehension of facts,(8) or where there has been no real exercise of discretion at all.(9) These principles will be of general application in first appeals and appeals from orders. In the case of second appeals it must be shown that the order complained of comes within the provisions of sect. 100.

(1) Secretary of State *v.* Marjum Hossein Khan, 11 C. 359 (1885); Amirul Hossain *v.* Khairunnessa, 28 C. 567 (1901); Moshingan *v.* Mozari Sayad, 12 C. 271 (1885) [where successful defendant was ordered to pay plaintiff's costs]; Bunwari Lall *v.* Chowdhry Drup Nath Singh, 12 C. 179 (1885) [where the plaintiff had no cause of action against appellant, and sought no relief against him, and therefore could not receive costs]; Ranchordas Vithaldas *v.* Bai Kasi, 16 B. 676, 682 (1892); Kushal Sadashiv *v.* Punamchand Jusrupji, 22 B. 164 (1897); Bishen Dayal *v.* Bank of Upper India, 13 A. 290, 295 (1890) [where a successful party was without cause deprived of his costs]; Parshram *v.* Dorabji, 2 Bom. L. R. 254, 255 (1900); Pratap Chandra *v.* Kali Bhanjan, 4 C. W. N. 600 (1900) [costs whether allowable as for suit or miscellaneous proceeding]; in Tara Prosunno *v.* Satish Chandra, 4 C. W. N. 90 (1896), the question does not appear to have been one of principle but of the propriety of the order; see Kamat *v.* Kamat, 8 B. 369 (1884).

(2) Secretary of State *v.* Marjum Hossein Khan, *supra.*

(3) Moshingan *v.* Mozari Sayad, *supra;* that is appealable orders, an appeal lying from that part of the order relating to costs: Balkissen Das *v.* Luchmeeput Singh, 8 C. 91 (1881); but where no appeal lay from the order, there was no appeal as to the direction as to costs which was ancillary to it: Ramakissoor Dossji *v.* Sriranga Charlu, 21 M. 421 (1898). The Court can hear an appeal as to costs although that portion of the appeal not relating to costs has been abandoned at the hearing: Vasudev Ramchandra *v.* Bhavan Sivraj, 16 B. 241 (1891).

(4) Bunwari Lall *v.* Chowdhry Drup Nath Singh, *supra.*

(5) Ranchordas Vithaldas *v.* Bai Kasi, 16 B. 676 at p. 682 (1892), foll. Kushal Sadashiv *v.* Punamchand Jusrupji, 22 B. 164 (1897); Parshram *v.* Dorabji, 2 Bom. L. R. 254, 255 (1900).

(6) Ranchordas Vithaldas *v.* Bai Kasi, 16 B. 676 at p. 682 (1902), foll. Kushal Sadashiv *v.* Punamchand Jusrupji, 22 B. 164 (1897).

(7) The English cases are numerous, see Morgan and Wurtzburg's Costs, 266. Ann. Practice, Notes, O. 65, r. 1, p. 963, vol. ii. p. 467; Parshram *v.* Dorabji, 2 Bom. L. R. 254, 255 (1900).

(8) *In re* Gilbert, 28 C. D. 549; Robertson *v.* Robertson, 6 P. D. 119; Parshram *v.* Dorabji, 2 Bom. L. R. 254, 255 (1900).

(9) As where costs have been awarded arbitrarily: Daulat Ram *v.* Durga Prasad, 15 A. 333 (1893). Though the Court will assume that the Judge has exercised his discretion, unless satisfied that he has not done so: Bew *v.* Bew (1899), 2 Ch. 467, foll. in Parshram *v.* Dorabji, 2 Bom. L. R. 254, 260 (1900); *Re* Hunt, W. N. (1901) 144 C. A.; Civil Service, etc., Society *v.* G. S. Navigation Co., (1903) 2 K. B. 766, where the Judge decided on grounds not open to him; see Ann. Pr. ii. p. 467.

PART II.

EXECUTION.

GENERAL.

36. *The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.*

Application to orders.

Orders.—This section replaces and supersedes the first paragraph of sect. 649 of the last Code, the second paragraph being incorporated in the next section. By virtue of sect. 647 (now 141) and sect. 649 of the Code of 1882, it was held that an order obtained from a Judge in Chambers by an attorney against his client for payment of costs might be executed under Chapter XIX. of the Code of 1882, corresponding with the present Part.(1) By virtue of sect. 649 of the last Code, execution might have been had of a judgment entered up under sect. 86 of the Insolvent Act.(2)

Execution.—Execution is the enforcement by process of Court of its decrees and orders. The words "execution of decrees" at the head of the Chapter in the last Code was held to mean the enforcement of the decrees of Courts by process of execution only, viz. the different kind of execution dealt with in the Chapter for compelling the judgment-debtor to obey the order of the Court.(3) Process in execution must always be granted by the direct act of the Court itself. And as parties cannot invoke the process *de novo* either by agreement or by their conduct, so neither can they extend the relief which the Court has chosen to award.(4) *Primâ facie* it is the right of every litigant to call on the Courts to take such action as may be requisite to secure the execution of a decree containing a direction in his favour, and the Court of execution cannot impose terms which are not in the decree.(5) Procedure in execution

(1) *In re* Premji Trikumdas, 17 B. 514 (1893).

(2) *In re* Bhagwandas Hurjivan, 8 B. 511 (1884).

(3) Sreenath Roy *v.* Radhanath Mookerjee, 9 C. 773, 776 (1882) [as regards the question decided, an order directing an account is now a decree. See s. 2, *ante*].

(4) Eckowrie Singh *v.* Bijoynath Chatterjee, 13 W. R. 11 (1870). As to decrees incapable of execution, see Sri Krishna Tata *v.* Singara Chanar, 4 M. 219 (1881); Ramanagra Singh *v.* Ramyad Singh, 5 C. L. R. 176 (1879).

(5) Nawab Mir Sadrudin *v.* Nawab Nurudin, 29 B. 79 (1904).

ought not to be conducted in a slipshod and slovenly fashion, as if it were an unimportant branch of the work they have to do in the administration of justice, but it ought to be conducted with as much care as the procedure in suits because of the difficulties which so frequently arise. The Courts are bound to look to the Code for the procedure they should follow in these execution proceedings.(1)

"**Provisions of this Code.**"—This Part, together with O. XXI., replaces Chapter XIX. of the Code of 1882. The provisions relating to execution have been divided into two portions, viz. those contained in the present Part, and those contained in the Rules of O. XXI., which must be read with it. These Rules refer to minor points of procedure. The arrangement and numbering of this Part has been very materially altered, and sections appearing in it have been taken from other portions of the old Code. Further, the sections of the Code reproduced have been added to, and made the subject of important amendments, which, for the most part, embody or have been suggested by previous case law. A considerable number of the sections or portions of the sections are entirely new.

The general scheme of the Part is as follows :—

Firstly, the Code is declared applicable to decrees and orders, and a definition given of the term "Court which passed the decree" (sects. 36, 37) [transfers of decrees to the Collectors for execution are dealt with in sects. 68–72 and the Third Schedule]. Then follow provisions relating to the Courts by which decrees may be executed, and the jurisdiction of such Courts (sects. 38–46); thirdly, the questions to be determined by those Courts (sect. 47, formerly 244); fourthly, the limit of time for execution (sect. 48); fifthly and sixthly, transferees, legal representatives, and procedure in execution respectively (sects. 49–54); seventhly, the mode of execution, whether by arrest, attachment, or sale (sects. 55–72); eighthly, payment and distribution of assets (sect. 75); and lastly, the resistance to execution (sect. 74). Other provisions concerning these matters are contained in the 103 rules of O. XXI.

The main alterations to be noted in the sections are as follows: the introduction of precepts (sect. 46), and of sects. 53, 61, and amendments of sect. 244 (now sect. 47), and of the sections corresponding with sects. 51, 55 (1) (2), 62, 64, 73. As regards sects. 68 *et seq.*, dealing with execution by Collectors, the provisions, as they deal with a special matter, and are not of general application, have been placed in the Third Schedule.

The alterations in the rules are cited under O. XXI.

The chief omissions in the sections are of clauses (*a*) and (*b*) of the former sect. 244 (see notes to sect. 47) and of sect. 288 of the last Code, which it was considered might be omitted, having regard to the provisions of Act XVIII. of 1850. Sect. 257A of the last Code has also been omitted. It was first enacted by Act XII. of 1879, with a view to protect the interests of judgment-debtors against undue pressure by decree-holders. The Select Committee stated that the section had given rise to conflicting decisions, and, as interpreted by the majority of the High Courts, was found in practice to be of little service to judgment-debtors. Moreover, sect. 16 of the Indian

(1) Thakur Pershad *v.* Sheikh Fakir-ullah, 22 I. A. 44 at pp. 45, 46 (1894).

Contract Act, as amended, was considered to afford adequate protection where it is required. As, however, the section remains in force until the coming into operation of the present Code, and some cases decided under it have a relation to sect. 258 (now O. XXI. r. 2), the following notes on the section are given.

Object of section 257A of last Code, now omitted.—The Legislature considered that the power of executing a decree placed the holder of it in a position to exercise undue pressure over the judgment-debtor and enabled him to obtain terms too favourable to himself from the latter, whose interests needed protection at the hands of the Court which passed the decree.(1) The object is to avoid inconvenience and delay in executing the decree and its being held *in terrorem* over the debtor, and to afford protection against unfair arrangements, which protection is insured by the necessity for sanction.(2)

"**The Court.**"—It was held under the last Code that the Court to which a decree had been transferred for execution could not pass an order under this section and that sanction could be given only by the Court which passed the decree.(3)

"**Shall be void.**"—Under the last Code an agreement of the nature stated was declared to be void, and a question arose whether it was void *in toto* and for all purposes or for the purposes of execution proceedings only, and was enforceable by a fresh suit.(4) It is not easy to reconcile all the decisions on the point. There is no absolute prohibition against such an agreement. The section, however, forbids the enforcement of an agreement entered into in contravention of the section, while a decree is subsisting and enforceable. If that be so, then the decree must be enforced by execution and not by separate suit, and in such execution an unsanctioned agreement will not be recognized. If, however, an agreement is such that it adjusts and puts an end to the decree, which thus ceases to be enforceable, no question of or in execution arises, and the substituted agreement may be made the subject of a fresh suit.(5)

"**Every agreement.**"—The agreement referred to to give time is an agreement to pay the judgment-debt with a stipulation that it shall not be

(1) Heera Nema *v.* Pestonji, 22 B. 693, 697, 698 (1898). See as to this and sect. 258, now O. XXI. r. 2, G. C. Whitworth's "Decrees in Bar of Contracts."

(2) Bank of Bengal *v.* Vyabhoy Gangjii, 16 B. 618, 625 (1891), where it was also held that an unsanctioned agreement could be enforced where it formed part of the consideration of a bond and had been enjoyed by the obligee: Govind *v.* Sakharam, 28 B. 383, 391 (1904); Venkata Subramania Ayyar *v.* Koran Kannan Ahmed, 26 M. 19, 24, 26 (1902).

(3) Gandharaj Singh *v.* Sheodarshan Singh, 12 A. 571 (1890); Paramananda Das *v.* Mahabur Dossji, 20 M. 378 (1896).

(4) Lalji Singh *v.* Gaya Singh, 25 A. 317, 320 (1903), and case there cited; Venkata Subramania Ayyar *v.* Koran Kannan Ahmed, 26 M. 19, 26 (1902); Gopalsahu *v.* Brij Kishore Pershad, 32 C. 917 (1901).

(5) See cases cited in last note. In Govind Krishna *v.* Sakharam, 28 B. 383 (1904), these cases were not referred to. In Venkata Subramania Ayyar *v.* Koran Kannan Ahmed, 26 M. 19 (1902), at p. 26 it was pointed out that in Hukum Chand Aswal *v.* Taharunnissa Bibi, 16 C. 504 (1889), there was no agreement by the judgment-creditor to surrender his rights under the decree, and that being so, the case was, upon the principles above stated, wrongly decided.

payable at the time when under the decree it became payable. An agreement to give time for the satisfaction of a judgment implies *ex vi termini* that there has been no actual satisfaction but merely a stipulation for future satisfaction. Therefore an agreement under which there is an actual and present satisfaction of the judgment replacing it and putting an end to the decree is not within the section. In other words, the agreement to which the section relates is one which suspends and does not destroy the rights of execution consequent on the decree.(1) The last clause presupposes the existence of a judgment-debt, for the sum paid cannot be applied in satisfaction unless there is a subsisting judgment to which it can be applied. Where the judgment-debt is extinguished in whole or in part by the substitution for it of a contract, such a contract cannot be regarded as an agreement to give time for the satisfaction of a judgment-debt, since the latter, to the extent to which it has been extinguished, is no longer in existence. The agreement in such a case is only an adjustment of the decree under O. XXI. r. 2, which, if not certified, will not prevent execution.(2) An agreement may be good in one part and bad as regards another,(3) and what is valid will be upheld, provided that the stipulations are not part and parcel of one and the same agreement and can be separated one from the other.(4) The section did not apply to agreements by persons who are not parties to the suit in which the original decree was made.(5) Persons who have nothing to do with a decree cannot fall within the mischief struck at by the section. But the same consideration cannot apply where a person is substantially bound by the decree though not *pro forma* a party to it.(6) It was held that an agreement was none the less void because one of the parties to it, who was the legal representative of one of the judgment-debtors, had not been one of the parties to the suit in which the decree was obtained.(7)

Enforceable.—It was held under the last Code that the section must be deemed to relate to judgment-debts which are still enforceable.(8)

(1) Tukaram *v.* Anantbhat, 25 B. 252 (1900); s. c., 2 Bom. L. R. 1012, in which the previous decisions are reviewed. Venkata Subramania Ayyar *v.* Koran Kannan Ahmed, 26 M. 19 (1902), where, however, the operation of the decree was only suspended, not extinguished; Gopal Sahu *v.* Brij Kishore Pershad, 32 C. 917 (1905); [ref. to Hur Kissen Das Serowji *v.* Nibaran Chander Banerjee, 6 C. W. N. 27 (1901), as a case in which the judgment-debt was extinguished.] Lalji Singh *v.* Gaya Singh, 25 A. 317, 325 (1903), diss. from Dhauram Ragho *v.* Ganpat Sadashir, 27 B. 96 (1902); s. c., 4 Bom. L. R. 872, which practically refused to follow the case first mentioned.

(2) Lalji Singh *v.* Gaya Singh, 25 A. 317 at p. 328. See Ram Doyal Bannerjee *v.* Ram Hari Pal, 20 C. 312 (1892).

(3) Bhagchand *v.* Radha Kisan, 28 B. 62 (1903); s. c., 5 Bom. L. R. 672: foll Raichand *v.* Naran, 28 B. 310 (1904).

(4) Govind *v.* Sakharam, 28 B. 383, 386 (1904); Davlatsing *v.* Pandu, 9 B. 176 (1884); Vishnu Vishwanath *v.* Hur Patil, 12 B. 499 (1888); Chatru *v.* Kondaji Vithal, 38 B. 219 (1913).

(5) Ramji Pandu *v.* Mahomed Walli, 13 B. 671 (1889); Yella Chetti *v.* Munisami Reddi, 6 M. 101 (1882); Hur Kissen Dass Serowjee *v.* Nibaran Chandra Banerjee, 6 C. W. N. 27, 30 (1901).

(6) Govind Krishna *v.* Sakharam, 28 B. 383, 391 (1904).

(7) Venkata Subramania Ayyar *v.* Koran Kannan Ahmed, 26 M. 19 (1902).

(8) Shripatrao *v.* Govind Narayan, 14 B. 390 (1889).

"**Sanction.**"—Where no formal sanction had been recorded it was held that under the circumstances sufficient had been done to satisfy the requirements of the section.(1) As regards time for sanction, see below.(2) and as to the effect of want of sanction, see *ante*. The new agreement, when sanctioned, became part of the decree and could be executed as the decree in the case.(3) The parties could not resile from the agreement so sanctioned, and if there was irregularity in the sanction not amounting to want of jurisdiction, the compromise must take effect until the order sanctioning it is set aside.(4) An order passed under this section being one relating to the execution of the decree was appealable.(5)

"**Decree. Order.**"—For the meaning of these terms, see note to sect. 2, *ante*.

What decree may be executed.—The rule may shortly be stated to be—the decree of the Court of first instance until appeal, and after that the decree of the Court of last instance. Whether the decree of the appellate Court is for reversing or for affirming the decree against which the appeal is preferred, it is, in either case, the final decree in the cause, and, as such, the only decree which is capable of being enforced by execution after it is once pronounced. If the decree of the lower Court is reversed it is absolutely dead and gone; if it is affirmed or modified it is equally so, though in a different way, namely, by being merged in the decree of the superior Court, which takes its place for all intents and purposes.(6) If it is altered by the Court of first instance, execution cannot issue.(7) But where the appellate decree is not complete in itself, reference

(1) Krishna *v.* Vasudev, 21 B. 808 (1896), and see Lakshmanna *v.* Sukiya Bai, 7 M. 400 (1884).

(2) Nam Kole *v.* Chima Bhosle, 13 B. 54 (1888).

(3) Sita Ram *v.* Dasrath Das, 5 A. 492 (1883); Sham Karan *v.* Piari, 5 A. 596 (1883); Champat Rai *v.* Pitambar Das, 6 A. 16 (1883); Makund Ram *v.* Makund Ram, 6 A. 228 (1884); Muhammad Sulaiman *v.* Jhukki Lal, 11 A. 228, 232 (1888); Thakoor Dyal Singh *v.* Sarju Pershad Missir, 20 C. 22 (1892); but see Ramlakhan Rai *v.* Bakhtaur Rai, 6 A. 623 (1884). Prior to the enactment of this section the only decree which could be executed was the original; Ram Runjun *v.* Jowhurujumah, 23 W. R. 129 (1874); Madhub Chunder *v.* Madhub Lal, 15 W. R. 542 (1871), and see also Ameerunissa Khatoon *v.* Meer Mahomed, 2 C. L. R. 143 (1878); Debi Rai *v.* Gokul Prasad, 3 A. 585 (1881); Khedoo *v.* Kalee Sahoo, 12 W. R. 71 (1869); Dinonath Sen *v.* Gooroo Churn Pal, 21 W. R. 310 (1874); Pillai *v.* Pillai, 21 A. 219 (1875); Bishto Chunder *v.* Woomanath Roy, 15 W. R. 459 (1871).

(4) Muhammad Sulaiman *v.* Jhukki Lal, 11 A. 228 (1888).

(5) Rangji *v.* Bhaiji, 11 B. 57 (1886).

(6) Muhammad Sulaiman Khan *v.* Muhammad Yar Khan, 11 A. 267 (1888) F. B.; Ram Charan Bysak *v.* Lakhi Kant Bannerji, 7 B. L. R. 704 (F. B.) at pp. 709, 714 (1871); Nourang Rai *v.* Latif Choudhuri, 13 A. 394 (1891); Shohrat Singh *v.* Bridgman, 4 A. 376 (1882); Mana Vikraman *v.* Unnicappan, 15 M. 170, 171 (1891). So though an order of the P. C. may confirm a decree of the Court, below, that order is the paramount decision which must be executed, Luchman Persad *v.* Kishun Persad, 8 C. 218 (1882). A different view from those above expressed was taken in Mir Ajimuddin *v.* Mathura Das, 11 B. H. C. R. at p. 215 (1874). As regards appellate decrees which coincided with the original decree, see notes to O. XX. r. 6 and sect. 149.

(7) Muhammad Sulaiman Khan *v.* Fatima, 11 A. 314 (1889).

may be made to the prior decree.(1) The decree, however, which is executed is the appellate decree. Where a decree was compromised by agreement made by the parties and communicated to the Court which passed the decree, *held* that the effect of the decree was extinguished by the agreement, which could only be enforced by a fresh suit and not by an application for execution of the former decree.(2) When a decree contains a direction for payment and creates a charge and default is made, the decree cannot be at once executed; the proper course for its enforcement is not to apply for execution, but to apply for either an order for an account and sale or to institute a suit for enforcing the charge.(3)

From which Court execution may be had.—See the notes to sects. 37, 38, 68–72, and Third Schedule. The general jurisdiction of such Courts is dealt with *post*. Sects. 43, 44, 45 deal with execution of decrees passed by British Courts either in places to which this Part does not extend, such as those scheduled districts to which the Code, or this portion of it has not been extended; execution of decrees passed by Courts of Native States, and issue of precepts to certain British Courts in foreign territory. The Courts, therefore, by which execution may be given, are Courts in British India executing either their own decrees or the decrees of other Courts in British India, or Courts in British India executing the decrees of British Courts in foreign territory (sect. 43), or Native Courts of such territory (sect. 44). There remains the question of execution of decrees of British Indian Courts out of British Indian territory. As regards this, the general principle is that Courts of British India have no authority to send their decrees for execution to Courts not in British India.(4) An exception to this rule exists (sect. 45) in the case of British Courts in foreign territory, provided that such execution is authorized under the notification of the Governor-general.(5)

Jurisdiction of Court executing decree.—The following section was proposed as regards this matter:—

"(1) *Save for the purpose of rateably distributing assets realized by sale or otherwise in execution of a decree by a Court of competent jurisdiction, no Court shall execute a decree which, by reason of the value or the nature of the suit at the time of its institution, it would have been incompetent to pass.*

(2) *The Court which passed a decree for the enforcement of*

(1) Gobardhan Das *v.* Gopal Ram, 7 A. 366 (1885); Himayat Husain *v.* Jai Devi, 5 A. 589 (1883); Bihari Lal *v.* Khub Chand, 6 A. 48 (1883); Ram Saran *v.* Persidhar Rai, 10 A. 51, 54 (1887). See further as to decree of simple affirmance incorporating mandatory part of original decree, Noor Ali *v.* Koni Meah, 13 C. 13 (1886). See notes to O. XX. r. 6 and sect. 149.

(2) Hari Raghunath *v.* Krishnaji Anant Joshi, 19 B. 546 (1894).

(3) Chundra Moni *v.* Mutty Lall Mullick, 2 C. W. N. 33 (1897), *sed qu.* as to first of the two alternatives. See Aubhoyessuree Dabee *v.* Gouri Sunkur Panday, 22 C. 859 (1895); Matangini Dassee *v.* Choneymoney Dassee, 22 C. 903 (1895).

(4) Kastur Chand Gujar *v.* Parsha Mahar, 12 B. 230 (1887).

(5) Ratan Mahanti *v.* Khaloo Sahoo, 29 C. 400 (1902).

a mortgage or charge against immoveable property included therein or subject thereto, shall have power to order the sale of any such immoveable property, wherever the same may be situate.

(3) *Where, after the passing of a decree in a suit for the enforcement of a mortgage or charge, the whole of the immoveable property included therein or subject thereto falls, by transfer of jurisdiction, within the local limits of the jurisdiction of another Court, the decree may be executed either by the Court which passed the decree, or by the Court within the local limits of whose jurisdiction the immoveable property falls by such transfer.*

(4) *Save as provided by this section and section* 158 [*dealing with attachment of salary*] *no Court shall have power to execute a decree in which the subject-matter of the suit or application for execution is property situate entirely outside the local limits of its jurisdiction.*

(5) *Where immoveable property attached in execution of a decree for the payment of money forms one estate comprised within the local limits of the jurisdiction of two or more Courts, any one of such Courts may order the sale of the entire estate upon such conditions as it may consider reasonable and necessary for the prevention of conflict of orders.*

Explanation.—For the purposes of this section, a Court, which would have been competent to pass the decree, shall not be deemed to be incompetent to execute it merely because, by reason of the amount of rent or mesne profits ascertained for a period subsequent to the institution of the suit, the pecuniary limits of the jurisdiction of such Court are exceeded."

This section would have cleared up several points which have been the subject of judicial decision. The Court executing the decree referred to is, as appears from sect. 38, either the Court which passed the decree or the Court to which it is sent for execution. Clause (5) with some modifications has been embodied in O. XXI. r. 3. The other clauses have not been enacted; as, however, they have reference to preceding case-law, they are here reproduced and commented upon.

Clause (1).—There has been a conflict of decision on the question whether the Court executing a transferred decree was restricted to the pecuniary limits of its jurisdiction.(1) An application for the execution of a decree, however, is an application in the suit in which the decree was obtained, and questions arising in the execution of decrees are frequently as important as the

(1) See, in the affirmative, Gokul Kristo Chunder *v.* Aukhil Chunder Chatterjee, 16 C. 457 (1889); Durga Charan Mojumdar *v.* Umatara Gupta, 16 C. 465, 467 (1889); cf. Shiv Sideshwar *v.* Shri Harihar, 12 B. 155 (1887); and in the negative Narasayya *v.* Venkata Krishnayya, 7 M. 397 (1884); Shanmuga Pillai *v.* Ramanathan Chetti, 17 M. 309 (1893); cf. Kelu *v.* Vikrishna, 15 M. 345, 347 (1891).

questions in issue in the suit. The proposed clause adopted the principle of those decisions which held that a Court had no jurisdiction to execute a decree sent to it when the decree had been passed in a suit, the value or subject-matter of which was in excess of the pecuniary limits of its ordinary jurisdiction, and that the power to send a decree to "another Court" meant another Court having jurisdiction, and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction. The words "*at the time of its institution*" were introduced to declare beyond doubt that a Court having jurisdiction to grant a decree has also authority to execute it, even though the pecuniary limits of its jurisdiction may be subsequently exceeded by the operation of incidental causes, such as a rise in the value of property or the gradual accumulation of interest.(1) With this Clause should be read the *Explanation*, which was intended to give effect to the undermentioned decision.(2) This Explanation was confined to cases of rent or mesne profits, but, as stated, the principle is one of general application, and has been applied in cases of interest also.

Clauses (2) and (3).—These both refer to suits on mortgages and charges, and form an exception to the general principle enacted in the fourth Clause of the proposed section. They embody the result of the decisions noted (3), in which it was held that it would be impossible, to apply the provisions of the Transfer of Property Act relating to sales in accordance with the decree passed in a suit on a mortgage if it were necessary to apply to different Courts to obtain realization of the mortgaged debt by sale of the properties hypothecated. It was, however, pointed out that the Court passing the decree is not alone competent, for in some cases it might be more convenient that sales of various lots mortgaged should be held in the Districts in which they are situate.(4) Moreover, a sale under a mortgage decree is not in its proper sense a sale in execution, being a sale directed by the decree itself.(5)

Clause (4).—If at the time a suit is brought a Court has no territorial jurisdiction over the subject-matter, then it has no jurisdiction to execute such decree. Sect. 16 indicates that the object of the Code is to limit the territorial jurisdiction of the Courts in regard to the property they are entitled to deal with, and as execution is only a continuation of the suit, a Court in the later stages of a suit has no greater powers than it possessed at its institution. Moreover (and this applies to all cases whether the decree is that of the Court

(1) Shamrav Pandoji *v.* Niloji Ramaji, 10 B. 200 (1885).

(2) Rameswar Mahton *v.* Dilu Mahton, 21 C. 550 (1894).

(3) Maseyk *v.* Steel, 14 C. 661 (1887) [in which the earlier decision, Shuroop Chunder *v.* Ameerunnessa Khatoon, 8 C. 703 (1882), is referred to]; Kartuk Nath Pandey *v.* Tilukhdari Lall, 15 C. 667 (1888) [transfer of jurisdiction]; Gopi Mohan Roy *v.* Doybaki Nundun, 19 C. 13 (1891); Tincouri Debya *v.* Shib Chandra Pal, 21 C. 639 (1894); Jagernath Sahai *v.* Dip Rani Koer, 22 C. 871, 875 (1895); Jahar *v.* Kamini Debi, 28 C. 238 (1900), 5 C. W. N. 150 [it being held that the provisions of s. 649 (now 108) were permissive].

(4) Jagernath Sahai *v.* Dip Rani Koer, *supra*.

(5) See Maseyk *v.* Steel, 16 C. 661 at pp. 664, 668 (1887).

executing it or not), territorial jurisdiction is a condition precedent to a Court executing a decree.(1)

Clause (5).—This is a provision inserted for convenience, it being obviously undesirable in many cases, and in others not practicable, that an entire estate should be sold otherwise than as a whole.(2) An estate forming one revenue-paying unit, but extending over more than one District, may be regarded as situate in the District where the whole revenue is paid or where the Court holding the sale has jurisdiction. This clause therefore forms another exception to the general principle upon which the fourth clause is based, in so far as authority is given to sell beyond local limits in execution of a simple money decree,(3) which authority may be exercised upon reasonable conditions by any Court of competent pecuniary jurisdiction within which any portion of the estate is situated. With some verbal alterations and the omission of the words "attached in execution of a decree for the payment of money" this clause has been retained and appears as O. XXI. r. 3.

Who may apply for execution.—A decree-holder or his representative, a joint decree-holder or his representative (O. XXI. r. 15), and the transferee of either of such decree-holders, where the transfer is by an assignment in writing or by operation of law (sect. 49, O. XXI. r. 16) only, for the position of an assignee of a decree under an oral assignment is not recognized.(4) The application may be in person or by recognized agent or pleader (O. III. r. 1).(5) Under O. I. r. 12 each of several plaintiffs or defendants may authorize any other to appear and act for him.(6) In the case of execution by a representative of a deceased decree-holder, see sect. 4 of the Succession Certificate Act (VII. of 1889).(7)

Against whom execution may be had.—The judgment-debtor, his legal representative (sects. 50, 52), and sureties for the performance of the decree or the other matters referred to in sect. 145, *post*.

Questions to be determined in execution.—See notes to sect. 47, *post*.

Nature of execution.—See notes to sects. 51 *et seq.*, *post*, and O. XXI.

(1) Prem Chand Dey *v.* Mokhoda Debi, 17 C. 699, 703 (1890); and see Obhoy Churn Coondoo *v.* Golam Ali, 7 C. 410 (1881); 9 C. L. R. 361; Dakhina Churn Chattopadhya *v.* Bilash Chunder Roy, 18 C. 526 (1891); and so the High Court must execute its decrees through the intervention of the Mofusil Courts, 1 Hyde, 136 (1862).

(2) See Gunga Narain Gupta *v.* Annanda Moyee, 12 C. L. R. 404 (1883), where shares in a single entire estate were sold, and Unnocool Chunder Chowdhry *v.* Hurry Nath Koondoo, 2 C. L. R. 334 (1877) [sale of portion of *taluk* outside jurisdiction void]; Ram Lall Moitra *v.* Bama Sundari Debia, 12 C. (1885), dist. last case.

(3) That is only when the property attached forms one estate. See Masoyk *v.* Steel, 14 C. 661 at pp. 668, 669, where the distinction is pointed out between mortgage (*v. ante*, clauses (2) and (3)) and money decrees.

(4) Dakshina Mohun Roy *v.* Sm. Basumati Debi, 4 C. W. N. 474 (1900); Parvata *v.* Digambar, 15 B. 307 (1890).

(5) As to applications under a defective power, see Mitra's Limitation Act, 4th ed. 1159.

(6) See Ambaram *v.* Himatsingh, 2 B. H. C. R. 103 (1865).

(7) Some cases on this point will be found collected in O'Kinealy's C. P. C. notes to s 230, and more in Mitra's Limitation, 4th ed. 1155, 1159.

[s. 649.] **37.** The expression "Court which passed a decree," or words to that effect, shall, *in relation to the execution of decrees*, unless there is anything repugnant in the *subject or* context, be deemed to include,—

Definition of Court which passed a decree.

(*a*) where the decree to be executed *has been* passed in *the exercise of appellate jurisdiction*, the Court *of first instance*, and

(*b*) where the Court *of first instance* has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed *was* instituted at the time of making *the* application for *the* execution of the decree, would have jurisdiction to try such suit.

"Include."—This section corresponds with the second paragraph of sect. 649 of the last Code as amended by Act XII. of 1879, which explained the meaning of the expression the "Court which passed the decree." This does not exclude the Court which originally passed the decree as being a Court in which an application for execution should be made, but merely includes another Court.(1) In clause (*a*) the expression "Court *of first instance*" has been substituted for "Court which passed the decree from which the appeal was preferred;" the reason being that, as a matter of practice, the Court of intermediate appeal never executes a decree passed on second appeal. The meaning of the words "ceased to exist or to have jurisdiction to execute it" are explained in the under-mentioned cases.(2) The terms of clause (*b*) are general and draw no distinction as to the nature of the cause which puts an end to the jurisdiction.(3) It was held under the last Code that the Court to which a decree was transferred for execution, if it had ceased to have territorial jurisdiction, might either of its own motion, or when applied to under sect. 223 of that Code, transfer it for execution to the Court which had territorial jurisdiction;(4) and that a comparison of that section with the last paragraph of section 649, corresponding with this section, indicated that territorial jurisdiction is a condition precedent to a Court executing a decree.(5) This is so now.

(1) Latchman Pundeh *v.* Maddan Mohun, 6 C. 513 (1880); Kartick Nath *v.* Tilukhdari Lall, 15 C. 667, 669 (1888); Sheik Jafar *v.* Kamalini Debi, 5 C. W. N. 150, 152 (1900); s. c., 28 C. 238; but see Zamindar of Vallur *v.* Adinarayuda, 19 M. 445 (1896).

(2) Latchman Pundeh *v.* Maddan Mohun, 6 C. 513 (1880); in particular, see judgment of Field, J.; Hurro Proshad *v.* Bhupendro Narain, 6 C. 201 (1880); Vishnu *v.* Krishna Rao, 11 B. 153 (1887). In Kale Podo *v.* Dino Nath, 25 C. 315 (1897), it was held that the Court had not ceased to exist, or to have jurisdiction: referred to in Sheikh Jafar *v.* Kamalini, 5 C. W. N. 150; Panduranga *v.* Vythilinga, 30 M. 537 (1907); s. c., 17 M. L. J. 417.

(3) Ganskha *v.* Abdul Ropkha, 17 B. 162 (1892).

(4) Girendro Chunder *v.* Jarawa Kumari, 20 C. 105 (1891).

(5) Prem Chand *v.* Mokhoda Debi, 17 C. at p. 703 (1890).

COURTS BY WHICH DECREES MAY BE EXECUTED.

Court by which decree may be executed.

38. A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. [s. 223 first para.

Courts of Execution.—Under sect. 223 of the last Code also a decree might have been executed either by the Court which passed it or by the Court to which it was transferred for execution under the circumstances mentioned in that section by the former Court. According to this procedure, the Court which passed the decree was after transfer virtually deprived of control until the decree was returned, and to all intents and purposes execution was everywhere in suspense except in the particular Court which happened to have the decree on its file. The Court to which the decree was transferred had seizin of the execution proceedings, and carried them on until as far as possible execution was obtained. The decree might then have been transferred to another Court, and the process repeated until full execution was had. Though the legality of concurrent execution has been recognized,(1) both under the Codes of 1859 and 1877, as well as that of 1882, in practice it was not generally carried out. The Court to which the decree was transferred could not, after executing it as far as it could, transfer it directly to a third Court. It had to send it back to the Court which passed the decree, which might then transfer it to a third Court, a procedure which was cumbersome and caused delay.(2) It was at first considered in Committee that the results of the transfer system, which seriously affected the chances of realization and added greatly to the expenses eventually to be borne by the judgment-debtor, were not justified by any compensating advantage. Excess in realization, which the former system was primarily introduced to prevent, could, they considered, be quite as effectively obviated by reserving the power of ordering attachment or sale to the Court which passed the decree and which would not issue a precept for either of these purposes unless, looking to the amount of assets obtained from all sources, it considered such action to be necessary. Special limitations were later placed on this power. It was proposed that the Court which passed a decree should be responsible throughout for seeing it enforced, and the Court to which the precept was issued should have jurisdiction only to entertain objections not affecting the legality or propriety of the precept or the right to execute the decree. It was thus proposed to effect an important simplification of procedure by substituting execution by precept for the former procedure by transfer of the decree. This would have involved two results, viz., firstly, concurrent execution as opposed to the former practice under which there was only one Court at one time carrying out the execution of a decree; and, secondly, execution by one Court (that to which the precept is given) under the direction of another Court (or that which passed the decree) as

(1) Saroda Prosad *v.* Luchmeeput Sing, 14 M. I. A. 529, 538, 539 (1872); 17 W. R. 289; Kristo Kishore Dutt *v.* Rooplall Dass, 8 C. 687 (1882); Baijnath Goenka *v.* Holloway, 1 C. L. J. 315 (1905).

(2) See Dhunput Singh *v.* Wooma Sunkeree, 21 W. R. 337 (1874); Shib Narain Shaha *v.* Bepin Behary Biswas, 3 C. 572 (1878).

opposed to the former practice under which the Court in which the execution proceedings were pending had control of them. The Court passing the decree might thus have executed the decree itself, and might at the same time have issued precepts to another Court or to two or more Courts directing simultaneous execution of the decree. The conduct of the execution would have remained in the hands of the Court passing the decree, which might from time to time give such directions as it thought fit regarding the execution to the Court to which the precept is issued, whose powers were stated and limited. The adoption of the precept system would of necessity have abolished the elaborate conditions of transfer embodied in sect. 223 of the last Code. The Select Committee, which, however, considered the Draft Bill immediately prior to its introduction, considered that the difficulties in the existing system arose not so much from the machinery of execution itself as from the defective manner in which it was worked. They therefore stated that they were unable to accept the proposal of the Committee of 1902 in relation to the execution of decrees by precept. They were, however, so far in accord with the view expressed by that Committee as to have been able to insert sect. 46, *post*, enabling the Court which passed the decree to issue a precept to any other Court to attach property of the judgment-debtor pending execution in the ordinary course. Beyond this they stated they felt they could not safely go. With this exception, therefore, the general system of execution, viz., by the Court passing the decree or by transfer has been maintained.

The section provides that a decree may be executed by the Court which passed it, and it was held that where a Court passed a decree for sale of property, and the place where such property was situate was transferred to the jurisdiction of another Court, the former Court might still execute the decree.(1) It has been held that the provisions of this section read with those of the next section plainly indicate that as a general rule (to which there are sundry exceptions) no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property entirely outside its local jurisdiction.(2)

[s. 223.] **Transfer of decree.**

39. (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

(*a*) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(*b*) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree, sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(1) Panduranga *v.* Vythilinga, 30 M. 537 (1907).

(2) Begg Dunlop *v.* Jagannath, 14 C. L. J. 228 (1911). See notes to sect. 17.

(*c*) if the decree directs the sale *or delivery* of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(*d*) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court *of competent jurisdiction.*

Transfer of decree to Court in another province.

40. *Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.*

Result of execution proceedings to be certified.

41. The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure. [s. 223.

Transfer of decree.—As sect. 38 embodies the first paragraph of sect. 223 of the last Code, sect. 39 embodies the second and third paragraphs, sect. 41 the fourth paragraph, and O. XXI. rr. 4 and 5 the fifth and concluding paragraphs of that section. See notes to sects. 36–38, *ante*, and to the last-mentioned rules in O. XXI., *post*. To make the provisions relating to the transmission of decrees applicable, it is necessary that the provisions of the Code should regulate the procedure of both the Courts.(1) Where a decree has been transferred by a Court which passed it to another Court for execution, the original Court, it has been held, does not thereby completely lose all jurisdiction in respect of execution thereof.(2) As to orders sending certificates for execution under the Public Demands Recovery Act, see case cited.(3) Where in different districts different modes of execution are prescribed, and where the question is how a decree passed in one, but of which execution is sought in another of such districts, is to be executed, the executing Court must be guided by the rules in force in its own district.(4) It has been held under sect. 233 of the last Code that an application for transfer of decree is an application to take a step in aid of execution within the meaning of Art. 182 of the Limitation Act of 1908.(5)

(1) Prabhu Narain Singh *v.* Saligram Singh, 34 C. 576 (1907); 11 C. W. N. 622.

(2) Baij Nath Goenka *v.* Holloway, 1 C. L. J. 315 (1905).

(3) Girish Chandra Changdar *v.* Golam Karim, 33 C. 451 (1906).

(4) Martand Trimbak Garde *v.* Vinayak Khasgivale, 31 B. 5 (1906).

(5) Todar Mal *v.* Phola Kunwar, 35 A. 389 (1913), following Chundra Nath Gossami *v.* Gurroo Prosunno Ghose, 22 C. 375 (1895).

[s. 228.]

Powers of Court in executing *transferred* decree.

42. The Court executing a decree sent to it shall have the same powers in executing such decree as if it has been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Limitation of Powers.—The powers of a Court are subject to other sections of the Code, which may affect them. So the section corresponding to this in the Code of 1882 was held subject to the special provisions of the section corresponding to O. XXI. r. 16, *post*.(1) Under the Code of 1882, the Court to which the decree was sent was, by virtue of the provisions of sect. 225 (now O. XXI. r. 7), held entitled to enquire into the jurisdiction of the Court which passed the decree.(2) And if the Court to which the decree was sent held that there was no jurisdiction, then its hands were stayed and the parties had to go back to the Court which passed the decree, the Court to which the decree was sent having declined to become the executing Court within the meaning of sect. 228 of that Code, corresponding with the present section.(3) Under the Code of 1882 it was also held that where a decree was transferred, the Court to which the decree was sent was competent to determine whether execution of the decree was barred by limitation or not; (4) but not where a Court made an order for execution of the decree and then transmitted it.(5) It has been held that an order for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is the application for the transmission an application for execution.(6)

As illustrations of the limitation on its powers, the following decisions under the earlier Codes may be referred to as being in force under this Code. The executing Court cannot question the validity of the decree or any portion of it. Its duty is to enforce it and not to determine whether it was illegal

(1) Amar Chundra Banerjee *v.* Guru Prosunno Mukerjee, 27 C. 488 (1900).

(2) Bhagwantappa *v.* Vishwanath, 28 B. 379 (1904); see Mohah Ishwar *v.* Haku Rufa, 4 B. 638 (1880); Haji Musa *v.* Purmanand Nursey, 15 B. 216 (1890), at p. 219 [but this was a case of a foreign judgment, and fraud was alleged]; Imdad Ali *v.* Jagan Lal, 17 A. 478, 482 (1895) [Execution Court can enquire into jurisdiction unless the decree itself precludes that question]; *contra*, Choga Lall *v.* Trueman, 7 B. 481 (1883), where, however, it was held that the executing Court might stay proceedings to enable an application to be made to the Court passing the decree].

(3) Bhagwantappa *v.* Vishwanath, 28 B. 378 (1904).

(4) Leake *v.* Daniel, B. L. R. F. B. 970 (1868); Choti Lall *v.* Manick Chand. 7 A. H. C. R. 115 (1875); Nursing Doyal *v.* Hurryhur Saha, 5 C. 897 (1880); Srihary Mundal *v.* Murari Chowdhry, 13 C. 257 (1886); Chotay Lal *v.* Purna Mull, 23 C. 39 (1895) [dissenting from Soomut Dass *v.* Bhoobun Lall, 21 W. R. 292 (1874)]; Lootfullah *v.* Keerut Chand, 21 W. R. 330 (1874); Ranno Rai *v.* Dayal Singh, 16 A. 390 (1894).

(5) Husein Ahmad *v.* Saju Mahamad, 15 B. 28 (1890), distinguished in Jeewandas *v.* Ranchoddas, 35 B. 103, 109 (1910).

(6) Jeewandas *v.* Ranchoddas, 35 B. 103, 109 (1910).

or not,(1) or wrong or defective.(2) And it cannot go behind it, but must execute it as it stands,(3) nor can it question the propriety or correctness of the order directing execution.(4) So it should not refuse execution on the ground that the plaintiff had been improperly allowed to maintain suit; (5) or that the decree had been obtained by fraud; (6) or that questions are raised between the parties that cannot be properly dealt with in execution; (7) or that property directed to be sold by the decree is unsaleable.(8) Nor can it entertain any question of the right of a transferee, whose name is on the record; (9) nor of the right of the person asking for execution.(10) The executing Court cannot alter or add to the terms of the decree or extend its scope; (11) or go behind it for the purpose of entertaining equitable considerations which appear to render further enforcement of it unfair or improper,(12) or correct errors,(13) or execute before the period fixed in the decree,(14) or allow instalments not directed by the decree,(15) or enquire whether the balance certified to be due on the decree is correct.(16) Its duty is to execute it according to its terms.(17) But if a decree is improperly altered behind the judgment-debtor's back, the

(1) Ambaram Harivallab Das *v.* Himat Singh Kalianji, 2 B. H. C. R. 103 (1866) [where the executing Court held that the award of interest in the decree after its date was illegal]; Bechardas Thobun Das *v.* Gokalia Bhagla, Bom. P. J. (1882), p. 379, cited in 8 B. at p. 186 [held Court executing decree ordering sale of mortgaged property could not raise question whether property could be sold]; Arunachellam *v.* Murugappa, 12 M. 503 (1889) [objection that compromise entered into without leave of Court not binding on minor]; Chintaman Vithoba *v.* Chintaman Bajaji, 22 B. 475 (1896).

(2) Rajcrav Chandrarao *v.* Nandrav Krishna, 11 B. 528, 532 (1887).

(3) Appa Rao *v.* Krishna Ayyangar, 25 M. 537 (1901); or question its validity, Chhoti Narain *v.* Rameshwar Koer, 6 C. W. N. 796 (1902).

(4) Ram Lall *v.* Reedhoy Lal, 7 A. 330 (1885): or transferring the decree for execution: Mulla Abdul *v.* Sakhinaboo, 21 B. 456 (1896).

(5) Subramanian *v.* Panjamma, 4 M. 324 (1881), though the Court added that if fraud was discovered it would be competent to stay proceedings to enable aggrieved party to apply for review or to set aside decree. As to fraud, see Haji Musa *v.* Purman and Nursey, 15 B. 216 at p. 219 (1880) [foreign judgment; fraud].

(6) Parvata *v.* Digambar, 15 B. 307 (1890). See last note.

(7) Rajcrav Chandrarao *v.* Nanarav Krishna, 11 B. 528 (1887).

(8) Sadashiv Lalit *v.* Jayantibai, 8 B. 185 (1883).

(9) Ram Chunder *v.* Mohendro Nath Bose, 21 W. R. 141 (1874).

(10) Mt. Dhunesh Koeree *v.* Oolfut Hossein, 21 W. R. 219 (1874).

(11) Hurro Durga Chowdhrani *v.* Sarut Soondari Debi, 9 I. A. (1881), 8 C. 332; Rao Oomrao *v.* Jutun Lall, 1 A. H. C. R. 168 (1869); Forester *v.* Secretary of State, 3 C. 161 (1877), 41 A. 137; Sadasiva Pillai *v.* Ramalinga Pillai, 2 I. A. 219 (1875); Muttia *v.* Virammal, 10 M. 283 (1886); Mahant Ishwargar *v.* Chudasama Manabhai, 13 B. 106 (1888) [extension of period of redemption]; Subhana *v.* Krishna, 15 B. 644 (1891) [the same]; Sheo Pershad *v.* Shiva Ram, 2 A. H. C. R. 59 (1870).

(12) Ramphal Rai *v.* Ram Baran Rai, 5 A. 53 (1882).

(13) Nilkamal Roy *v.* Rohinee Dossia, 13 W. R. 330 (1870) [a decree wrongly drawn up must be corrected by the Court passing it]; Rao Oomdao *v.* Jutun Lall, 1 A. H. C. R. 168 (1869).

(14) Har Dayal *v.* Chadami Lall, 7 A. 194 (1884).

(15) Sheo Pershad *v.* Shiva Ram, 2 A. H. C. R. 59 (1870).

(16) Kishub Chunder *v.* Khelat Chunder, 9 W. R. 361 (1868).

(17) Krishto Kishore Dutt *v.* Rooplall Dass, L. C. 687 (1882).

latter may object that the decree sought to be executed is not the decree of the Court to be executed.(1)

"Same powers."—While the functions of an executing Court are confined to effecting execution, and to matters arising out of the proceedings in execution: (2) and are subject to the limitations above mentioned, they are yet judicial and not merely ministerial functions.(3) So a Court to which a decree has been sent has power to make orders in execution of the decree, to deal with obstruction to execution, to investigate claims of third parties to attached property, and the like. It may generally be stated that the Court to which a decree is sent has the same power as those which were possessed by a Court to which a decree was transferred for execution under the Code of 1882.

[s. 229.] **43.** *Any* decree *passed by a Civil* Court *established in any part of British India to which the provisions relating to execution do not extend, or by any Court* established or continued by the authority of the Governor General in Council in the territories of any foreign Prince or State, *may, if it* cannot be executed within the jurisdiction of the Court by which it was *passed*, be executed in manner herein provided within the jurisdiction of any Court in British India.

Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory.

Decrees of British Courts where provisions do not extend.—The first part of this section was enacted because formerly a decree obtained in a scheduled District to which the provisions of Chapter XIX. of the Code of 1882 had not been extended, could not be executed under the Code.(4) It was determined therefore to revert to the provisions of sect. 284 of the Code of 1859, which placed such decrees on a footing as regards execution with those obtained in a foreign Court.

Or in foreign territory.—The words "*or continued*" were introduced into the Code of 1882, by sect. 23 of Act VII. of 1888. Applicants under this section must show that the Court passing the decree is one or other of the Courts referred to in this section.(5)

[s. 229B.] **44.** The Governor General in Council may, by notification in the Gazette of India, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with his Majesty and not established or continued by

Execution of decrees passed by Courts of Native States.

(1) Abdul Hayai Khan *v.* Chunia Kuar, 8 A. 377 (1886); Muhammed Sulaiman *v.* Fatima, 11 A. 314, 318 (1889).

(2) Jadu Roy *v.* Farrell, 6 B. L. R. app. 66 (1871).

(3) Govind Hari Walekar *v.* Shidram Shidmurti, 7 B. H. C. R. 37 (1870).

(4) Kashi Mohun Borwa *v.* Bishnoo Pira, 15 C. 365 (1888).

(5) See Jadab Chandra *v.* Dinanath Das, 4 B. L. R. 134 (1870).

the authority of the Governor General in Council, *or any class of such decrees*, may be executed in British India as if they had been *passed* by the Courts of British India.

"**May be executed.**"—This section, it was held, did not remove the decree of a Native State falling within its purview from the category of foreign judgments. A Court in British India, though it may, is not bound to, execute the foreign decree, and will not do so if it is shown to have been without jurisdiction or obtained by fraud.(1) The judgment of a foreign Court on a decree obtained in British India is no bar to the execution of the original decree.(2) As to foreign judgments generally, see sects. 11-13, *ante*; proof (3) and execution (4) of foreign decrees, cases cited.

45. So much of the foregoing sections of this *Part* as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor General in Council in the territories of any foreign Prince or State to which the Governor General in Council has, by notification in the Gazette of India, declared this section to apply. [s. 229A

Execution of decrees in foreign territory.

Execution of decrees in foreign territory.—This section was inserted in the Code of 1882 by sect. 24, Act VII. of 1888. The tributary *Mahals* of Orissa do not form part of British India, and therefore in the absence of a prior notification in the India Gazette as specified in this section, it was held that no decree by a Court in British India could be sent for execution into a territory such as Mayoorbhunj which is a tributary Mahal.(5) An instance of a Court "established or continued" within the meaning of this section is the Court of the Political Agent at Sikkim.(6)

46. (1) *Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.*

Precepts.

(2) *The Court to which a precept is sent shall proceed to attach*

(1) Haji Musa *v.* Purmanand Nursey, 15 B. 216 (1890).

(2) Fukuruddeen Mahomed Assan *v.* Official Trustee, 7 C. 82 (1881).

(3) Ganee Mahomed Sarkar *v.* Tarini Charan Chuckerbutty, 14 C. 546 (1887).

(4) Kandasami Pillai *v.* Moidin, 2 M. 337 (1880); Hukum Chand Aswal *v.* Gyanender Chunder Lahiri, 14 C. 570 (1887). In Prabhu Narain Singh *v.* Saligram Singh, 34 C. 576 (1907), the section was held inapplicable [family domains of Maharajah of Benares].

(5) Ratan Mahanti *v.* Khatoo Sahoo, 29 C. 400 (1902).

(6) Zamil Ahmed *v.* Maharaja of Sikkim, 38 C. 859 (1911); 15 C. W. N. 992.

the property in the manner prescribed in regard to the attachment of property in execution of a decree:

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

Precepts.—See as to this section the notes to sect. 38, *ante*. As regards this section the Report of the Select Committee states:—"Though a system of execution based on precepts is, in the opinion of the Committee, open to grave objection, they think the idea may be utilized for the purpose of enabling a decree-holder to obtain an interim attachment when there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. They have for this purpose introduced clause 46 into the Bill. They think it expedient to fix a time limit for the continuance of this interim attachment, but at the same time they have empowered the Court to extend the period to meet the exigencies of particular cases. After careful consideration they have come to the conclusion that notwithstanding attachment under a precept, re-attachment on the ordinary application for execution will still be necessary. Though at first sight it may appear a better course to provide that re-attachment shall not be necessary when the issue of a precept is followed by the ordinary application for execution, after careful consideration they have come to the conclusion that it will be safer to require re-attachment, having regard to the agency by which execution is carried into effect." The section, therefore, originally contained a third clause as follows:—"Notwithstanding anything contained in this section, it shall be incumbent on the decree-holder to apply for execution as though no precept had been issued." This, however, was later in Council struck out.

Appendix E No. 1 gives form of certificate of result of proceedings in precepts.

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

[s. 244.] **47.** (1) *All* questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing *the* decree and not by a separate suit.

Questions to be determined by the Court executing decree.

(2) *The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.*

(3) *Where* a question arises as to *whether any person is or is*

not the representative of a party, *such question shall*, for the purposes of this section, *be determined by the Court.*

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

History and Scope of Section.—The provisions of this important section are designed to prevent multiplicity of suits and to secure that all matters which can be decided in the suit should be so decided. The subject-matter has been repeatedly considered both by the Legislature since it was first statutorily dealt with in sect. 11, Act XXIII. of 1861, amending the Code of 1859, as also by the Courts, which have given numerous and often conflicting decisions on points which have arisen with reference to it. The tendency both of the Legislature and, on the whole, of the Courts has been to enlarge as much as possible the scope of the proceedings before Courts charged with the execution of the decree. With this view the statutory law has been amended from time to time. Sect. 11 of Act XXIII. of 1861, which referred expressly only to parties and not representatives, and not to discharge, satisfaction or stay, ran as follows :— [s. 224.]

"All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit, and the order passed by the Court shall be open to appeal."

This enactment was followed by the Code of 1877 (Act X.). This Code expressly referred to representatives, and was in its terms the same as those of the Code of 1882, as the latter was first published, except that the words "discharge" and "satisfaction" appeared for the first time in the Code of 1882 (Act XIV.). The latter Code was amended by Act VII. of 1888. Sect. 26 of that amending Act substituted a new clause (*c*) for that which appeared in sect. 244 of that Code prior to this amendment. The amended clause (*c*) included cases of stay of execution as to which there had been some difference of opinion whether, as suspending execution, it was a matter relating to execution. Act VII. of 1888 also added the last clause of sect. 244 of the former Code which corresponds with subsection (3) of the present Code, though the latter has been amended.

It will be observed that the present Code effects several amendments. In the first place clause (*a*) of sect. 244 of the last Code has not been re-enacted. That clause ran : (*a*) "*questions regarding the amount of any mesne profits as to which the decree has directed inquiry.*" All reference to mesne profits has now been omitted. This omission is due to the recognition of the principle that inquiries into the amount of mesne profits are properly not a matter for the execution department, but should be treated as an integral

part of the suit, for the duties of execution do not properly arise until the amount of mesne profits has been ascertained and the successful party is in a position to apply to the Court with all the necessary formalities in order to realize the sum as though it were the subject of a decree for the payment of money. Under the former Code the Court might under sect. 212 of that Code have passed a decree for the property and directed an inquiry into the amount of mesne profits accrued due prior to the suit, which under clause (*a*) of sect. 244 might have been determined by the Court executing the decree, and under clause (*b*) of that section the Court of execution might also determine questions regarding the amount of mesne profits accruing after the institution of the suit as allowed by sect. 211. Now the ascertainment of the mesne profits no longer forms part of the proceedings in execution, but is a part of the suit itself. Under O. XX. r. 12 of the present Code the Court, in the case of mesne profits accruing before the suit, may either determine the amount in the decree or pass a preliminary decree for possession only. In the case of mesne profits accruing after the suit, it may pass such a preliminary decree. Whenever it passes a preliminary decree the Court must then, *in continuation of the suit,* inquire as to mesne profits and dispose of the same by a final decree which is then capable of execution.

On the same principle, viz. that questions regarding the amount of both mesne profits and interest should be determined by the decree and not in execution clause (*b*) of the former section has been omitted.

The reference to stay of execution has been omitted, but this is a matter clearly coming within the words "*all questions*," etc.

The third sub-section has been redrafted, and the Legislature has made it compulsory on the Court to determine questions arising as to representation of parties. It was considered inexpedient that separate suits should be instituted for the decision of such questions, as the delay and expense were often very great and resulted in the needless protraction of litigation.

The second sub-section and the explanation are new. The first sanctions an existing practice and the latter is intended to end a conflict of judicial decisions. See as to these, *post.*

There are several other matters which have been the subject of conflicting judicial decisions, but these have not been dealt with and are commented upon, *post.*

The object of this section is that the Court having the parties before it in the suit, it is proper that all questions between them relating to the execution of the decree should be determined and there should not be the expense of separate suits to determine such questions. The most liberal interpretation, therefore, ought to be given to the provisions of this section in order to carry out what was the design of the Legislature.(1) The section has been framed so as to prohibit in a separate suit any relief being granted which shall interfere with the conduct of the execution proceedings by the Court executing the decree.(2) The Privy Council speaking of sect. 11 of Act XXIII. of 1861 said, "This enactment was undoubtedly passed for the beneficial purpose of checking

(1) Oseemmunissa Khatoon *v.* Ameeroonnissa Khatoon, 20 W. R. 162 (1873).

(2) Lal Das *v.* Kishor Das, 22 B. 463, 466 (1896), citing Azizan *v.* Matuklal, 21 C. 437.

needless litigation, and their Lordships do not desire to limit its operation." (1) And again, under the last Code, the Judicial Committee stated that it was of the utmost importance that all objections to execution should be disposed of as cheaply and as speedily as possible, and that they were glad to find that the Courts in India had not placed any narrow construction on the language of sect. 244 of that Code; (2) and in accordance with that decision it has been repeatedly held that a wide and liberal construction should be placed on the section so as not to drive parties to an independent suit, unless the case be clearly outside the scope and purview of the section, so that all questions which can possibly be determined in the execution proceedings should be so determined.(3) It has been recently held that the expression "parties to the suit" imports "between parties opposed to each other in the suit," but does not necessarily mean between parties who are plaintiff and defendant respectively: in a partition suit parties who are co-defendants are often opposed to each other.(4)

The provisions of this section relate not only to proceedings initiated by the decree-holder, but also to applications made by the judgment-debtors.(5) The section does not apply as a bar to an adjudication of a question raised by a party not seeking such adjudication as a plaintiff, but resisting the plaintiff's claim as a defendant.(6) When a Court passes an order under this section it is not necessary to draw up a decree.(7) This section does not affect the jurisdiction of the Court but only prescribes the form of procedure.(8)

As to the applicability of this section in cases under the Public Demands Recovery Act, a matter which appears to be in an unsettled state, and to Agency Tracts in Madras,(9) see cases noted below.(10)

A party may be estopped from raising an objection that the section is a bar.(11)

(1) Chowdhry Wahed Ali *v.* Mt. Jumaee, 11 B. L. R. 149, A. C., p. 155 (1872).

(2) Prosonno Kumar Sanyal *v.* Kali Das Sanyal, 19 C. 683, at p. 689 (1892).

(3) Sett Umedmal *v.* Srinath Roy, 27 C. 810, 813 (1900); Jogemoya Dassi *v.* Thackomani Dassi, 24 C. 473, 492 (1896); Punchanun Bundopadhya *v.* Rabia Bibi, 17 C. 711, 718 (1890). Gobardhan Roy *v.* Bishan Prasad, 23 A. 116, 118 (1900); Adhar Singh *v.* Sheo Prasad, 24 A. 209, 210, 211 (1898); Appa Rao *v.* Venkatara Manayamma, 23 M. 55 (1899); Ghazidin *v.* Fakir Buksh, 7 A. 33 (1884); Muttuvelu Pillai *v.* Vythilinga Pillai, 5 M. H. C. R. 185, 188 (1870); Jamini Nath Roy *v.* Dharma Das Sur, 33 C. 857, 860 (1906).

(4) Mangayya *v.* Sriramulu, 24 M. L. J. 977 (1913).

(5) Erusappa Mudaliar *v.* Commercial, etc. Bank, 23 M. 377 (1899).

(6) Durga Charan Agradani *v.* Karama Khan, 7 C. W. N. 607, at p. 608 (1903).

(7) Kherode Sundari Debi *v.* Juanendra Nath Pal, 6 C. W. N. 283 (1901), dist., Gopal Chandra *v.* Preonath Dutt, 32 C. 175 (1904).

(8) Venkata Krishnama *v.* Krishna Rao, 32 M. 425 (1909).

(9) Maharajah of Vijianagram *v.* Somasekara, 17 M. L. J. 147 (1906).

(10) Hari Charan Singh *v.* Chandra Kumar Dey, 34 C. 787 (1907); Purna Chandra Chatterje *v.* Dinabundhu Mukerjee, 34 C. 811 (1907); Janki Dass *v.* Ram Golam Sahu, 28 C. 813 (1901); s. c., 6 C. W. N. 331; Hazra *v.* Dilwar Ali, 5 C. W. N. 521 (1901); Ramrup Sahay *v.* Khushal Misser, 6 C. W. N. 630 (1902); Barhamdeo Narayani Singh *v.* Bili Rasul Bandi, 1 C. L. J. 360; s. c., 32 C. 691 (1905); Umedali Bhuya *v.* Rajalakshmi Debya, 33 C. 84; 1 C. L. J. 538 (1905); Raghubans Sahai *v.* Ful Kumari, 1 C. L. J. 542 (1905); s. c., 32 C. 1130; Elokeshi Dasi *v.* Abinash Chandra Bose, 5 C. L. J. 638 (1907); Banga Chandra *v.* Tarakinkar, 16 C. W. N. 973 (1912); Prag Narain *v.* Kamakhia Singh, P. C., 31 A. 551 (1909).

(11) Hara Dhan Kalia *v.* Purna Chundra Mondal, 11 C. W. N. 145 (1906).

"All questions," etc.—As already stated, the section should receive a liberal construction. This has been further emphasized by the introduction of the word "*all.*" This section, however, applies only to questions relating to execution, etc., of a decree which is unchallenged. It presupposes the existence of a decree which is validly susceptible of execution. Cases can only be inquired into under it where the execution of a decree which is susceptible and capable of execution is conceded, and it does not apply to a case where the object is to impugn the decree itself or to set up a case inconsistent with the decree which it is sought to execute,(1) as where fraud affecting the decree is alleged,(2) or an agreement previous to the decree that it was not to be executed,(3) or the judgment-debtor tries to set aside the effect of a decree.(4) The validity of a decree of which execution is sought cannot be disputed in proceedings under this section, the power given to stay execution referring to the stay of execution of valid decrees.(5) The scope of the section is limited to questions arising in the enforcement of an existing decree capable of execution on the application of one or other of the parties to it.(6) This section presupposes that the questions with which it deals are such as can be finally determined in the execution proceedings. If they cannot, it has no application.(7) The section applies as well to a dispute arising after the decree has been executed as to disputes before that event.(8) But the questions must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it.(9) Where, however, the decree has been fully satisfied and the execution proceedings closed, no order can be passed under this section and a separate suit will lie; (10) and a question is not within this section which did not arise at all until the decree ceased to exist.(11) It has recently been held that the answer to the question whether an order in execution-proceedings is

(1) Hassan Ali *v.* Gauzi Ali Mir, 31 C. 179, 181, 182 (1903), see Khettrapal Singh Roy *v.* Shyama Prosad Barman, 32 C. 262, 265 (1904). ["It (s. 244) refers to proceedings in execution based on the decree as if the decree was perfectly good and valid."] As to decree incapable of execution by reason of events subsequent to decree, see Ahmed *v.* Khalifa, 18 B. 495 (1894); Kumaretta Servaigaran *v.* Sabhapathy Chettiar, 30 M. 26 (1906) [the objection is to the decree itself and not to the execution of the decree]; Rashbehari Singh *v.* Joynanda Singh, 4 C. L. J. 475 (1906); Debendra Nath Bhuttacharjee *v.* Prasanna Kumar Chakravarti, 5 C. L. J. 328 (1907) Sundarappa *v.* Sreeramulu, 17 M. L. J. 288 (1907).

(2) See notes to "Fraud," *post.*

(3) Hassan Ali *v.* Gauzi Ali Mir, *supra.*

(4) Khetrapal Singh Roy *v.* Shyama Prosad Barman, 32 C. 265, 267 (1904), dist., Ram Chandra Mukerjee *v.* Ranjit Singh, 27 C. 242 (1899).

(5) Chintaman Vithoba *v.* Chintaman Bajaji, 22 B. 475, 480 (1896), and cases there cited, and in notes to s. 42, *post;* Chhoti Narain Singh *v.* Mt. Rameshwar Koer, 6 C. W. N. 796 (1902); Sudindra *v.* Budan, 9 M. 80, 83 (1885), where at p. 81 it was pointed out that the question raised really re-opened the whole litigation in an execution proceeding.

(6) See Chowdhry Wahed Ali *v.* Mt. Jumace, 11 B. L. R. 149, 156 (1872); Rustomiji Burjorji *v.* Kessowji Naik, 8 B. 287 (1884).

(7) Ramanathan Chettiar *v.* Levvai Marakayar, 23 M. 195 (1898).

(8) Imdad Ali *v.* Jagan Lal, 17 A. 478 (1895); Collector of Jaunpur *v.* Bithal Das, 24 A. 291 (1902), dist., Ram Chandar Misar *v.* Bechu Bhagat, 7 A. 641 (1885).

(9) Chhoti Narain Singh *v.* Mt. Rameshwar Koer, 6 C. W. N. 796 (1902).

(10) See notes on "Separate suit."

(11) Coffin *v.* Karbari Rawat, 22 C. 501 (1895).

ithin the scope of this section depends upon its nature and contents: if it ecides a question relating to the execution, satisfaction, or discharge of the ecree, and if the decision has been given between parties to the suit or their presentatives in interest, the order of the Court falls within the scope of this ction and is a decree within the meaning of section 2.(1)

The three forms in which the question under discussion generally arises e as to the competency of the Court of execution to entertain the application; hether an appeal lies from an order passed by the executing Court; and whether, a separate suit has been brought, it is barred.

The following matters have been held to be within the section:—

All matters relating to the attachment or sale of property such as an order r attachment and sale in execution; (2) refusing to confirm a sale; (3) eking to obtain execution of the decree against some property other than at actually mortgaged; (4) impugning under sect. 294 (now O. XXI. r. 71), rchase by holder of decree in execution of which property was sold; (5) eking to have a sale set aside; (6) suit for property wrongly taken in execution a decree.(7) Where a claim is made against defendant as holding ssession of an estate said to be liable for the claim, any question whether e defendant, in fact, held such estate, and any question as to the right execute against property belonging to the defendant; (8) the question ether a person alleged to be a representative of a deceased party is ch representative, and whether property against which execution is sought the hands of the representative was, in fact, the property of such

(1) Roghubar *v.* Jadu Nandan, 15 C. L. J. (1911); 16 C. W. N. 736, following ytara *v.* Pran Krishen, 13 C. L. J. 257 010); and see Srinivas *v.* Kesho Prosad, C. L. J. 489 (1911).

(2) Polokdhari Rai *v.* Radha Pershad igh, 8 C. 28 (1881); 8 I. A. 165 [order pealable].

(3) Doyamoyi Dasi *v.* Sarat Chunder zumdar, 25 C. 175 (1897); 1 C. W. N. 656 der appealable].

(4) Jogemaya Dassi *v.* Thackomoni Dassi, C. 473, 492 (1896) [suit not maintainable].

(5) Chintamanrav Natu *v.* Vithabal, 11 B. 3 (1887) [suit not maintainable].

(6) Prosunno Kumar Sanyal *v.* Kali Das yal, 19 C. 683 (1892), P. C. [suit not intainable]; Sri Maharani Beni *v.* Lokhi i, 3 C. W. N. 6 (1898) [sale in execution of *parte* decree subsequently set aside: competency of execution Court to go into stion]. Krishnan *v.* Arunachellam, 16 M. , 449 (1892) [competency of Court; if the ceeding sought to be set aside relates to cution the specific ground on which the ceeding is impeached is immaterial]; Munshi Prag Narain *v.* Thakur Kamakhia, 14 C. W. N. 55 (1909).

(7) Biru Mahata *v.* Shyama Churn Khawas 22 C. 483 (1895) [separate suit not maintainable]; Muttuvelu Pillai *v.* Vythilinga Pillai, 5 M. H. C. R. 185 (1870) [same]; Rani Katama *v.* Bothagurusami Tevar, 6 M. H. C. R. 293, 297 (1871) [same]; Jogendra Narain *v.* Ranee Surno Moyee, 14 W. R. 39 (1870) [suit barred]; Prannath Roy Chowdhry *v.* Preonath Roy Chowdhry, 8 W. R. 398 (1867) [order appealable]; but where the Act was unauthorized and therefore not done in execution, a separate suit was held to lie: Rash Beharee Lall *v.* Beebee Wajan, 11 W. R. 516 (1869); Imdad Ali *v.* Jagan Lal, 17 A. 478 (1895) [competency of Court to restore possession].

(8) Osecmunnissa Khatoon *v.* Ameeroonissa Khatoon, 20 W. R. 162 (1873) [suit not maintainable]; and see as to questions relating to liability of private property of a representative, Chowdhry Wahed Ali *v.* Mt. Jumaee, 11 B. L. R. 149 (1872), P. C. [same]; Seth Chand Mal *v.* Durga Dei, 12 A. 313 (1889). See notes, *post*.

deceased party and not the separate property of the representative.(1) Question regarding the appointment or removal of a receiver appointed by decree in an administration suit; (2) the appointment of a person as head of a religious endowment in execution of a decree; (3) an order declaring party entitled to *khas* possession; (4) an order holding that a party was not entitled to a greater quantity of land than that sued for, though given by a consent decree; (5) a question as to propriety of execution of a rent decree by sale, and as to suppression of sale proclamation; (6) or as to sale of an occupancy holding not transferable by custom in execution of a decree for arrears of rent obtained by a co-sharer landlord; (7) objection by a person dispossessed under compromise decree to which compromise she was not a party; (8) the question whether the defendant is entitled to a right of occupancy or non-saleable tenure; (9) all questions regarding liability to attachment and sale, whether arising under the Code or other Act being within the section.(10) An order requiring the decree-holder to give security; (11) a question as to the amount of security required in granting stay of execution; (12) an order relating to the stay of execution; (13) an inquiry into a disputed question as to

(1) Beni Prosad Kunwar *v.* Lukhna Kunwar, 21 A. 323 (1899) [suit not maintainable]; Upendra Bhatta *v.* Ranganatha Bhatta, 17 M. 399 (1893) [competency of Court]. See notes to "Arising."

(2) Mithibai *v.* Limji Nowroji, 5 B. 45 (1880) [the management of the estate being in this case a matter relating to the execution of the decree; order appealable].

(3) Gnana Sambanda *v.* Visvaliga, 13 M. 338 (1890) [order appealable]; Ponnambala Tambiran *v.* Sivagnana Desika, 17 M. 343 (1894), P. C. [same]; 21 I. A. 71.

(4) Najhan *v.* Mahomed Taki Khan, 9 C. 872 (1883) [suit not maintainable]; as to whether delivery of formal possession gives cause of action for fresh suit, see Shama Charan Chatterji *v.* Madhub Chander Mookerji, 11 C. 93 (1884).

(5) Mohibullah *v.* Imami, 9 A. 229 (1887) [suit barred].

(6) Jagan Nath Gorai *v.* Watson, 19 C. 341 (1892) [suit barred].

(7) Durga Charan Mandal *v.* Kali Prasanna Sarkar, 26 C. 727 (1899); 3 C. W. N. 586 [competency of execution Court to entertain application].

(8) Sankaravadivammal *v.* Kumarasamya, 8 M. 473 (1885) [order appealable].

(9) Ram Gopal *v.* Khiali Ram, 6 A. 448 (1884) [suit barred]; Janki Singh *v.* Ablakh Singh, 6 A. 393 (1884) [same objection on ground that land not liable to sale]; Basti Ram *v.* Fattu, 8 A. 146 (1886) [suit barred]. In Bardeo Prasad *v.* Juthan Ram, 27 A. 684 (1905), the Court held that the plea whether the property was saleable should have been raised in the original suit.

(10) Basti Ram *v.* Fattu, *supra*, at p. 148 [foll. Sheikh Nurullah *v.* Sheikh Burullah, 9 C. W. N. 972 (1905)]; Krishnan *v.* Arunachellum, 16 M. 447 (1892).

(11) Lutchmeeput Singh *v.* Sita Nath Doss, 8 C. 477 (1882) [under s. 546 of Code of 1877; order appealable].

(12) Mahant Ishwargar *v.* Chudusama Manathar, 12 B. 30 (1887) [order appealable]. But see Saraswati Barmania *v.* Golap Das Barman, 41 C. 160 (1913) [order for security in stay of execution not appealable].

(13) Clause (*b*); Hoti Lal *v.* Hardeo, 5 A. 212 (1882) [order appealable]; Ghazidin *v.* Fakir Buksh, 7 A. 73 (1884) [same]; Kassa Mal *v.* Gopi, 10 A. 389 (1888) [same]; Kristomohiny Dossee *v.* Bama Churn Nag, 7 C. 733 (1881); Mussaji Abdulla *v.* Damodardas, 12 B. 279 (1888) [same]; Steel *v.* Ichamoye Chowdhrain, 13 C. 111 (1886) [same]; *contra* Nihal Chand *v.* Rameshari Dassee, 9 C. 214 (1882), in so far as it held that the matter does not relate to execution is no longer law, the section having been amended in this respect in 1883, though the question whether there is an appeal is another matter depending on whether the order is a decree; [held no appeal].

the transfer of a decree; (1) a claim for refund of proceeds of execution sale on ground that decree satisfied; (2) a suit for the purpose of having it determined that execution is barred; (3) the adjustment of a decree, the question being one relating to its satisfaction.(4) An application for restitution of amount which had in execution been realized in excess.(5) An order under sect. 87 of the Transfer of Property Act; (6) or under sect. 89 of the same Act; (7) the setting aside of a sale as being in contravention of sect. 99 of the same Act; (8) a suit to recover possession after failure to execute decree for possession; (9) a statement of amount received under a decree for possession on an usufructuary mortgage.(10) A suit to set aside sale on ground that defendant had purchased without permission of Court; (11) an agreement before decree by the decree-holder not to recover costs which the decree might award; (12) an order for payment of surplus sale proceeds; (13) a suit to restrain a decree-holder from executing his decree when the decree has been satisfied by an agreement out of Court, and such satisfaction has not been certified; (14) the question whether the decree is capable of execution; (15) or whether there

(1) Dwar Buksh Sircar *v.* Fatik Jali, 26 C. 250 (1898) [competency of Court to entertain application].

(2) Syud Velayet Hossein *v.* Syad Wulee Ahmed, 23 W. R. 207 (1875) [competency of execution Court].

(3) Nojabut Ali *v.* Shukh Moha, 11 B. L. R. 42 (1873). See Zumeer Sirdar *v.* Asseemooddeen Sirdar, 23 W. R. 257 (1878).

(4) Rangji *v.* Bhaiji, 11 B. 57 (1886).

(5) Harnam Chandar *v.* Muhammad Yar-Khan, 27 A. 485 (1905).

(6) Kedar Nath *v.* Lalji Sahai, 12 A. 61 (1889), F. B. [order appealable]; Bansidhar *v.* Gaya Prasad, 24 A. 179, 183 (1901) [s. 74 of same Act. Suit barred, dist. in Tufail Fatma *v.* Bitola, 27 A. 400 (1904).

(7) Oudh Behari Lal *v.* Nageshwar Lal, 13 A. 278 (1890) [competency of execution Court]; Mallikarjunadu *v.* Lingamurti, 25 M. 244 (1900) [order appealable]; *contra* Ajudhia Persbad *v.* Baldeo Singh, 21 C. 818 (1894) [application not one for execution]; followed in Jehangir Cowasji *v.* The Hope Mills, Ltd., 34 B. 273 (1905).

(8) Mayan Pathuli *v.* Pakuran, 22 M. 347 (1898) [suit barred]; Sonu Singh *v.* Behari Singh, 33 C. 283 (1905). The first case was dist. in Muthu *v.* Karrupan, 30 M. 313 (1907), 17 M. L. J. 163; Ashutosh Sikdar *v.* Behair Lal Kutunia, 11 C. W. N. 1011 (1907); s. c., 35 C. 61 F. B.; and see Sahadu Manaji *v.* Dwlya Jaba, 14 Bom. L. R. 254 (1911).

(9) Ranganasary *v.* Shappani, 5 M. H. C. R. 375 (1870) [suit barred]; Kisan Nandram *v.* Anandram Bachaji, 10 B. H. C. R. 433 (1873) [same]; Fakirapa *v.* Pandurangapa, 6 B. 7 (1881) [same]; when a decree was declaratory and also gave consequential relief, it was held that though execution for this might be barred, it did not follow that plaintiff's declared title could not be enforced by suit. Jagan Nath *v.* Balgobind, 1 A. H. C. R. 154 (1869); but a decree which is not declaratory only can be enforced in execution. Madhavrao *v.* Ramrao, 22 B. 267 (1896).

(10) Golam Russul *v.* Kishen Mohun, 23 W. R. 156 (1875) [competency of execution Court].

(11) Viraraghava *v.* Venkata, 16 M. 287 (1892) [suit barred; at p. 286. "The Court which did the erroneous act, that is, which put the defendant into possession, must undo it, and that is the Court executing the decree"].

(12) Laldas Navandas *v.* Kishordas Devidas, 22 B. 463 (1896), F. B. [competency of Court], *sed qu.* Diss. from in Hassan Ali *v.* Gauzi Ali Mir, 31 C. 179 (1893).

(13) Hurdwar Singh *v.* Bhawani Pershad, 2 C. W. N. 429 (1897).

(14) Azizan *v.* Matuk Lal Sahu, 21 C. 437 (1893) [suit barred]; Banerjee, J., diss.; observing at p. 460, on the case of Mukund Harshet *v.* Haridas Khemji, 17 B. 23 (1892); Dist. in Iswar Chandra Dutt *v.* Haris Chandra Dutt, 25 C. 718 (1898); 2 C. W. N. 247.

(15) Imdad Ali *v.* Jagan Lal, 18 A. 478, at p. 482 (1895).

is anything due on it; (1) questions as to part satisfaction of a decree.(2) Suit by judgment-debtor against auction-purchaser to recover property sold in execution, on the ground that being a tenant's right it is not saleable.(3) When a prior mortgagee has been made a party in a puisne mortgagee's suit, and the puisne mortgagee has obtained a decree for sale on his mortgage, the prior mortgagee can have his rights settled in execution-proceedings by an application under this section.(4)

What a decree means is a question relating to execution; and a suit therefore which asks the Court to construe a decree and ascertain plaintiff's rights is barred, notwithstanding that other parties against whom no relief is claimed are added.(5) So also is an objection to a partition made by a Collector; (6) an order refusing a representative of a deceased decree-holder his claim to continue the execution proceedings; (7) an order declining to enlarge the time fixed for redemption.(8)

It is to be observed (and this is not always understood) that an order may be, none the less, an order under this section because it is also passed under some other of the sections of the Code relating to the execution of decrees. So orders under the following sections of the last Code have been held to be also orders under sect. 224 of that Code corresponding with the present section:—sects. 318 and 334; (9) sect. 310A; (10) sect. 287, clause (8); (11) sect. 294, clause (2); (12) sect. 294, last clause; (13) sect. 243; (14) sects. 232, 234.(15) In such cases the matter is one ordinarily and from the nature of the case relating to execution, within the meaning of this section. If it is further one between the parties

(1) Sheo Narain *v.* Chunni Lal, 22 A. 243, at p. 247 (1900).

(2) Kristo Mohinee Dossee *v.* Kaliprosono Ghose, 8 C. 405 (1882).

(3) Basti Ram *v.* Fattu, 8 A. 146 (1886) [suit barred].

(4) Bhojo Hari *v.* Gajendra, 14 C. W. N. 672 (1909).

(5) Nowrojee Nusserwanji *v.* Bapaji Dossubhai, 5 Bom. L. R. 1036 (1903) [consent decree declaring defendant owner; option to plaintiff to purchase: failure of plaintiff: suit by latter to have determined his rights under decree].

(6) Krishnaji Narayan *v.* Damodar Parashram, 5 Bom. L. R. 648 (1903) [under s. 265 of last Code; suit barred].

(7) Jeshankar Mancharam *v.* Pandya Fulia 2 Bom. L. R. 887 (1900) [order appealable and therefore no revision].

(8) Rango *v.* Bomshetti, 3 Bom. L. R. 554 (1901) [orders appealable].

(9) Kasinatha Ayyar *v.* Uthamansa Rowthan, 25 M. 529 (1901); Sandhu Taraganar *v.* Hussain Sahib, 28 M. 87 (1904); Pita *v.* Chunilal, 31 B. 207 (1906).

(10) Manikka Odayan *v.* Rajagopala Pillai, 30 M. 507 (1907); but see Mahomed Mosraf *v.* Habil Mia, 6 C. L. J. 749 (1904); Phul Chand Rani *v.* Nursingh Pershad Misser, 28 C. 73 (1899); Kripa Nath Pal *v.* Ram Lakshmi Dasya, 1 C. W. N. 703 (1897); Murlidhar *v.* Anandrao, 25 B. 418 (1900) [at p. 421, "where the dispute did not fall within the terms of s. 244 (c), no appeal would lie"]; Pandurang Govind Purandare *v.* Krishnabai, 1 Bom. L. R. 74 (1899); Murlidhar *v.* Anand Rao, 3 Bom. L. R. 100 (1900); Kedar Nath Sen *v.* Uma Charan, 6 C. W. N. 57 (1900); Imtiazi Begam *v.* Dhuman Begam, 29 A. 275 (1907); in Amir Rai *v.* Basdeo Singh, 5 C. L. J. 204 (1906), the auction-purchaser was a third party.

(11) Ganga Prasad *v.* Raj Coomar Singh, 30 C. 617 (1903).

(12) Makka *v.* Sri Ram, 24 A. 108 (1901).

(13) Durga Kunwar *v.* Balwant Singh, 23 A. 478 (1901).

(14) Steel *v.* Ichamoye Chowdhrain, 13 C. 111 (1886); Lingum Krishnabhupati *v.* Kandula Swaramayya, 20 M. 366 (1896).

(15) Badri Narain *v.* Jai Kishen Das, 16 A. 483, at p. 490 (1894).

or their representatives, within the meaning of this section, then the order also falls within it and there is an appeal; otherwise not.

The following have been held to be within the section :—

An order disallowing objection that the value of property specified in sale proclamation was inadequate; (1) an order determining whether an alleged transferee from a decree-holder or his legal representative is the representative of the decree-holder; (2) or refusing to stay sale for under-valuation; (3) or refusing to enforce execution on the ground that applicant is not transferee or representative or on ground of limitation; (4) or refusing delivery of possession of jewels retained by Court in course of execution though not subject-matter of decree; (5) a suit to set aside sale on grounds that property not legally saleable, and that the real purchaser was the decree-holder who had not obtained leave to bid.(6) An order refusing to set aside a sale to a decree-holder purchaser, the decree in which suit has been set aside; (7) a suit for recovery of lands taken by decree-holder in excess of terms of his decree; (8) a suit by decree-holder to recover purchase-money; (9) an application for mesne profits by way of restitution,(10) or on the same grounds to recover possession of property; (11) an order refusing to determine the question whether an occupancy holding is transferable according to custom or usage and is therefore saleable,(12) or erroneously holding that the same can be attached and sold; (13) or an order refusing to set aside on appeal an order dismissing objections for default of appearance,(14) or an order setting aside a sale on the ground of fraud; (15) an application to recover from a decree-holder the proceeds of a sale in execution, such sale having been set aside; (16) or an order refusing to enlarge time prescribed in a decree for redemption; (17) an application for restitution of

(1) Ganga Prosad *v.* Rajcoomar Ghose, 30 C. 617 (1903) [order appealable].

(2) Ganga Das Seal *v.* Yakub Ali Dobashi, 27 C. 670 (1900).

(3) Sivasami Naickar *v.* Ratnasami, 23 M. 568 (1900) [order appealable]; *contra* Sivasami Achi *v.* Subrahmania, 27 M. 259 (1903).

(4) Badri Narain *v.* Jaikishen, 16 A. 483 (1894).

(5) Appa Rao *v.* Venkataramanayamma, 23 M. 55 (1899).

(6) Daulat Singh *v.* Jugal Kishore, 22 A. 108 (1899), and in Sitanath Chatterjee *v.* Atmaram Kar, 4 C. W. N. 571, 572 (1900) [objection on ground that property not liable to attachment and sale]; Gohar Khalipa Bipan *v.* Kasimuddi Jamadar, 4 C. W. N. 557 (1899), 27 C. 415 [question of saleability of occupancy holding].

(7) Umedmal *v.* Srinath Roy, 27 C. 810; s. c., 4 C. W. N. 692 (1900).

(8) Biru Mahata *v.* Shyama Churn Khawas, 22 C. 483 (1895).

(9) Rahim-ud-din *v.* Ram Lal, 27 A. 155 (1904).

(10) Collector of Meerut *v.* Kalka Prasad, 218 A. 665 (1906).

(11) Sheodehal Sahu *v.* Bhawani, 29 A. 348 (1907).

(12) Majid Hossein *v.* Raghubar Chowdhry 27 C. 187 (1899); Gahar Khalipa Bipari *v.* Kasimuddi Jamadar, 27 C. 415 (1899); s. c., 4 C. W. N. 557.

(13) Sitanath Chatterjee *v.* Atmaram, 4 C. W. N. 571 (1900).

(14) Lalnarain Singh *v.* Mahomed Rafiuddin, 28 C. 81 (1900).

(15) Monmohini Dossee *v.* Lakhinarain Chandra, 28 C. 116 (no second appeal lies as none of the questions under s. 153 of the Bengal Tenancy Act was decided); Sadho Chaudhri *v.* Abhenandan Prasad, 26 A. 801 (1903), and see notes on "Fraud."

(16) Collector of Jaunpur *v.* Bithal Das, 24 A. 291 (1902), in which it was generally laid down that the section applies as well to a dispute arising after decree has been executed as it does to a dispute arising previous to execution.

(17) Rango *v.* Bhomsetti, 26 B. 121 (1901).

money realised in execution of an *ex parte* decree in a suit in which decree set aside and which is subsequently dismissed ; (1) or an order made on an application arising out of purchase by mortgagee holding decree for sale of portion of mortgaged property subject to mortgage ; (2) a suit for a declaration that a decree has been satisfied and for an injunction restraining decree-holder from executing it ; (3) or an order refusing delivery of possession of properties sold to a decree-holder in execution of his decree,(4) or an order declaring the amount due under a mortgage-decree under sect. 88 of the Transfer of Property Act,(5) or an order refusing an application by judgment-debtor for recovery of the amount paid in excess of the decretal amount,(6) or an order setting aside a sale, or refusing to set aside a sale,(7) or dealing with a question relating to discharge or satisfaction although no formal application for execution may have been made ; (8) a suit to set aside a sale in execution of a decree on the grounds that the real purchasers were the decree-holders who had not obtained leave to bid,(9) or on the ground that a compromise alleged to have been entered into, whereby the sale was confirmed after judgment-debtor's objection, was invalid.(10) Proceedings for delivery of possession to auction-purchaser after sale, as where the legal representative of the judgment-debtor resisted application for possession by the auction purchaser, alleging that portions of the properties belonged to him and not to the judgment-debtor.(11) A suit by a decree-holder at whose instance a receiver has been appointed to realize and pay off the decretal amount for a declaration that a lease alleged to have been executed by judgment-debtors after the appointment of the receiver was invalid ; (12) and a suit for recovering of possession of properties by a person in whose presence a decree was made although he was a minor, his remedy, if he could object to the sale under the decree, being by an application under this section ; (13) the question whether there was an agreement before decree by the decree-holder not to recover costs which the decree might award ; (14) an objection by the judgment-debtor to auction-purchaser's application to be put into possession on ground that

(1) Saran *v.* Bhagwan, 25 A. 441, at p. 442 (1903).

(2) Erusappa *v.* Commercial L. M. Bank, 23 M. 377 (1899).

(3) Deno Bundhu Nundy *v.* Hari Mati Dassee, 31 C. 480 (1904) ; s. c., 8 C.W. N. 395.

(4) Kashinath Ayyar *v.* Uthermansa, 25 M. 529 (1901) ; Kattayal Pathumay *v.* Raman Menon, 26 M. 740 (1902) ; Sheo Narain *v.* Nur Muhammad, 30 A. 72 (1907).

(5) Aryan Bank *v.* Kamma Venkata, 26 M. 237 (1902).

(6) Dhan Kunwar *v.* Mahtab Singh, 22 A. 79 (1899) ; Saran *v.* Bhagwan, 25 A. 441, 442 (1903).

(7) Makka *v.* Sriram, 24 A. 108 (1901).

(8) Ram Kamlessari *v.* Sukhan Singh, 7 C. W. N. 172 (1902).

(9) Durga Kunwar *v.* Balwant Singh, 23 A. 478 (1901).

(10) Adhar Singh *v.* Sheo Prosad, 24 A. 209 (1898).

(11) Madhusudan *v.* Gobinda Pria Chowdhurani, 27 C. 34 ; s. c., 4 C. W. N. 417 (1899) ; Sadashiv *v.* Narayan, 35 B. 452 (1911), dissenting from Bhagwati *v.* Banwari, 31 A. 82 (F. B.) (1908).

(12) Mathewson *v.* Gobardhan Tribedi, 28 C. 492 (1900).

(13) Ram Chandra Bannerjee *v.* Ranjit Singh, 27 C. 242 ; s. c., 4 C. W. N. 405 (1899).

(14) Laldas Narandas *v.* Kishordas, 22 B. 463 (1896), dist. in Benode Lal Pakrashi *v.* Brojendra Kumar Saha, 29 C. 810, at p. 812 (1902).

sale was invalid; (1) an application to allow execution proceedings to be re-opened; (2) a suit by surety for declaration of non-liability as to portion of decree.(3)

A case is not within the section if it is a question which does not relate to, and is not directly connected with, the execution of the decree, even though between the same parties,(4) that is, if it is not a question in respect to the furtherance of or hindrance to, or the manner of carrying out, the execution of the decree; (5) or does not arise between the parties to the suit in which the order was passed; (6) or is a question which cannot be properly determined in execution; (7) or if it is an order not in execution, such as an interlocutory order pending suit appointing a commission to make partition subsequently to a preliminary decree,(8) or if it indirectly and remotely relates to the execution of the decree; (9) or the decree has been satisfied; (10) or if an order is made not in execution of decree but after execution and when such proceedings have come to an end; (11) or the question is one not under but outside the decree, such as assessment of damages for excessive execution,(12) or for damages for injury to property after it had vested in him on the confirmation of the sale.(13)

The section does not apply where the decree has passed beyond the stage of execution and the Court is *functus officio*. So it does not apply to a suit by one of two judgment-debtors who has been compelled to satisfy the decree against the other judgment-debtor for contribution; (14) nor where a person

(1) Mohim Chandra Bhattacharjee *v.* Ram Lochan Dey, 7 C. W. N. 591 (1903).

(2) Nilratan Khasnobish *v.* Ram Rutton Chatterji, 5 C. W. N. 627 (1901).

(3) Lingu Reddy *v.* Hussain Reddy, 28 M. 117 (1904).

(4) Roy Nundolal Bose *v.* Mir Abu Syed, 5 C. L. R. 45 (1876); Kashee Kishori Roy Chowdhry *v.* Noor Khan, 7 W. R. (Civ. R.) 45 (1867) [claim for damages in respect of injury sustained by goods while under attachment in execution of a decree which was afterwards set aside]; Sita Ram *v.* Mahipal, 3 A. 533 (1881); Krishna Roy *v.* Jawahir Singh, 20 C. 260 (1892); Annoda Prasad Banerjee *v.* Nobo Kissore Roy, 9 C. W. N. 952 (1905) [suit on unsatisfied order of insolvent Court].

(5) Haragobind Das Koiburto *v.* Issuri Dasi, 15 C. 187 (1887).

(6) Ketlilamma *v.* Kelappan, 12 M. 228, 230 (1887).

(7) Gopi Narain Khauna *v.* Bansidhar, 27 A. 325 (1905).

(8) Jogodishury Debea *v.* Kailash Chundra Lahiri, 24 Cal. 725 (1897).

(9) Berham Deo Prasad *v.* Tara Chand, 9 C. W. N. 989, 991 (1905).

(10) Raja Pudmanund Singh Bahadoor *v.* Doorga Pershad Doobey, 4 C. W. N. 39 (1899) [execution case dismissed for non-payment of process fee—not appealable].

(11) Har Prasad *v.* Sheo Ram, 20 A. 506, 508, 509 (1898); Ram Adhar *v.* Narain Das, 24 A. 519 (1902); Bujha Roy *v.* Ramkumar Pershad, 26 C. 529; s. c., 3 C. W. N. 374 (1899) [amending sale certificate]; Saddo Kunwar *v.* Bansi Dhar, 23 A. 476 (1901) [ib.]; Jotindra Mohan Tagore *v.* Mahomed Basir Chowdhry, 32 C. 332 (1904) [right of auction-purchaser to refund of purchase-money when auction-sale set aside]; Bhimal Das *v.* Mt. Ganesha Koer, 1 C. W. N. 658 (1897); Ghulam Shabbir *v.* Dwarka Prosad, 18 A. 36 (1895) [an order directing delivery of possession to an auction-purchaser, not appealable]. *Contra:* Muttia *v.* Appasami, 13 M. 504 (1890).

(12) Deno Nath Banikya *v.* Ram Kumar Chuckerbutty, 6 C. L. J. 527 (1904).

(13) Kolintavita *v.* Kolintavita, 17 M. L. J. 543 (1907); s. c., 31 M. 37.

(14) Ramsaran Pande *v.* Janki Pande, 18 A. 106 (1895).

annot as transferee execute the decree, in which case of necessity he must ue.(1) Where a decree is executed by delivery of formal possession a cause of action exists against a defendant who remains in occupation of the premises.(2) A question relating to execution pre-supposes a person against whom execution is sought and cannot arise between decree-holder and a complete stranger.(3) And the section does not apply when the question is not between parties to the suit in which the decree was passed, but between parties who both claim to be representatives of one of such parties; (4) or the question is one which forms no subject of enquiry in the suit and could not form the subject of enquiry in execution of decree.(5) A dispute between two judgment-debtors as to the right to property sold in execution is not within the section.(6) The question whether the decree itself is valid is not one relating to execution.(7) The section does not apply when a previous suit is compromised and dismissed, defendant agreeing to do something, and on his failure plaintiff sues to enforce it, there being no direction in this respect in the former decree.(8) A question as to whether there has been an adjustment of the decree which has not been certified cannot be raised under this section.(9) A charge for maintenance created by a decree is not enforceable in execution.(10) An application by purchaser to set aside sale of immoveable property sold by the sheriff in execution of a decree or for compensation on the ground of deficiency in the area of the land sold is not within the section; (11) nor is the question of the right of an auction-purchaser to a refund where the sale has been set aside.(12) A suit has been allowed to recover properties not included in a mortgage though inadvertently mentioned in the plaint and the decree.(13) Any questions that arise as to an order absolute for sale or foreclosure of mortgaged property are not within the section.(14) Nor is an order in proceedings.

(1) Pasupathy Ayyar *v.* Kothanda, 28 M. 34 (1904).

(2) Hassan Raja Chaudry *v.* Kailash Chandra Singha, 8 C. W. N. 49 (1903), following Shama Charan Chatterji *v.* Madhab Chandra Mookerjee, 11 C. 93 (1884). *Contra:* Madhu Sudan Das *v.* Gobinda Priya, 27 C. 36; s. c., 4 C. W. N. 419 (1899).

(3) Nagamuthu *v.* Savarimuthu, 15 M. 226 (1891).

(4) Gour Mohun Gouli *v.* Dino Nath Karmakar, 25 C. 49; s. c., 2 C. W. N. 76 (1897).

(5) Hanmant *v.* Surbabhat, 23 B. 394, 396 (1898). And it does not apply to an order that the plaintiff may be allowed to execute the decree if he fulfilled certain conditions at different stages of the proceeding, Srinivas *v.* Kesho (1911), 14 C. L. J. 489.

(6) Kastura Kunwar *v.* Gaya Prasad, 29 A. 207 (1906).

(7) Arunachallam *v.* Murugappa, 12 M. 503 (1899) (application to set aside a decree passed with the consent of the minor's guardian but without the sanction of the Court rejected—no appeal lies); Dhaniram Mahta *v.* Luchmeswar Singh, 23 C. 639 (1896) [objection that the person who was said to have consented to the decree had no authority to consent].

(8) Chunilal Dutt *v.* Hiralal Dutt, 7 C. W. N. 158 (1902).

(9) Ramdoyal Banerjee *v.* Ram Huri Pal, 20 C. 32 (1892); but see as to separate suit, Deno Bundhu Nundy *v.* Harimati Dassee, 31 C. 480, at p. 485 (1903).

(10) Matanginee Dassee *v.* Chooney Money Dassee, 22 C. 903 (1895); see also Arunachala *v.* Zamindar of Sivagiri, 7 M. 328 (1883) [decree charging impartible Zamindari].

(11) Ram Narain *v.* Dwarka Nath Khettry, 4 C. W. N. 13 (1899).

(12) Jotindra Mohun Tagore *v.* Mahomed Basir Chowdhry, 32 C. 332 (1904).

(13) Ram Chander *v.* Kondo, 22 A. 442 (1900).

(14) Akikunnissa Bibee *v.* Rooplal Das, 25 C. 133 (1897) [dissenting from Kedar Nath

before Courts of Revenue under Act XII. of 1881,(1) or an order passed in exercise of inherent powers to punish for contempt,(2) or cases arising under Act X. of 1859 (Landlord and Tenant Act).(3) Where formal possession has been given under a final foreclosure decree but the mortgagor has continued in actual possession, the remedy is by suit.(4) An application under sect. 396 of the last Code for an appointment of a Commissioner is not within the section.(5)

Fraud.—It was well settled law under sect. 244 of the last Code that when circumstances affecting the validity of a sale in execution had been brought about by the fraud of one of the parties to the suit or the auction-purchaser and gave rise to a question between these parties such as, apart from fraud, would be within the provisions of that section, a suit would not lie to impeach the validity of the sale on the ground of such fraud.(6)

v. Lalji Sahai, 12 A. 61 (1890); Oudh Bihari Lal *v.* Nageshwar Lal, 13 A. 278 (1891)]; Tarapado Ghose *v.* Kamini Dassee, 29 C. 644 (1901); Hatem Ali Khundkar *v.* Abdul Guffar, 8 C. W. N. 102 (1903).

(1) Masik-ulla Khan *v.* Majidunnissa, 26 A. 149 (1903) [application for refund in consequence of the reversal or modification in appeal of a decree under above Act; separate suit lies].

(2) Godu Ram *v.* Suraj Mal, 27 A. 380 (1904) [such an order not a decree and no appeal]. But where there is a genuine dispute between the parties as to execution, it should be dealt with under this section, and not on a motion for contempt: Jamsetji *v.* Sorabjee, 9 Bom. L. R. 1361 (1907). It has been also said that an executing Court has no inherent power to commit for contempt: Sankaralinga Reddi *v.* Kandasami Teran, 17 M. L. J. 334 (1907), citing Kochappa *v.* Sachi Devi, 26 M. 494.

(3) Damoodar *v.* Iswar, 15 C. W. N. 78 (1910).

(4) Jagan Nath *v.* Milap Chand, 28 A. 722 (1906); Wilayati Begam *v.* Nand Kishore, 30 A. 231 (1908).

(5) Jatla *v.* Madepalli, 17 M. L. J. 144 (1906).

(6) Mohendro Narain Chaturaj *v.* Gopal Mondul, 17 C. 769 (1890) F. B.; Rajoni Kant Bagchi *v.* Hossain Uddin Ahmed, 4 C. W. N. 538 (1899) [fraud of auction-purchaser]; Prosunno Kumar Sanyal *v.* Kali Das Sanyal, 16 C. 683 (1892) P. C. The Allahabad High Court [Durga Kunwar *v.* Balwant Singh, 23 A. 478, 480 (1901)] have treated the question as concluded by authority of a long string of cases in the Calcutta, Madras and Bombay High Courts. See Saroda Churn Chuckerbutty *v.* Mahomed Isuf Meah, 11 C. 376, 378 (1885); Balladeb *v.* Anadi, 10 C. 410 (1884) [in this case the matter had been dealt with in execution]; Siva Pershad Maity *v.* Nundo Lall Kar Mahapatra, 18 C. 139 (1890); Jagan Nath Gorai *v.* Watson & Co., 19 C. 341 (1892); Bhubun Mohun Pal *v.* Nundo Lal Dey, 26 C. 324 (1899); Moti Lal Chakerbutty *v.* Russick Chandra Bairagi, 26 C. 326 (1896); Hira Lal Ghose *v.* Chundra Kanto Ghose, 26 C. 539 (1899) [in this case application was under s. 244]; s. c., 3 C. W. N. 403; Brojo Gopal Sarkar *v.* Busirunnissa Bibi, 15 C. 179 (1887) [in this case it was held a suit would lie because s. 244 of the Code had no application to proceedings in execution of a decree under Act X. of 1859]; Viraraghava *v.* Venkatacharyar, 5 M. 217 (1882) [referred to with approval in Krishnan *v.* Arunachellam, 16 M. 447 (1892)]; Rama Ayyan *v.* Sreenivasa Pattar, 19 M. 230 at p. 231 (1895); Subbaji *v.* Sunnasee, 2 M. 264 (1880); Paranjpe *v.* Kanado, 6 B. 148 (1882); Sakharam *v.* Damodar, 9 B. 468 (1885); Adhar Monee Dassi *v.* Monmotha Nath Bose, 6 C. W. N. 279 (1901); Mathura Das *v.* Lachman Ram, 24 A. 239 (1902); Kokil Singh *v.* Edal Singh, 31 C. 385 (1904). As to what constitutes fraud vitiating the sale, see Sm. Sarat Kumari *v.* Nemai Charn Dey, 5 C. W. N. 265 (1900); Rojoni Kant Bagchi *v.* Hossain Uddin Ahmed, 4 C. W. N. 538 (1899); Gaya Prasad Misr *v.* Randhir Singh, 28 A. 681 (1906); and see Asaban Banu *v.* Ananda, 14 C. W. N. 823 (1909) (effect where there is compromise and no sale); Akhil Prodhan *v.* Manmotha Nath, 18 C. L. J. 616 (1913) (fictitious sale).

This rule was, of course, subject to this, that the other conditions of the section existed, viz., that the question was one arising between the parties to the suit or their representatives. So it was held that as between a party to the suit and a stranger, the provisions of sect. 312 of the former Code did not debar the person aggrieved from instituting a suit, if he could establish that a material error in the sale had its origin not in mere irregularity but in fraud.(1) So also in the under-mentioned case,(2) while the suit was held to be barred as regards those plaintiffs who were parties to the suit the sale in which was sought to be set aside, it was held to lie at the instance of the other plaintiffs who had been no parties to such suit.

It was held that when a decree or purchase was made *benami*, sect. 244 did not apply, and a suit would lie, as the section could not be applied on the footing that the persons really interested were parties to the proceeding (3) and that the auction-purchaser could not be regarded as a party to the suit.(4) Though this case was not referred to, it must be taken on this latter point to have been overruled (5) by the decision of the Privy Council, that when a question relating to execution has arisen between the parties to the suit in which the decree was passed, the fact that the purchaser, who is not party to the suit, is interested in the result is not a bar to the application of the section.(6) A judgment-debtor was held entitled by an application under sect. 244 to have an execution sale of his properties set aside if he alleged and proved fraud on the part of the decree-holder, though no fraud was alleged or proved against the auction-purchaser, who was a stranger to the suit. The auction-purchaser was of course entitled to have the purchase-money paid by him refunded by the decree-holder. When during the pendency of an application under sect. 244 to set aside a sale the sale is confirmed, such confirmation was held to be no bar to the maintenance of the application even though the auction-purchaser was a stranger to the suit.(7)

(1) Viraraghava *v.* Venkatacharyar, 5 M. 17, 219 (1882)

(2) Jagan Nath Gorai *v.* Watson & Co., 19 C. 341 (1892).

(3) Mohendro Narain Chaturaj *v.* Gopal Mondul, 17 C. 769, 777 (1890), in which case it was held that the question did not arise between "parties."

(4) Ib. at p. 778.

(5) Bhubun Mohun Pal *v.* Nundo Lal Dey, 26 C. 324 (1899) [see Moti Lal Chakerbutty *v.* Russick Chandra Bairagi, 26 C. 326 (1896); Durga Kunwar *v.* Balwant Singh, 23 A. 479 (1901); Kherode Sundari Debi *v.* Juanendra Nath Pal Chaudhuri, 6 C. W. N. 283 (1901)], which dealt with the objection that the auction-purchaser was not a party. Whether such purchaser is real or nominal makes no difference. *Quære* whether the case of a benami decree-holder, which was also dealt with by the F. B. decision, is still open.

(6) Prosunno Kumar Sanyal *v.* Kali Das Sanyal, 19 C. 683, 689 (1892), followed in cases cited in last note and in Hira Lal Ghose *v.* Chundra Kanto Ghose, 26 C. 539 (1899), in which it was also held that an appeal would lie at the instance of the auction-purchaser: Nemai Chand Kanji *v.* Deno Nath Kanji, 2 C. W. N. 691 (1898); Bhubun Mohun Pal *v.* Raja Peary Mohun Mukerjee, 3 C. W. N. LXXX. (1899); Doyamoyi Dasi *v.* Sarat Chandra Mojumdar, 25 C. 175, 177 (1897).

(7) Kherode Sundari Debi *v.* Juanendra Nath Pal, 6 C. W. N. 283 (1901); Hungsha Majillya *v.* Tincouri Das Karmakar, 8 C. W. N. 230 (1903), dist. Mohesh Chandra Bagchi *v.* Dwarka Nath Mitra, 24 W. R. 260 (1875) [in which it was held that however fraudulent the conduct of a plaintiff in a suit may be, if the purchaser is not implicated in the fraud the validity of the sale is not affected; but pointing out that the different rule holds good where not only the decree but the auction-proceedings are fraudulent].

An application to set aside a sale on the ground of fraud may be made even after the sale has been confirmed.(1)

Where a judgment-debtor applies to have an execution-sale set aside and alleges circumstances which, if found in his favour, would amount to fraud on the part of the decree-holder or auction-purchaser the application was held to come under sect. 244, something more being alleged than a material irregularity in publishing or conducting the sale within the meaning of sect. 311 of the last Code.(2) But a mere allegation of fraud without any attempt to substantiate it was insufficient.(3)

In order, however, to determine whether a case in which fraud is alleged comes within this section or may be made the subject of a separate suit, it is necessary, apart from any other conditions annexed to the section, to ascertain whether it is the decree or the execution proceedings under the decree which are alleged to be fraudulent. Proceedings under this section presuppose the existence of a valid and binding decree.(4) The section was held not to apply to a case where the judgment-debtor tried to set aside the effect of a decree, but it referred to proceedings in execution based on the decree as if it were perfectly good and valid.(5) Under this section the questions to be decided in execution are questions relating to the execution, discharge, or satisfaction of the decree. A question whether the decree itself was obtained by fraud or collusion was held not to be one which relates to the execution, discharge, or satisfaction of the decree, but which affects its very subsistence and validity.(6) The question whether the decree sought to be executed was obtained by fraud

(1) Wahid-un-Nissa *v.* Girdhari, 27 A. 702 (1905), and cases there cited.

(2) Nemai Chand Kanji *v.* Deno Nath Kanji, 2 C. W. N. 691 (1898); Bhubun Mohun Pal *v.* Raja Peary Mohun Mookerjee, 3 C. W. N. LXXX. (1899). As to these two sections, see judgment of Ghose, J., in Mohendro Narain Chaturaj *v.* Gopal Mondul, F. B. 17 C. 769 (1890), in which the learned Judge was of opinion that an application to set aside a sale for fraud was not provided for in the Code either in s. 244 or 311, that the executing Court had, however, inherent power to set aside a sale before confirmation, but that after confirmation the Court of execution was *functus officio*, and that the matter could only be dealt with by separate suit. At one time it was not clearly understood that after a decree had been fully executed the Court could re-open the matter under s. 244 and set aside a sale already confirmed, but the law was subsequently settled as stated in the text, that an application lay under s. 244 whether before or after confirmation of the sale; see Jagan Nath Gorai *v.* Watson & Co., 19 C. 341 at p. 344 (1892), and the F. B. case cited. See also Golam Ahad Chowdhry *v.* Judhistir Chandra Saha, 7 C. W. N. 305 (1902); s. c., 30 C. 142.

(3) Umakanta Roy *v.* Dino Nath Sanyal, 28 C. 4 (1900).

(4) Ram Narain Tewari *v.* Shew Bhunjan Roy, 27 C. 197, 200 (1899), the terms valid and binding were here cited with reference to fraud. It has been held that where there was no subsisting decree the matter was yet within s. 244: Doyamoyi Dasi *v.* Sarat Chunder Mojumdar, 25 C. 175 (1897); also when the decree did not warrant a sale at all but provided for satisfaction out of money in Court: Jagan Nath Gorai *v.* Watson & Co., 19 C. 341, 344 (1892); also where it was contended in a mortgage-suit that there had been no decree absolute directing the sale: Siva Pershad Maity *v.* Nundo Lall Kar Mahapatra, 18 C. 139 (1890); Harihar Kanta *v.* Rama Pandu, 33 B. 698 (1909).

(5) Khetra Pal Singh Roy *v.* Shyama Prosad Barman, 32 C. 265 (1904).

(6) Sudindra *v.* Bhudan, 9 M. 80, 83 (1885); Dhaniram Mahta *v.* Luchmeswar Singh, 23 C. 639, 641 (1896).

was thus held not to be within the scope of sect. 244 (1) and could only be raised by a separate suit.(2) When, therefore, both the decree and in consequence the sale thereunder were impeached on the ground of fraud, the remedy lay by separate suit.(3) But, as already stated, if the decree was not impeached for fraud but only the execution-proceedings thereunder, the question had to be raised in those proceedings and a separate suit would not lie. An objection, therefore, to a sale of property in execution of a decree on the ground of fraud is a question to be determined exclusively under this section, even though the purchaser was no party to the decree.

"**Court executing the decree.**"—That is, either the Court which passed the decree or the Court to which the decree has been transferred. The provisions of this section govern the procedure of both such Courts.(4) The words must be interpreted to mean the Court executing the decree at the time when the application is made; and they do not include the Court which has executed the decree and has thereby become *functus officio*.(5) The section is limited to Courts executing the decree, and therefore an order refusing to stay execution by a Court which is not executing the decree is not appealable.(6)

"**And not by separate suit.**"—A separate suit ought not to be instituted unless all questions between the parties or their representatives cannot be decided in the original suit,(7) and all questions which can possibly be determined in the execution proceedings should be so determined.(8) The existence, however, of a decree cannot bar a fresh suit between the parties in respect of rights which cannot be worked out without additions to the decree which the Court of execution has no power to make.(9)

It has been held that this section does not absolutely bar a suit, but prohibits in a separate suit between the same parties to a decree, any relief being

(1) Moti Lall Chakerbutty *v.* Russick Chandra Bairagi, 26 C. 326, 328, 332 (1896); Pallapragada *v.* Boorngapalli, 28 M. 402 (1907); Debendra Nath Bhattacharjee *v.* Prasanna Kumar Chakravarti, 5 C. L. J. 328 (1907).

(2) Sudindra *v.* Bhudan, 9 M. 80, 83 (1885).

(3) Abdul Mazumdar *v.* Mahomed Gazi Chowdhry, 21 C. 605 (1894) [dist. in Keshab *v.* Durga, 1 C. W. N. cxl., in which the decree had already been set aside but not on the ground of fraud]; Ram Narain Tewari *v.* Shew Bhunjun Roy, 27 C. 197 (1899) [in this case the decree, which was *ex parte*, had already been set aside and not on the ground of fraud, which, however, the plaintiff by his suit desired to go into]; Moti Lall Chakerbutty *v.* Russick Chandra Bairagi, *supra*; Sudindra *v.* Bhudan, *supra*; Preo Nath Roy *v.* Mohesh Chandra Moitra, 24 C. 546 (1897); Kedar Nath Mukerjee *v.* Prosunno Kumar Chatterjee, 5 C. W. N. 559 (1901). See question of fraud and liability for fraud discussed in Chitambar *v.* Krishnappa, 26 B. 543, 547 (1902): Debendra Nath Bhattacharjee *v.* Prasanna Kumar Chakravarti, 5 C. L. J. 328 (1907).

(4) Ghazidin *v.* Fakir Buksh, 7 A. 73 (1884); Oudh Behari Lal *v.* Nageshwar Lal, 13 A. 278 (1890).

(5) Fakaruddin Mohamed *v.* Official Trustee, 10 C. 538 at p. 540 (1884).

(6) Ramchandra *v.* Balmukund, 29 B. 71 (1904); discussed in Srinivas *v.* Kesho Prosad, 14 C. L. J. 489, 496 (1911).

(7) Jogemoya Dassi *v.* Thakomani Dassi, 24 C. 473 at p. 487 (1896). In Chaudri Ahmad Baksh *v.* Seth Raghubar Dayal, 28 A. 1 (1905), the P. C. held that the suit was not barred.

(8) Jogemoya Dassi *v.* Thakomani Dassi, at p. 492.

(9) Gopi Narain Khanna *v.* Babu Bansidhar, 9 C. W. N. 577 (1905).

granted which interferes with the conduct of the execution proceedings of the Court executing a decree.(1) In considering whether the scope of any suit comes within the section, regard must be had both to the cause of action and the relief claimed. Thus the question of an uncertified adjustment may be a matter relating to execution, and no suit is permissible which has as its object to restrain the execution of the decree on this ground; but it may be that a suit would lie for other relief which had as its subject-matter such uncertified adjustment.(2) Further, this section differs from sect. 11 which bars the trial of an issue. This section bars a suit brought for the determination of certain questions specified therein, but does not bar the trial of any issue involved in those questions if the issue is raised at the instance of a defendant in a suit brought against him.(3) Where the execution proceedings are closed, a separate suit will lie, as the section is then no longer applicable.(4)

"**Arising.**"—It has been said (5) that this word should be read as "directly arising," otherwise the most remote enquiries would be possible in the execution department. Probably, however, it is best not to import words into the section and to determine in each case whether a question does arise which is dealt with by this section.

The following considerations establish that for the purposes of this section an objection made by a party to the decree or his representative against whom execution is applied for, to the effect that property is held by him by a right or title not rendering it liable to attachment in execution of such decree, is a question arising between the parties. The provision formerly in force corresponding to sect. 244, namely, sect. 11 of Act XXIII. of 1861, was limited in its operation to questions arising between parties to the suit, and the question arose whether the term "parties" applied to persons who had not been made parties before decree but against whom execution was sought as heirs of the judgment-debtor upon his death after decree. In the last Code the words "*or their representatives*" were added and applied to persons against whom, or against the property in whose hands, execution was sought, on the ground that they were the heirs of a judgment-debtor who has died after decree. As regards the kind of questions intended in sect. 244 of that Code, the matter was fairly clear from the provisions of sect. 234. Under that section (now 50) the representative could have been made liable "to the extent of the property of the deceased which has come to his hands and has not been duly disposed of." So that two kinds of property could be attached. First, property of the ancestor found in the hands of the heir; second, the property of the heir, from whatever source derived, to the extent to which he had wasted the assets that had descended

(1) Azizan *v.* Matuk Lal Saha, 21 C. 456 (1893).

(2) Ib., at pp. 456, 459.

(3) Bhiram Ali Shaik *v.* Gope Kanth Shaha, 24 C. 355 (1897); foll. in Nil Kamal Mukerjee *v.* Jahnabi Chowdhurani, 26 C. 946 (1899).

(4) Ramanadan Chetti *v.* Kunnappu Chetti, 6 M. H. C. R. 304 (1871); Fakaruddin Mohamed *v.* Official Trustee, 10 C. 538 (1884); Rash Behary Mondal *v.* Rakhal Churn Mondal, 1 C. W. N. 708 (1897). See Haragobind Dass Koiburto *v.* Issuri Dassi, 15 C. 187, at p. 194 (1889); Girdhari Lal *v.* Khushali Ram, 31 A. 364 (1909).

(5) *Per* Duthoit, J., in Ram Ghulam *v.* Dwarka Rai, 7 A. 170, at p. 174 (1884).

to him without satisfying the debts of the deceased. Where property is said to be liable to execution in the hands of heirs as assets inherited from their ancestor, in such a case the question that ordinarily arises is, whether the property has so descended or not. That is a question in which the parties interested are the judgment-creditor on one side and the alleged heir himself on the other. The persons interested would be the same if the property against which execution was sought were the property of the heir himself which it was sought to charge on the ground of his having wasted the inherited assets. The provision in the former sect. 234 for taking an account made this plain.

An examination of the decisions led to the same result. The cases fell into two classes. The first class consisted of cases in which a person is originally made a party in a representative capacity, or is subsequently made a party in consequence of the death of an original party before decree. In this case it was clearly settled that such a person was a party to the suit within the meaning of sect. 244, and that a question between him and the decree-holder, as to whether property had come to him as the representative of the judgment-debtor, and so was liable to be taken in execution of the decree against him as such representative, or on the other hand belonged to himself alone and not in such representative character, was one that must be decided in the execution proceedings, and not by suit. The governing authority on the subject was the decision of the Privy Council in Chowdry Wahed Ali *v.* Jumace; (1) and it was followed and applied in the sense indicated in several subsequent cases in this country.(2) The second class of cases consisted of those in which the representatives had not been made parties to the suit before decree, but in which, in consequence of the death of the judgment-debtor after decree, a question arose as to the rights of the decree-holder to execute the decree against the representatives or the property said to have descended to them. Under Act XXIII. of 1861, it was held, both by the Madras (3) and Calcutta (4) High Courts, that representatives proceeded against in execution of a decree against the person they represented were parties to the suit within the meaning of the section corresponding to sect. 244 of the last Code. That question no longer arose under the Code of 1882, because in sect. 244 of that Code the representatives were expressly mentioned. In both of those cases and in a series of subsequent cases it was held in accordance with the analogy of the other class of decisions already mentioned, that questions arising between a decree-holder and the representatives of the judgment-debtor as to whether property had come to the representatives as such, and so was liable to be taken in execution, or was their own property derived from any other source, and therefore not so liable, must be decided in the execution-proceeding and not by suit.(5) There were other cases in which

(1) 11 B. L. R. 149 (1872); Oseemunnissa Khatoon *v.* Ameeroonissa Khatoon, 20 W. R. 162 (1873); Arundadhi Ammyar *v.* Natesha Ayyar, 5 M. 391 (1882).

(2) Nimba Harishet *v.* Sitaram Paraji, 9 B. 458 (1885).

(3) Buddu Ramaiya *v.* Venkaiya, 3 M. H. C. R. 263 (1866).

(4) Ameerunnissa Khatoon *v.* Mozuffer Hossein Chowdhry, 12 B. L. R. 65 (1873).

(5) Kuriyali *v.* Mayan, 7 M. 255 (1883); Ram Ghulam *v.* Hazaree Kuar, 7 A. 547 (1885); Sita Ram *v.* Bhagwan Das, 7 A. 733 (1885).

the decisions turned upon considerations which did not apply to the case mentioned. They were cases in which it was held that a claim either by the judgment-debtor or by his representatives to property attached in execution, made not in his own right but as a trustee,(1) did not fall within sect. 244 of the last Code.(2)

Two propositions were then established under the previous case-law: firstly, that where in execution of a decree for a debt due by a deceased person, property in the hands of his representative was attached, a claim by the representative to have the property released on the ground that it was his own private property fell not within sect. 278 of the last Code but within the section corresponding to this.(3) Secondly, however, if the judgment-debtor objected to attachment, not on the ground that the property was his private property but set up a *jus tertii*, namely, the right of third parties not before the Court as parties to the suit or their representatives, then the matter fell within sect. 278 of the last Code and not this section.(4) Thus where the judgment-debtor alleged that he was in possession only as *shebait* of a deity to whom the property had been dedicated, it was *held* that the case fell within sect. 278 read with sect. 280 of the last Code, and not within sect. 244 of that Code, now represented by this section.(5)

Questions arising between whom.—Questions may possibly arise between a party on one side and a party on the other side, or between a party on one side and the representative (*i.e.* heir, executor, administrator or transferee within the meaning of the term hereafter stated) of a party on the other side, or between representatives on both sides, or between a party or his representative

(1) Shankar Dial *v.* Amir Haidar, 2 A. 752 (1880); Nath Mal Das *v.* Tajammul Husain, 7 A. 36 (1885). The case of Bahori Lal *v.* Gauri Sahai, 8 A. 626 (1886), in which the facts were very peculiar, was decided by one at least of the Judges before whom it came on the ground that it fell within the same principle, *vide post*.

(2) Rajrup Singh *v.* Ramgolam Roy, 16 C. 1 (1888).

(3) Ib.; Punchanun Bandopadhya *v.* Rabia Bibi, 17 C. 711 (1890) F. B.; Seth Chand Mal *v.* Durga Dei, 12 A. 313 (1889) [foll. Kali Charan *v.* Jewat Dube, 28 A. 51 (1905)]; Mungeshar Kuar *v.* Jamoona Prashad, 15 C. 603 (1889); Beni Prasad Kunwar *v.* Lukhua Kunwar, 21 A. 323 (1899); Vengapayyan *v.* Mahalinga Bhat, 26 M. 501 (1902) [question raised as to whether improvements attached in execution were property of deceased judgment-debtor or of his representatives in their own right].

(4) Shankar Dial *v.* Amir, 2 A. 752 (1880) [objection by judgment-debtor that he held on account of an endowment]; Nath Mal Das *v.* Tajammal Husain, 7 A. 36 (1889) [objection by same that he was in possession as Mutwalli]; Roop Lall Dass *v.* Bekani Meah, 15 C. 437 (1888) [same], foll. in Murigeya *v.* Hayat Saheb, 23 B. 237 (1898); Bhajahari Pal *v.* Ram Lal Das, 6 C. W. N. 62 (1901) [objection that property *debuttur*]; Ramanathan Chettiar *v.* Levvai Marakayar, 23 M. 195 (1898) F. B. [claim to hold as trustee where it was held that the claims of third parties whether put forward by themselves or by a party to the suit must be dealt with under ss. 278-283 and not under s. 244 of the last Code]. The decision in Beg Raj Marwari *v.* Kundali Debya, 8 C. W. N. 353 (1902), and a dictum in Upendra Bhatta *v.* Ranganatha Bhatta, 17 M. 399 at p. 400 (1893), appear to be against this view. In Rani Indomati *v.* Jageshar, 28 A. 644 (1906), it was held that there was nothing to compel an objection under s. 278; Budrudeen *v.* Abdul Rahim, 31 M. 125 (1908).

(5) Kartick *v.* Ashutosh, 39 C. 298 (1911); 16 C. W. N. 26, F. B. *Cf.* Jogendra *v.* Gobinda, 35 C. 364 (1908).

on one side and the auction-purchaser or his representative on the other. It has been held that the section does not cover a question between a party to a suit and *his* representative.(1)

Parties.—This means parties to the suit and on the record.(2) It means parties who have properly been made parties in accordance with the provisions of the Code. Thus where a Mahomedan infant was represented by his father's brother (who has disqualified because his interest was adverse) it was held that the minor had never been a party.(3) Where a decree is passed against one who represents others, all persons whom he represents are parties, as in the case of a *karnavan* and members of the *tarwad*.(4) If the question arises between parties the section cannot be evaded by adding an unnecessary party to the suit.(5) A decree-holder does not cease to be a party by becoming a purchaser.(6) In a suit for partition a compromise was entered into by all the parties except S. and a decree obtained in the terms thereof. In execution S. was dispossessed, and presented a petition to the Court objecting that the decree was not binding on her. It was held that she was a party and entitled to appeal.(7) Defendants not joining in compromise on which decree was passed were held not to be judgment-debtors.(8) It was held that where a decree or purchase was made *benami* sect. 244 did not apply, it being said that it was not necessary to apply that section on the footing that the persons really interested were parties.(9) But this case, in so far at any rate as it held that the matter did not come within the section as far as the auction-purchaser was concerned, must be taken to have been overruled by the Privy Council.(10) It was held that the Collector, and, in proceedings relating to the enforcement of an order under sect. 412 of

(1) Magan Lal Mulji *v.* Doshi Mulji, 25 B. 631, 635 (1901).

(2) See Dutto *v.* Gonesh, 5 Bom. L. R. 952 (1903), in which the section was held inapplicable as the plaintiff was not a party to the previous suit. In Bishen Dyal Singh *v.* Sagar Singh, 2 C. W. N. 311 (1896), a person obstructing the decree-holder at the instigation of the judgment-debtor was held not a party: Ameer Ali, J., *dubit.* And so in Sankaralinga Reddi *v.* Kandasami Teran, 17 M. L. J. 334 (1907), it was held that the section was not applicable where the person violating the rights of the attaching decree-holder was not a party to the original suit; and consequently a suit for damages will lie against him.

(3) Rashid-un-Nisa *v.* Muhammad Ismail Khan, 36 I. A. 168, 175 (1909); s. c., 13 C. W. N. 1182; Narsingh *v.* Jahi, 15 C. L. J. 3 (1911); Purno Chandra *v.* Bejoy Chand, 18 C. L. J. 18 (1913); Kunwar Partab Singh *v.* Bhabuti Singh, P.C., 18 C. L. J. 384 (1913).

(4) Marivittil *v.* Pathram, 30 M. 215 (1906), and consequently an objection to attachment was held to fall under s. 278; Mathu *v.* Paramaswaran, 17 M. L. J. 377 (1906).

(5) Kristo Mohinee Dossee *v.* Kaliprosonno Ghose, 8 C. 402 (1881); and see Nowrojee Nusserwanjee *v.* Bapuji Dossubhai, 5 Bom. L. R. 1036 (1903).

(6) Muttia *v.* Appasami, 13 M. 504, 507 (1890); Kasinatha Ayyar *v.* Uthumansa Rowthan, 25 M. 529, 532 (1901); Sadashiv *v.* Narayan, 35 B. 402 (1911), dissenting from Bhagwati *v.* Banwari, 31 A. 83, F. B. (1908).

(7) Sankaravadivammal *v.* Kumaraswmya, 8 M. 473 (1885).

(8) Jathavedan *v.* Kunchu, 30 M. 72 (1906).

(9) Mohendro Narain Chaturaj *v.* Gopal Mondal, 17 C. 769, 777 (1890).

(10) Bhubun Mohun Pal *v.* Nundo Lall Dey, 26 C. 324 (1899).

the said Code against a next friend, the latter, was not a party.(1) If the rights of parties are transferred before decree, and if the transferee is made a party to the suit before decree, then he comes within the words "parties to the suit."(2) A person who is sued in one suit in his personal capacity is in law a different person when suing in a subsequent suit in the capacity of *shebait* or trustee.(3) In a recent case it was held that where a judgment-debtor claimed property not in his personal capacity but as a *mutwalli* who was not a party to the suit, the case did not come under this section.(4)

The words "*parties to the suit*" are not now limited to judgment-creditors and judgment-debtors.(5) The case of rival decree-holders has been held not to be within the section,(6) nor a third party objecting to the sale of attached property; (7) nor is a person who becomes a surety for the appearance of a party himself a party to the suit.(8) In an order made under an application under O. XXXIII. r. 12 for payment under O. XXXIII. r. 10 or 11, Government is deemed to be a party to the suit, and such an order is therefore under this section and appealable.(9)

The Official Assignee is the representative of an insolvent debtor within the meaning of this section.(10) A Court has no jurisdiction in execution to reopen the question as to whether certain persons brought on the record as representatives of the deceased plaintiff, and as such made respondents in an appeal, had been properly joined as parties to the suit.(11)

"**Representative.**"—This refers to all persons by or against whom the decree may be executed (see as to this notes to sect. 36, *ante*). The term used is not "legal representative" but "*representative.*" The former term means

(1) Collector of Trichinopoly *v.* Suarama Krishna, 23 M. 73 (1899) (no appeal). Similarly as regards Collectors, see Collector of Rathnagiri, 6 B. 590 (1882) [no appeal, Collectors seeking Court Fees under sect. 412 of Code of 1877]; Collector of Kanara *v.* Hedge, 15 B. 77 (1890) [same: revision]; *contra* Janki *v.* Collector of Allahabad, 9 A. 64 (1886); Secretary of State *v.* Bhagwanti Bibi, 13 A. 326 (1891).

(2) Kameshwar Pershad *v.* Run Bahadur Singh, 12 C. 458, 463 (1886).

(3) Ram Krishna Mahopatra *v.* Mohunt Padma Charan, 6 C. W. N. 663 (1902).

(4) Kali Prasanna Ghose *v.* Gulam Rahman, 17 C. W. N. cclv. (1913); Kartick Chandra *v.* Ashutosh Dhara, 16 C. W. N. 26.

(5) Ramaswami Sastrulu *v.* Kameswaramma, 23 M. 361 at p. 366 (1899).

(6) Ram Chunder *v.* Hamiran, 11 C. W. N. 433 (1906); Afzaloonissa Begum *v.* Parbutty Koonwar, 2 W. R. Misc. 41 (1865) [dispute in respect of proceeds of property sold: no appeal]; Misree Kowur *v.* Buksh Singh Marsh 527 (1864) [dispute as to distribution of assets]; Deen Dyal Sahoo *v.* Radha Muddun, 9 W. R. 223, 227 (1868); Sanjivi *v.* Ramasami, 8 M. 494 (1885) [incompetency of Execution Court]; see Lakshmi Ammah *v.* Ponnassa Menon, 17 M. 394 (1893) [no contest between the decree-holders; order under sect. 231 of last Code is one relating to execution and appealable].

(7) Luchmeeput Singh *v.* Lekraj Roy, 2 W. R. Misc. 56 (1865); see Raghu Nath Das *v.* Badri Prasad, 6 A. 21 (1883); Sevu *v.* Muttusami, 10 M. 53, 54 (1886).

(8) Sikooram Agurwallah *v.* Komolokant Dey, 2 W. R. 65 (1865); as to surety's right of appeal, see Sheik Suleman *v.* Shivram Bhikaji, 12 B. 71 (1887); Ghoree Lal Jha *v.* Sheo Narain Singh, 8 W. R. 24 (1867).

(9) Secretary of State *v.* Narayan, 35 B. 448, 450 (1911).

(10) Miller *v.* Lukhimani Debi, 28 C. 419 (1901); s. c., 5 C. W. N. 761; *contra* Kashi Prasad *v.* Miller, 7 A. 752 (1885).

(11) Venkatachala Reddi *v.* Ventatarama Reddi, 20 M. 665 (1901).

an heir, devisee, executor, or administrator of a party, or more strictly the last two persons only.(1) But a person it was held might be representative within the meaning of this section who is not a legal representative in the sense stated.(2) The Courts in India did not confine the term to its primary meaning of executor or administrator, but have included heirs, executors before probate, persons in possession of property of the deceased (3) and persons taking joint property by survivorship.(4) A further extension was given to the term so as to include representatives in interest, such as assignees from a mortgagor of mortgaged property in proceedings for the execution of a decree against the mortgagor for sale of the mortgaged property.(5) It was held in an early case (6) under the Code of 1882 that the word "*representative*" meant only persons who succeeded to the rights of any of the parties to the suit after the decree was passed. In this case it was held that Run Bahadur was (*a*) not a legal representative as he inherited not from Ranee Asmedh Koer but from her husband; (7) (*b*) that he was not a representative under sect. 244 because the transfer to him was not after decree; (*c*) that he was not a party as the suit was dismissed as against him. This latter ground would not now be sustainable by reason of the Explanation. As regards the second ground, it is to be observed that the Ekrarnama referred to was not merely before decree but before the suit. It is, however, incorrect now to say that only those who take the interests of parties after decree are representatives. A person who is a transferee within the meaning of the cases cited is equally such whether the transfer took place pending the suit before decree or after decree.(8) There is no distinction between the position of legal representatives added to the suit before and those added after decree.(9) A person attaching decree is representative of decree-holder.(10)

For the purposes of this section, the word "representative" when used in relation to a party includes the transferee of any interest who so far

(1) Ishan Chunder Sirkar *v.* Beni Madhab Sirkar, 24 C. 62, 71 (1896); distinguished in Kali *v.* Misrijan, 15 C. W. N. 711 (1911); Badri Narain *v.* Kishen Das, 16 A. 483, 487 (1894); in Fanindro Deb Raikut *v.* Rani Jugudishwari, 14 C. 316 (1886), F. B., the heir was held not to be the legal representative of the executors on the will being set aside.

(2) Madho Das *v.* Ramji Patak, 16 A. 286 at p. 291 (1894).

(3) Badri Narain *v.* Kishen Das, *supra*.

(4) Peary Lal Sinha *v.* Chandi Charan Sinha, 11 C. W. N. 163 (1906).

(5) Badri Narain *v.* Kishen Das, *supra*.

(6) Kameshwar Pershad *v.* Run Bahadur Singh, 12 C. 458 (1886). In this case as in Rashbehary Mookhopadya *v.* Moharani Surnomoyee, 7 C. 403 (1881), the assignment was before suit.

(7) See as to this notes to sect. 50.

(8) See Sheo Narain *v.* Chunni Lal, 22 A. 243, 246 (1900), and notes, *post*. In Purmananddas *v.* Vallabdas, 11 B. 506 (1887); Ramchandra Kolatkar *v.* Mahadaji Kolatkar, 9 B. 141 (1884) [diss. from in Behari Lal *v.* Ganpat Rai, 10 A. 1 (1887)], the assignments were pending suit; and see also Azgar Ali *v.* Asaboddin Kazi, 9 C. W. N. 134 (1904); Gopi Nath Chattopadhya *v.* Sajani Kanta Singh, 10 C. W. N. 240 (1905).

(9) Seth Chand Mal *v.* Durga Dei, 12 A. 313 (1889); Shivram *v.* Sakharam, 33 B. 39 (1908).

(10) Peary Mohun Chowdhry *v.* Romesh Chunder Nundy, 15 C. 371 (1888); Sah Man Mull *v.* Kanagasabapathi, 16 M. 20 (1892); Krishnan *v.* Venkatapathi, 29 M. 31 (1905).

as such interest is concerned is bound by the decree.(1) The following have been held to be such transferees: an execution-purchaser of the judgment-debtor's interest, provided that he is affected by the decree, such as the purchaser at an auction-sale of the equity of redemption in mortgaged premises; (2) a lessee of the judgment-debtor of attached property; (3) a mortgagee of the judgment-debtor; (4) a second mortgagee taking his mortgage during the pendency of a suit on the first mortgage; (5) any person who at the time of the execution of a decree is a transferee of the same within the meaning of sect. 232 of the last Code (now O. XXI. r. 16), the term "representative" in the former section being held to include both subsequent transferees as well as those who purchased directly from the person who obtained the decree: (6) the purchaser of plaintiff's interest in property in suit; (7) the purchaser of property which was at the time of the purchase under attachment in execution of the decree; (8) the assignee of decree of Appellate Court.(9) The transferee must, however, be bound by the decree, and on this ground the purchaser of the interest of a tenure from the judgment-debtor was held

(1) Ishan Chunder Sirkar *v.* Benimadhub Sirkar, 24 C. 62 (1896) [competency of Execution Court], followed in Umeshanda *v.* Mahandra, 14 C. L. J. 337 (1911); Ganga Das Seal *v.* Yakub Ali Dobashi, 27 C. 670 (1899) [order appealable]; Dwar Buksh Sircar *v.* Fatik Jali, 26 C. 250 (1898) [competency of Execution Court]; Badri Narain *v.* Jaikishen Das, 16 A. 483 (1894) [order appealable]; Mathewson *v.* Gobardhan Tribedi, 28 C. 492 (1900) [suit barred]; Paramananda Das *v.* Mahabeer Donji, 20 M. 378 (1896); Minakshi Achi *v.* Chinnappa Udayan, 24 M. 689, 692 (1901) [competency of Execution Court]; Sheo Narain *v.* Chunni Lal, 22 A. 243 (1900) [suit barred]; Kasinatha Ayyar *v.* Uthumansa Rauthan, 25 M. 529 (1901) [order appealable]. See cases cited in Gulzari Lal *v.* Madho Ram, 26 A. 417 (1904). Madho Das *v.* Ramji Patak, 16 A. 286, 291 (1894), distinguishing case of simple money-decree [in which case suit maintainable]. See as to this case, Gur Prasad *v.* Ram Lal, 21 A. 20 (1898), a purchaser *pendente lite* is as much bound as a purchaser after decree; Sheo Narain *v.* Chunni Lal, 22 A. 243, at p. 246 (1900); Radha Kishun Marwari *v.* Hem Chandra Bose, 11 C. W. N. 495 (1907); Peari Lal Singh *v.* Chandi Charan Singh, 5 C. L. J. 80 (1906); s. c., 11 C. W. N. 164. As to transferees of partial interests, see Pasupathy *v.* Kothanda, 28 M. 64 (1904); Haradhan *v.* Girish, 13 C. W. N. 98 (1908).

(2) Ishan Chunder Sirkar *v.* Benimadhub Sirkar, *supra*; Kasinatha Ayyar *v.* Uthumansa Rauthan, 25 M. 521 (1901); ref. to Sandhu Tarayanar *v.* Hussain Sahib, 28 M. 87 (1904); Swarama *v.* Somasundaru, 28 M. 119 (1904).

(3) Mathewson *v.* Gobardhan Tribedi, 28 C. 492; s. c., 5 C. W. N. 654 (1900).

(4) Paramananda Das *v.* Mahabur Dossji, 20 M. 378 (1896).

(5) Sheo Narain *v.* Chunni Lal, 22 A. 243 (1900) [suit barred]; and Vendee of Mortgagor; Janki Prajsad *v.* Ulfat Ali, 16 A. 284 (1894); and see Tara Prasanna Bose *v.* Nilmoni Khan, 41 C. 418 (1913), distinguishing Kommineri Appaya *v.* Mangela Rangayya, 31 M. 419 (1908).

(6) Ganga Das Seal *v.* Yakub Ali Dobashi, 27 C. 670 (1900); Dwar Buksh Sircar *v.* Fatik Jali, 26 C. 250 (1898); Badri Narain *v.* Jai Kishen Das, 16 A. 483 (1894).

(7) Menakshi Achi *v.* Chinnappa Udayan, 24 M. 689, 692 (1901); the report says, "plaintiff's interest" *sed qu.*; judgment-debtor. The plaintiff was seeking to attach the property, and the petitioner was claiming that it was subject to attachment. The report does not state by whom the property was sold: Gulzari Lal *v.* Madho Ram, 26 A. 447, at p. 456 (1904).

(8) Gur Prasad *v.* Ram Lal, 21 A. 20 (1898); foll. Lalji Mal *v.* Nund Kishore, 19 A. 332 (1896); Kuppana *v.* Kumara, 34 M. 450 (1910).

(9) And claiming restitution: Jamini Nath Roy *v.* Dharma Das Sur, 28 C. 857 (1906).

not to be a representative of the judgment-debtor.(1) Where property was purchased subject to an attachment, but the decree under which the attachment was levied was subsequently set aside, it was held that the purchaser was not the representative of the judgment debtor within the meaning of sect. 244 of the last Code.(2) A person who has purchased a *putni* holding at a sale in execution of a money-decree, but has not had his name registered in the landlord's register, is bound by a subsequent decree for arrears of rent obtained by the landlord against the registered *patnidar* and by the sale in execution of that decree, and is therefore a "representative" within the meaning of the section; (3) as is also a person to whom a transferable occupancy holding was mortgaged before its sale in execution of a rent decree; (4) as is also (where the landlord of an occupancy-holding obtains a decree for rent against his recorded tenant) an unregistered transferee of the tenant into whose hands a portion of the holding had previously passed,(5) and a mortgagee from the judgment-debtor after attachment.(6)

Auction-purchaser.—A distinction must be kept between the case of an auction-purchaser who, purchasing property affected by the decree, such as the purchase of the equity of the redemption in a mortgage suit, is a representative of the party whose interest is so purchased, within the meaning of the cases cited in the last paragraph and other cases, such as the auction-purchaser in execution of a simple money decree. The position of the latter was the subject of some conflict of opinion under the preceding Code. It was in some cases held that such an auction-purchaser was not a party nor the representative of a party to the suit.(7) On the other hand it was held

(1) Kalu Saha *v.* Bhagabati Debya, 6 C. W. N. 127 (1901). *Sed qu.* whether it made any difference that the purchase was prior to decree. See also Ram Narain *v.* Dwarka Nath Khettry, 27 C. 264 (1899), where distinguishing sales by sheriff from sales by the Registrar of the H. C., the Court pointed out that the purchase was not of an interest affected by the decree, and further the applicant did not represent the judgment-debtor because their interests were adverse.

(2) Ghafur-ud-din *v.* Hamid Husain, 32 A. 129 (1909). For right of possession of purchaser at a *putni* sale, see Srimati Krishna Promoda Dassi *v.* Dwarka Nath Sen, 17 C. W. N. 1092 (1913).

(3) Surendra Narain Singh *v.* Gopi Sundari Dasi, 32 C. 1031 (1905).

(4) Sm. Nissa Bibi *v.* Radha Kishore, 11 C. W. N. 312 (1906).

(5) Gopi Nath Chattopadhya *v.* Sajani Kanta Singh, 10 C. W. N. 240 (1905); Azgar Ali *v.* Asabodin Kazi, 9 C. W. N. 134 (1904).

(6) Narayanasawmi *v.* Seshappariyer, 17 M. L. J. 321 (1907).

(7) Vishvanath Chardu Naik *v.* Subraya Shivappa, 15 B. 290 (1890); Hira Lal Chatterji *v.* Gourmoni Debi, 13 C. 326 (1886); Shivram Chintaman *v.* Jiva, 13 B. 34, 37 (1888); Gour Sundar Lahiri *v.* Hem Chunder Chowdhury, 16 C. 355, 360 (1889); Sabhajit *v.* Sri Gopal, 17 A. 222, 224 (1894) [otherwise if he was a transferee within the meaning of] sect. 232 (now 122). See, however, *contra*, Gulzari Mal *v.* Madho Ram, 26 A. 447 (1904)], distinguished in Wilayati Begam *v.* Nand Kishore, 30 A. 231 (1908); Mahabir Prasad *v.* Partab Chand, 22 A. 450, 451 (1900) ["in this case the parties to the suit were parties to the proceedings; added to them was the purchaser, not as a representative of one of the parties, but as a looker-on interested in the result"]; Gobardhan Rai *v.* Bishan Prasad, 23 A. 116, 117 (1900) [distinguishing between private sale and Court sale]. In Magan Lal *v.* Doshi Mulji, 25 B. 631, 635 (1901), it was said that the auction-purchaser was certainly not the representative of the decree-holder, and it was doubtful whether he was a representative of the judgment-debtor. In Narain Acharjee

that when a question arose within this section the fact that the purchaser who was no party to the suit was interested in the result was no bar to the application of the section.(1) This decision of the Privy Council was sometimes understood as laying down that the auction-purchaser was a party or a representative. But this was not so; all that was held was that his interest in the result did not prevent the question being one between the parties.(2) It was also held that the provisions of sect. 244 prohibited a suit by a party or his representative against an auction-purchaser the object of which was to determine a question which properly arose between the parties or their representatives relating to the execution of the decree.(3)

An auction-purchaser therefore (other than one coming within the meaning of the cases cited in the last paragraph) is not a party or a representative of a party.

The purchaser of an undivided share must sue for partition by separate suit.(4) An unrecorded co-sharer in a tenancy is not a representative in interest of the recorded tenant within the meaning of this section.(5)

Sub-section (2).—This is a very just provision intended to remedy mere technical defects. Where a suit is instituted in the same Court as has jurisdiction to execute the decree, the fact that the question has been made the subject of a separate suit in that Court instead of being determined by an order under this section is not a matter affecting jurisdiction but of procedure only,(6) and an objection on this account has been held not to be ground of appeal.(7) The

Chowdhry *v.* Gregory, 8 W. R. 304 (1867), Mahabir Singh *v.* Ram Bhagowan Chowbay, 11 C. 150 (1884), the sale appears to have been under another decree than that under which the question arose. In Anandi *v.* Ajudhia, 30 A. 379 (1908), it was held that an auction-purchaser is the representative of the judgment-debtor, not of the decree-holder (see Bhagwati *v.* Banwari, 31 A. 82 (1908)). In Mahadeo *v.* Darsan, 51 C. W. N. 542 (1911), it was held that an auction-purchaser who sets up an antagonistic title is not a representative of the judgment-debtor.

(1) Prosunno Kumar Sanyal *v.* Kali Das Sanyal, 19 C. 683, 689 (1892) P. C.; applied in Pita *v.* Chunibal, 31 B. 207, 215 (1906).

(2) Maganlal *v.* Doshi Mulji, 25 B. 631, at p. 625 (1901), followed in Amir Rai *v.* Bardeo Singh, 5 C. L. J. 204 (1906). In Manikka Udayan *v.* Rajagopala Pillai, 30 M. 507, 509 (1907), the proposition appears to be laid down in such general terms. This case was dissented from in Nadamuni *v.* Veerabhadra, 4 M. 507 (1910). See also Narayan *v.* Umbar, 35 B. 275 (1911); and Krishna Satapasti *v.* Sarasvatula, 31 M. 177 (1908).

(3) Balsi Ram *v.* Fattu, 8 A. 146 (1886) F. B.; Dhani Ram *v.* Chaturbhuj, 22 A. 86 (1899); Daulat Singh *v.* Jugal Kishore, 22 A. 108 (1899); Surendra Mohini *v.* Amarash Chandra, 39 C. 687 (1912).

(4) Yelumalai *v.* Srinivasa, 29 M. 294 (1906).

(5) Joytara *v.* Pran Krishna, 13 C. L. J. 257 (1910); 15 C. W. N. 512.

(6) Purmessuree Pershad *v.* Jankee Koer, 19 W. R. 90 (1873); Azizuddin Hossein *v.* Ramanugra Roy, 14 C. 605 (1882); Biru Mahata *v.* Shyama Churn Khawas, 22 C. 483 (1895); Ram Saran Pande *v.* Janki Pande, 18 A. 106, 107 (1895); cf. as to distinction between competency and irregularity in execution-proceedings; Vishnu Sakharam *v.* Krishnarao Malhar, 11 B. 153 (1886); Ketlilamma *v.* Kelappan, 12 M. 228 (1887).

(7) Purmessuree Pershad *v.* Jankee Koer, *supra*; Azizuddin Hossein *v.* Ramanugra Roy, *supra*; see also Khoda Bux *v.* Sadu, 14 C. L. J. 620 (1910).

Court has therefore considered and treated a plaint under the circumstances stated as an application in execution (1) The Legislature has now sanctioned this practice both as regards suits which should have been applications, as also in the converse case.

Where an appeal was erroneously presented to the High Court as a first appeal from an order it refused to convert it into a first appeal from a decree under this section in the old Code read with sect. 2 of that Code.(2) Where a suit was barred under the provisions of this section but the order of the Court executing the decree was erroneous, the High Court suggested that the latter Court should review its order.(3)

Sub-section (3).—This sub-section corresponds, with amendments, with the last clause of sect 244 of the Code of 1882, which was added to that Code by Act VII. of 1888. The Court executing a decree can go into the disputed question of the transfer of the decree.(4) Indeed, the question whether a person is a representative must be decided under this section and not by separate suit.(5) The sub-section refers to a case where there is a dispute between two or more persons as to which of these is the representative of a person who had been a party to the suit. It does not include a case in which there could be no representative as there was no party to be represented.(6) Nor can an application by the assignee of an auction-purchaser to be placed on the record be dealt with under this section, as the expression "*representative*" does not mean the representative of a party to the execution-proceedings, but of a party to the suit.(7)a It was held by the Madras High Court that the amendment noted did not take away the right of suit at the instance of an assignee of a decree for a declaration as to the validity of his assignment; it being said to be unreasonable to construe the phrase "*and not by a separate suit*" as applicable to the question referred to in the amendment.(8) The sub-section has been amended so as to make it compulsory on the Court to determine the question of representation. See *ante*, "History and scope of section."

(1) Azizuddin Hossein *v.* Ramanugra Roy, 14 C. 605 (1882), at p. 609; Beru Mahata *v.* Shyama Churn Khawas, 22 C. 483 (1895); Jhamman Lal *v.* Kewal Ram, 22 A. 121 (1899); Lalman Das *v.* Jagan Nath Singh, 22 A. 376 (1900) [the Court refused to interfere in second appeal as the lower Court had not been asked to do so]; Mayan Pathuti *v.* Pakuran, 22 M. 347, 349 (1884); Jotindra Mohan Tagore *v.* Mahomed Basir Chowdhry, 32 C. 332, 335 (1904); Pasupathy Ayyar *v.* Kothanda Rama Ayyar, 28 M. 64 (1904); see Nowrojee *v.* Bapuji, 5 Bom. L. R. 1036, 1041 (1903), the Court refused to do so as it would not be the proper Court to execute the decree; and similarly in Gur Prasad *v.* Ram Lal, 21 A. 20, at p. 22 (1898). In Sheodihal Sahu *v.* Bhawani, 29 A. 348 (1907), it was held that the Court should have done so.

(2) Kedar Nath *v.* Lalji Sahai, 12 A. 61 (1889).

(3) Mohibullah *v.* Imami, 9 A. 229, 231 (1887).

(4) Dwar Buksh Sircar *v.* Fatik Jali, 26 C. 250, 253 (1898).

(5) Beni Prasad Kunwar *v.* Lukhha Kunwar, 21 A. 323 (1899); in, however, Vakulabharana *v.* Rangaiyan Chetty, 28 M. 357 (1905), it was held not to be obligatory on the Court to proceed under this section where the right to apply was already *sub judice*.

(6) Beni Prasad Kunwar *v.* Mukhtesar Rae, 21 A. 316, at pp. 319, 320 (1899).

(7) Sree Nath Ghose *v.* Roma Nath Santra, 3 C. W. N. 276 (1898).

(8) Bommanapati Veerappa *v.* Chinta Kunta Srinivasa, 26 M. 264 (1902)

An appeal lies even in a case in which the question is not between the parties o the suit or their representatives, but only between the decree-holder and a erson claiming as his assignee.(1) The effect of this sub-section is to give the ight of appeal against an order determining whether a party applying for xecution is or is not the representative of the decree-holder.(2)

A Judge who stayed execution-proceedings, pending a suit in which an ssue had been raised as to the validity of a will under which the applicant for xecution claimed, was held entitled to act upon his determination of that issue n the execution-proceedings.(3)

The Code contains no provisions under which a representative of a deceased lecree-holder can have his name entered on the record when nothing emains to be done under the decree beyond its execution, nor is there any ecessity for any such entry, as proceedings in execution do not abate on the udgment-creditor's death, and his representatives are entitled to continue hem.(4)

Explanation.—This Explanation has been added to remove a conflict f decisions under the last Code. It was held by the Calcutta (5) and Allaha- ad (6) High Courts that persons who were exempted from the operation of a lecree, by the dismissal, as respects them, of the suit, were thenceforth strangers nd not parties to the suit and therefore no longer subject to the section. It was considered that as between the party exonerated and the decree-holder, o question relating to execution could arise, because as against him there was o decree to be executed. The Madras (7) and Bombay (8) High Courts, however, eld on the contrary that a person was a party to an action, although he might have ceased to have any connection with the suit before the decree was passed nd would still come under that clause. The Legislature by this Explanation has now adopted the latter view.

(1) Bommanapati Veerappa *v.* Chinta Kunta Srinivasa, 26 M. 264 (1902).

(2) Krishnama Chariar *v.* Appasami Muda- liar, 25 M. 545 (1901); and see Ganga Das Seal *v.* Yakub Ali Dobashi, 27 C. 670 (1899).

(3) Bhawanishanker *v.* Naranshanker, 1 Bom. L. R. 36; s. c., 23 Bom. 536 (1899).

(4) Jeshankar Mancharam *v.* Pandya Fulia, 2 Bom. L. R. 887 (1900).

(5) Ram Pershad *v.* Jagannath Ram, 30 C. 134; s. c., 6 C. W. N. 10 (1902); Rahimuddi Sirkar *v.* Loll Meah, 29 C. 696; s. c., 6 C. W. N. 726 (1902); Kameshwar Pershad *v.* Run Bahadur Singh, 12 C. 458 (1886); Gour Kishore Chowdhry *v.* Mahomed Hossein, 10 W. R. 191 (1868); but when an intervenor had been made a defendant and exempted from the operation of the decree, but directed by the Appellate Court to pay costs, he was held to be a party to the suit: Huree Kishore *v.* Kalee Kishore, 8 W. R. 114 (1867).

(6) Jangi Nath *v.* Phundo, 11 A. 74 (1888); Mukarrab Husain *v.* Hurmat-un-nissa, 18 A. 52 (1895); Kalka Prasad *v.* Basant Ram, 23 A. 346 (1901) [party against whom no decree passed], followed in Sheo Pargash *v.* Nawab Singh (1910), 32 A. 321.

(7) Ramaswami Sastrula *v.* Kameswarama, 23 M. 361 (1899) [dissenting from Naga Mutha *v.* Kameswaramma, 15 M. 226 (1891); foll. in Vasudeva Upadhya *v.* Tirthasami, 19 M. 331 (1893), where the part of the decree which was being executed was not against the person in question]; Sankaradivammal *v.* Kumara Samya, 8 M. 473 (1885); *contra*, Gadecherla *v.* Gadecherla, 21 M. 45 (1897), though it was held that a person against whom the plaintiff had abandoned the claim, not being able to serve him with notice, was not a party to the suit: Venkatapathi Naidu *v.* Subraya Mudali, 17 M. L. J. 416 (1907).

(8) Gouri *v.* Vigneshwar, 17 B. 49 (1892) [party to suit though not to appeal].

Appeal.—The object of the section being that the Court having the parties (and other persons interested) before it, should decide all questions relating to execution arising between them, in place of allowing one or the other of them to put his adversary to the delay and cost of a separate suit in cases in which, but for this section, it might be possible for him to do so; in order to effect this object completely, without injustice to the parties, an order under this section has been included within the definition of decree in sect. 2 of the Code.(1)

In order to determine whether an appeal lies, it must be first ascertained whether the case is one which falls within the section. In the first place, the order complained of must be one made by a Court executing a decree.(2) If so, the question determined by it must be one relating to execution. If it is not, then, unless an appeal is elsewhere expressly given, there is none.(3) In the first place, there is a distinction between acts done in pursuance of a decree and acts done in execution of it. So an order passed in a suit for partition subsequent to the decree appointing a commission to make the partition is not an order in execution.(4)

There is no appeal from an order not relating to the enforcement of a decree, such as an order of a Judge confirming the report of the commissioner for taking accounts refusing to require the defendants to give inspection of certain books, for such an order is not within the contemplation of the section.(5) Nor is an order appealable which is a mere ministerial act, such as a direction to a subordinate officer to receive money, there being no question in controversy finally determined.(6) There is no appeal if the matter is one indirectly and remotely relating to the execution of the decree.(7) But though the property may not be the subject of the decree, if it has been interfered with in execution, the matter relates to execution.(8) Where an order absolute for sale or foreclosure of mortgaged property has been made, any question that arises as to that order has been held not to relate to execution of the decree.(9) Nor is there an appeal against an order made when no question arises in execution of decree, the decree

(1) Mohendro Narain Chaturaj *v.* Gopal Mondal, 17 C. 769, 773 (1890). As to orders under the Agra Tenancy Act, see Kharag Singh *v.* Pola Ram, 27 A. 31 (1904), overruled in Zohhra *v.* Mangu Lal, 28 A. 723 (1906).

(2) Ramchandra *v.* Balmukund, 6 Bom. L. R. 780 (1904).

(3) Nihal Chand *v.* Chutto Lal, 9 C. 214 (1882).

(4) Jogodishury *v.* Kailash Chandra, 24 C. 725, F. B. (1897).

(5) Rustomji Burjorji *v.* Kessowji, 8 B. 287 (1884).

(6) Hulas Rai *v.* Pirthi Singh, 9 A. 500 (1887); as to the distinction between administrative and judicial proceedings, see Sivagami Achi *v.* Subrahmania, 27 M. 259 (1903).

(7) Raja Pudmanund Singh Bahadoor *v.* Doorga Pershad Doobey, 4 C. W. N. 39 (1899) [execution-case dismissed for non-payment of process-fee].

(8) Appa Rao *v.* Venkataramanayamma, 23 M. 55 (1899).

(9) Akikunnissa Bibee *v.* Rooplal Das, 25 C. 133 (1897) [objection by the *representative* that she was entitled to a share in the mortgaged property. Separate suit lies to determine the question]. Tarapado Ghose *v.* Kamini Dassee, 29 C. 644 (1901) [objection that no notice was given before order absolute for foreclosure was made]; Hatim Ali Khunkar *v.* Abdul Gaffur Khan, 8 C. W. N. 102 (1903) [adjustment of decree: payment before decree absolute].

having been already executed.(1) A question whether the decree itself is invalid is not one relating to execution.(2) Further, the question must be between parties or representatives,(3) and not between a party and his representative (4) or between co-decree-holders.(5) See notes on the terms "Parties," "Representatives" and "Auction-Purchaser," *ante*. Again, assuming that the matter is one mentioned in the section, the order must fall within the definition of a decree. It must be an adjudication of the right claimed, and the determination must be final.(6) It is not every order made in execution which is a decree, otherwise every interlocutory order in an execution-proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable.(7) So an order merely determining a point of law arising incidentally or otherwise in the course of a proceeding and not refusing or granting relief, is not appealable,(8) nor is an order on an application to set aside a sale under O. XXI. r. 9,(9) nor is an order for security in stay of execution, for it does not determine the rights of the parties.(10) Nor is there an appeal when it is otherwise excluded, as in

(1) Bajha Roy *v.* Ramkumar Pershad, 26 C. 529; s. c., 3 C. W. N. 374 (1899) [amending a sale-certificate to correct boundaries]. Saddo Kunwar *v.* Bansi Dhar, 23 A. 476 (1901) [order refusing to amend a sale-certificate]; Bhimal Das *v.* Mt. Ganesha Koer, 1 C. W. N. 658 (1897).

(2) Arunachallam *v.* Murugappa, 12 M. 503 (1899) [decree impeached on the ground that though the minor's guardian consented, sanction of the Court had not been obtained], and see notes to Explanation IV.

(3) Saddo Kunwar *v.* Bansi Dhar, 23 A. 476 (1901); Rashbehary Mookerjee *v.* Maharani Surnomoyee, 7 C. 403 (1881) [applicants, assignees from judgment-debtors before rent-decree, which was being executed]; Mammod *v.* Locke, 20 M. 487 (1897) [dispute between judgment-debtor and purchaser only] as regards auction-purchaser, see now clause (*b*); Ishri Dutt *v.* Mewalal, 26 A. 136 (1903) [order refusing to entertain the objection of the mortgagor, judgment-debtor to the sale of the mortgage-decree in execution of a money-decree against the mortgagee]; Ramadhar *v.* Narain Das, 24 A. 519 (1903) [order disallowing an objection by the judgment-debtor that more had been delivered to the auction-purchaser than was included in the sale-certificate]. Ghulam Shabbir *v.* Dwarka Prosad, 18 A. 36 (1895) [order directing delivery of possession under ss. 318 or 319 of the last C. P. Code to an auction-purchaser; application in status as auction-purchaser, ref. Saddo Kunwar *v.* Bansi Dhar, 23 A. 476 (1901), which was an application to amend sale certificate]. Appd. Bhima Das *v.* Mt. Ganesha Koer, 1 C. W. N. 658 (1897). *Contra*, Muttia *v.* Appasami, 13 M. 504 (1890); Murigeya *v.* Hayat Saheb, 23 B. 237 (1898) [clause set up on behalf of third party. But see notes to Explanation III.].

(4) Maganlal Mulji *v.* Doshi Mulji, 25 B. 631 (1901).

(5) Gyamonee *v.* Radharaman, 5 C. 592 (1879).

(6) Nihal Chand *v.* Rameshwari, 9 C. 214 (1882). See Kharag Singh *v.* Pola Ram, 27 A. 31 (1904) [Agra Tenancy Act].

(7) Jogodishury Debea *v.* Kailash Chundra Lahiry, 24 C. 725, at p. 739 (1897), followed in Mukhtar Ahmad *v.* Mugarrab Husain, 34 A. 530 (1912); and see Lakshmia *v.* Maru Devi, 37 M. 29 (1914).

(8) Beharylal Pundit *v.* Kedarnath Mullick, 18 C. 469 (1891) [order directing that the question whether the decree had been compromised, and satisfaction entered by the fraud of the judgment-debtor, should be tried on its merits under s. 244]. Deoki Nandan *v.* Bansi Singh, 16 C. W. N. 124, 125 (1911).

(9) Asimuddi *v.* Pran, 15 C. W. N. 844 (1911).

(10) Saraswati Barmania *v.* Golap Das Barman, 41 C. 160 (1913).

the case of an order in execution of a decree for possession under sect. 9 of the Specific Relief Act.(1)

The following orders have been held to be appealable. An order refusing to allow representative to take out execution until certificate granted under Act XXVII. of 1860.(2) An order relating to the fitness of a member of a religious institution to be appointed under a decree,(3) an order under sect. 87 of the Transfer of Property Act extending the time for payment of the mortgage-decree (4) or refusing to enlarge time in a decree for redemption.(5) An order refusing to grant reasonable extension of time to the mortgagor judgment-debtor to pay in the decretal amount,(6) or declaring the amount due under a mortgage-decree under sect. 88 of the Transfer of Property Act.(7) or an order passed upon an application made under sect. 89 of that Act,(8) or an order on an application by a mortgagor that the mortgagee judgment-creditor, having purchased a portion of the mortgaged property subject to his mortgage in execution of a simple money-decree by a third party, was bound to discharge his mortgage-debt,(9) or an order setting aside a sale or refusing to set aside a sale,(10) or refusing to enforce execution upon the application of a transferee on the ground that he is not a transferee or representative, or on the ground of limitation,(11) or refusing to determine whether an occupancy holding is transferable according to custom or usage and is therefore saleable,(12) or erroneously holding that the same can be attached and sold.(13) or an order refusing to set aside on appeal an order dismissing objections to the execution of a decree for default,(14) or refusing an application of the judgment-debtor for recovery of the amount paid in excess of the decretal amount,(15) or an order disallowing the objection of a person who has been brought on the record of the execution-proceedings as a *representative* and who sets up a title of his own to the attached property; (16) or orders in proceedings for the delivery of possession to the auction-purchaser after sale in execution of the decree,(17) or an order refusing

(1) Souza *v.* Gulam Moidin, 26 M. 438 (1912).

(2) Hotilal *v.* Hardeo, 5 A. 212 (1882).

(3) Ponnambala *v.* Sivagnana, 17 M. 343: s. c., 21 I. A. 71 (1894).

(4) Rahima *v.* Nepal Rai, 14 A. 520 (1892).

(5) Rungo *v.* Bhomsetti, 26 B. 121 (1901).

(6) Note to Hulas Rai *v.* Pirthi Singh, 9 A. 500, at p. 503 (1887).

(7) Aryan Bank *v.* Kamma Venkata, 26 M. 237 (1902).

(8) Mallikarjunadu *v.* Lingamurti, 25 M. 244 (1902) [order refusing to pass an order absolute for sale]. In, however, Pramatha *v.* Khetra, 29 C. 651 (1902), it was held that the order was not in execution but in proceedings in continuation of the original suit.

(9) Erusappa Mudaliar *v.* Commercial Land Mortgage Bank, 23 M. 377 (1899).

(10) Makka *v.* Sriram, 24 A. 108 (1901).

(11) Badri Narain *v.* Jaikishen, 16 A. 483 (1894).

(12) Majed Hossein *v.* Raghbar, 27 C. 187 (1899); Gahar Khalipa Bipari *v.* Kasimuddi Jamadar, 27 C. 415; s. c., 4 C. W. N. 557 (1899).

(13) Sitanath Chatterjee *v.* Atmaram, 4 C. W. N. 571 (1900).

(14) Lalnarain Singh *v.* Mahomed Rafiuddin, 28 C. 81 (1900).

(15) Dhan Kunwar *v.* Mahtaf Singh, 22 A. 79 (1899).

(16) Shankar Dutt *v.* Harman, 17 A. 245 (1895), following Punchanun Bandopadhya *v.* Robia Bibee, 17 C. 711 (1890); Madhusudan Das *v.* Gobinda Pria, 27 Cal. 34; s. c., 4 C. W. N. 417 (1899) [representative resisting delivery of possession]. Jogendra *v.* Gobinda, 35 C. 364 (1908).

(17) Madhusudan Das *v.* Gobinda Pria, *supra*.

to set aside a sale to a decree-holder purchaser, the decree in which suit had been set aside.(1) An order setting aside a sale under sect. 310A of the last Code (now represented by O. XXI. r. 89), when the dispute is between the decree-holder and the judgment-debtor, (2) or an order refusing to set aside such sale when the dispute relates to execution,(3) or an order determining whether a party applying for execution is or is not the representative of the decree-holder,(4) or an order disallowing objection that the value of the property specified in the sale-proclamation was grossly inadequate,(5) or an order directing delivery of possession of property sold under a mortgage-decree, though purporting to be under sect. 335 of the last Code,(6) or refusing delivery of possession of properties sold to a decree-holder mortgagee or a decree-holder in execution of his decree,(7) or an order refusing delivery of possession of jewels not subject-matter of decree retained in Court,(8) or an order refusing to stay sale for under-valuation.(9) All orders staying execution of decrees, whether passed by the Court which made the decree, or by the Court to which it is sent for execution.(10) An order directing stay of execution of a decree on security being furnished by the judgment-debtor is appealable by the judgment-debtor on the ground that the security ordered is excessive.(11) So is an order in the execution-proceedings whereby the right of a defendant against whom no decree has been passed is invaded (12) Or where the judgment-debtor alleges fraud in execution-proceedings

(1) Umedmal *v.* Srinath Roy, 27 C. 810; s. c., 4 C. W. N. 692 (1900).

(2) Kripanath Pal *v.* Ram Laksmi Dasya, 1 C. W. N. 703 (1897); Phul Chand *v.* Nursingh Pershad, 28 C. 73 (1899); but see Asimuddi *v.* Pran, 15 C. W. N. 844 (1911).

(3) Murlidhar *v.* Ananda Rao, 25 B. 418 (1900). *Contra*, Maganlal *v.* Doshi Mulji, 25 B. 631 (1901), when a question arises between a party and his representative.

(4) Krishnama Chariar *v.* Appasami Mudaliar, 25 M. 545 (1891) [application for execution by successors of a trustee decree-holder who was alleged to have been suspended]; Badri Narain *v.* Jaikishen Das, 16 A. 483 (1894); Gunga Das Seal *v.* Jakub Ali, 27 C. 670 (1899).

(5) Gunga Prosad *v.* Rajcoomar Ghose, 30 C. 617 (1903).

(6) Ram Narain Sahoo *v.* Bandi Pershad, 31 C. 737 (1904) [in order to see under what section case comes, Court must look into true nature of application not merely to the statement of the party], followed in Mangayya *v.* Srirumulu, 24 M. L. J. 477 (1913).

(7) Kasi Nath Ayyar *v.* Uthumansa, 25 M. 529 (1901); see Kattayat Pathumaryi *v.* Raman Menon, 26 M. 740 (1902), in which it was held suit was barred.

(8) Appa Rao *v.* Venkataramanayamma, 23 M. 55 (1899) [on the ground that though the jewels were not subject-matter of the decree the property had been interfered with in course of execution].

(9) Sivasami Naickar *v.* Ratnasami Naickar, 23 M. 568 (1900). *Contra*, Sivagani Achi *v.* Subrahmania, 27 M. 259 (1903).

(10) Ghazidin *v.* Fakir Bakhsh, 7 A. 73 (1884); Musaji Abdulla *v.* Damodar Das, 12 B. 279 (1888) [order under s. 545]; Mahant Ishwargar *v.* Chudasama, 12 B. 30 (1887 [under s. 545]. Provided that the order is by the Court of execution: Ramchandra *v.* Balmukund, 6 Bom. L. R. 780 (1904).

(11) Udeyadeta Deb *v.* Gregson, 12 C. 624 (1886).

(12) Vibhudapriya *v.* Vidiamohi, 22 M. 131 (1898) [appeal dismissed as no invasion had taken place]; Ramaswami Sastralu *v* Kameswaramma, 23 M. 361 (1899) F. B Dissented from at p. 364, Appd. p. 366 Dissented from Kalka Prasad *v.* Basant Ram 23 A. 346 (1901). See subject discussed in notes to Explanation, *ante*.

on the part of the decree-holder or auction-purchaser.(1) An appeal lies in an application to set aside a sale under sect. 173 of the Bengal Tenancy Act and 311 of last Code where the auction-purchaser is the *benamidar* of the judgment-debtor: (2) and from an order upon an application to deposit landlord's fee under the Bengal Tenancy Act and for confirmation of the sale and grant of sale-certificate: (3) and an order allowing the judgment-debtor's objection to delivery of possession to the auction-purchaser on the ground that the sale was invalid as the landlord's fee in the manner required by the Bengal Tenancy Act was not paid and the sale could not be confirmed.(4) But an order under sect. 174 of that Act was held not within the section.(5) Where a Small Cause Court decree was sent for execution to the regular Court of the District and an order was passed under sect. 244 by that Court (Subordinate Judge), held that an appeal lay to the District Judge.(6)

The Court can require an appellant from an order made under this section in execution of a decree to give security for the costs of the appeal and of the original suit.(7)

LIMIT OF TIME FOR EXECUTION.

Execution barred in certain cases.

48. (1) Where an application to execute a decree *not being a decree granting an injunction* has been made, no *order for the execution of the same decree* shall be *made upon any fresh application presented* after the expiration of twelve years from—

(*a*) the date of the decree sought to be *executed*, or,

(*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date *or at recurring periods*, the date of the default in making the payment or delivery in respect of which the applicant seeks to *execute* the decree.

(1) Nemi Chand Kanji *v.* Dino Nath, 2 C. W. N. 691 (1898) [ss. 244 and 311, and second appeal lies at the instance of auction-purchaser]; Hiralal Ghosh *v.* Chunder Kant, 3 C. W. N. 403, 26 C. 539 (1899); but no *second appeal* lies where none of the questions under s. 153 of the Bengal Tenancy Act are decided: Monmohini Dassi *v.* Lackhinarain Chandra, 28 C. 116 (1900); Parashram *v.* Balmukund, 32 B. 572 (1908). See cases cited in notes "Fraud."

(2) Chandmonee *v.* Santomonee, 24 C. 707; s. c., 1 C. W. N. 534 (1897) [second appeal]; in Roghu Singh *v.* Misri Singh, 21 C. 825 (1894), there was no appeal as appellant was not a party to the suit, ref. to Harabandhu *v.* Harish Chandra, 3 C. W. N. 184 (1898).

(3) Krishna Chunder Dutt *v.* Anukul Chunder, 6 C. W. N. 190 (1901).

(4) Mohim Chandra Bhuttacharjee *v.* Ram Lochan Dey, 7 C. W. N. 591 (1903) [second appeal].

(5) Kishori Mohun *v.* Sarodamani, 1 C. W. N. 30 (1890), foll. Sulh Narain *v.* Goroke Persad, 3 C. W. N. 344 (1898).

(6) Peary Lal Singh *v.* Radha Nath Singh, 11 C. W. N. 861 (1907).

(7) Dagdu *v.* Chandrabhan, 24 B. 314; s. c., 1 Bom. L. R. 837 (1899).

(2) Nothing in this section shall *be deemed*—

(*a*) to *preclude* the Court from *ordering the* execution of a decree *upon an application presented* after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; *or*

(*b*) *to limit or otherwise affect the operation of article* 180 *of the second schedule to the Indian Limitation Act, 1877.*(1)

"**Where an application to execute a decree.**"—This was held to mean any application to execute a decree, and was not confined to the last application preceding the expiry of 12 years from either of the points of time mentioned.(2) The former section referred only to decrees for the payment of money (3) or delivery of other property. A decree for the sale of mortgaged property was held not to be a decree for the payment of money, even though the judgment-debtor was personally liable for the deficiency.(4) The application of the provision has apparently been extended to all decrees with the exception stated.

The words "and granted" have been omitted. "*Granted*" has been held to mean "admitted" (5) as stated in O. XXI. r. 17, and in addition there has been issue of process in execution.(6) "*Any fresh application*" has been substituted for "subsequent application," (7) with a view to rendering it clearer that ancillary applications merely to complete arrested execution are not obnoxious to the bar.(8) It has been held that since the right to enforce a

(1) Art. 183 of Act IX. of 1908.

(2) Tileshar Rai *v.* Parbati, 15 A. 198 (1893).

(3) Bal Chand *v.* Raghunath Das, 4 A. 155 (1881); Pahalwan Singh *v.* Narain, 22 A. 401 (1900); dist. in Maharajah of Benares *v.* Lalji Singh, 24 A. 636 (1912).

(4) Fazil Howladar *v.* Krishna Bundhoo Roy, 25 C. 580 (1897); Ram Charan Bhagat *v.* Sheoborat Rai, 16 A. 418 (1894); Kartick Nath Pandey *v.* Juggernath Ram Marwari, 27 C. 285 (1899), dissented from in Abdullah Sahib *v.* Oosman Sahib, *post;* ref. Chandi Charan Roy *v.* Ambika Charan Dutt, 31 C. 792 (1904); diss. from Jadu Nath Prasad *v.* Jagmohan Das, 25 A. 541 (1903); Pahalwan Singh *v.* Narain, 22 A. 401 (1900); Abdulla Sahib *v.* Doctor Oosman Sahib, 28 M. 224 (1904); Vaidhinadasamy Ayyar *v.* Somasundram Pillai, 28 M. 473 (1904).

(5) Dewan Ali *v.* Soroshibala Dabee, 8 C. 297 (1881).

(6) Nilmoney Singh Deo *v.* Biscssur Banerjee, 16 C. 744 (1889); Chengaya *v.* Appasami, 6 M. 172 (1882); Paraga Kuar *v.* Bhagwan Din, 8 A. 301 (1886); Ramadhar *v.* Ram Dayal, 8 A 536 (1886); Ram Newaz *v.* Ram Charan, 18 A. 49, at p. 51 (1895); but see Motichand *v.* Krishnarav Ganesh, 11 B. 524 (1887).

(7) As to this term which assumed that the previous application to execute had been made under the Code itself [Annaji Appaji *v.* Ramji Jivaji, 10 B. 348 (1889); Ashootosh Dutt *v.* Doorga Churn Chatterjee, 6 C. 504 (1880)], see Gandharap Singh *v.* Sheodarshan Singh, 12 A. 571 (1890); Rahim Ali Khan *v.* Phul Chand, 18 A. 482 (1896); Virarama *v.* Annasami, 6 M. 359 (1883); Sreenath Gooho *v.* Yusoof Khan, 7 C. 556 (1881); Musharraf Begam *v.* Ghalib Ali, 6 A. 189 (1884); Ram Sarup *v.* Dasrath, 33 A. 517 (1911).

(8) Kamsilla *v.* Ishri Singh, 32 A. 499 (1910); but this has been dissented from in Bisheshwar *v.* Jasoda, 17 C. W. N. 622 (1913).

decree is a substantive right, and not matter of procedure, this section cannot bar the execution of decrees which were alive when the present Code came into force.

"**Execution.**"—See note as to bar to future execution.(1) Where a second application was made at a time when it was barred, a third was held barred though presented within three years of the second.(2)

"***Twelve years.***"—A decree for payment of money was modified on *appeal; held that* the decree to be executed being the decree made on appeal *the 12 years* mentioned in this section ran from the date of the appellate decree.(3) *The period of limitation under this section is absolute, and will not be extended* on the ground of the minority of the decree holder.(4) It cannot be extended by an agreement between a decree-holder and a judgment-debtor.(5)

"***At a certain date, or at recurring periods.***"—*The former section* referred only to orders for payment or delivery at a certain date.(6) and occasion has been taken to embody rulings (7) declaring that decrees directing periodical payments are within the meaning of the section.

"**Fraud or force.**"—Fraud or force on the part of a judgment-debtor gives a new starting-point for the period of limitation and an application for the execution of a decree may be granted at any time within 12 years after the date in which a judgment-debtor has by fraud or force prevented execution of a decree.(8) In order to obtain the benefit of the proviso it is not necessary

(1) Mungul Pershad Dichit *v.* Grija Kant Lahiri, 8 C. 51 (1881); Ram Kirpal *v.* Rup Kuari, 6 A. 269 (1883); Kanji Mal *v.* Kanhia Lal, 7 A. 373 (1885); Dinkar Ballal *v.* Hari Shridhar Apte, 14 B. 206 (1889); Gourmoni Dabee *v.* Jagat Chandra Audikhari, 17 C. 57, 63 (1889); Nanchand *v.* Vithu, 19 B. 258 (1894); Kuppu Ammal *v.* Saminatha Ayyar, 18 M. 482 (1894); Venkatanarasimha v. Papammah, 19 M. 54 (1895); Futteh Narain Chowdry *v.* Chundrabati Chowdrain, 20 C. 551 (1892); Bandey Karim *v.* Romesh Chunder Bundopadhya, 9 C. 65 (1882); Bhoboona *v.* Jobraj Singh, 11 C. L. R. 277 (1882); Dalichand Bhudar *v.* Bai Shivkar, 15 B. 242 (1890) [foll. Nepal Chandra Sadookhan *v.* Amrita Lall Sadhookhan, 26 C. 888 (1899)]; Manjunath Badrabhat *v.* Venkatesh Govind, 6 B. 54 (1881); Hurrosoondary Dassee *v.* Jugobundhoo Dutt, 6 C. 203 (1880); Narhar *v.* Krishnaji, 36 B. 368 (1912); 14 Bom. L. R. 381.

(2) Bhagwan Jethiram *v.* Dhondi, 22 B. (1896).

(3) Mahomed Mehdi Bella *v.* Mohini Chowdhry, 34 C. 874 (1907); Muhammad Razi *v.* Karbalai Bibi, 32 A. 136 (1909).

(4) Ramana *v.* Babu, 24 M. L. J. 96 (1912); 37 M. 186; but see Midnapur Zemindary *v.* Naresh, 16 C. W. N. 109 (1911). In the former case it was held that whether a decree is complete or not must be decided by the law in force when the decree was made.

(5) Raghunath *v.* Kashi Prosad, 15 C. L. J. 678 (1911); and see Bhagwant Ram Chandra *v.* Kaji Mahamad, 36 B. 498 (1912); and Jwraj *v.* Babaji, 29 B. 68 (1904), period cannot be extended.

(6) See Yusuf Khan *v.* Sirdar Khan, 7 M. 83 (1883); Sabhanatha Dikshatar *v.* Subba Lakshmi, 7 M. 80 (1883); Kaveri *v.* Nenkamma, 14 M. 396 (1890)*c* Jogobundhoo Dass *v.* Huri Rawoot, 16 C. 16 (1888); Bal Chand *v.* Raghunath Dass, 4 A. 155 (1881); Jhoti Sahu *v.* Bhubun Gir, 11 C. 143 (1884).

(7) Lakshmibai Bapuji *v.* Madhavrav Bapuji, 12 B. 65 (1887); Ashutosh Bannerjee *v.* Lukhimoni Debya, 19 C. 139 (1891).

(8) Venkayya *v.* Raghava Charlu, 22 M. 320 (1899); Mohsin Ali *v.* Masum Ali, 34 A. 20 (1911).

that a judgment-creditor should prove that the fraud of the judgment-debtor continued so as to prevent execution of the decree at any time.(1) The action of a judgment-debtor, who, knowing that a warrant of attachment has issued against his moveable property, locks up his house and so prevents the moveable property therein from being attached, amounts to fraud,(2) as also a frivolous application to set aside the decree made for the purpose of delay (3) and preventing (4) or evading (5) arrest or attachment.(6) The word "fraud" here has a wider sense than that in which it is generally used in English law.(7)

Article 180, Limitation Act.—The former section which prescribed an absolute period of limitation, and was apparently rendered applicable to a High Court by sect. 638, was in conflict with article 180 of the Limitation Act, which permits a revivor in the case of decrees of High Courts and orders of His Majesty in Council. Statutory authority has therefore been given to the rulings which declare that article to be independent of the section.(8) This is art. 183 of Act IX. of 1908.

TRANSFEREES AND LEGAL REPRESENTATIVES.

49. Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Transferee.

Transfer subject to equities.—See as to the application of this well-known principle, first enacted by the Code of 1877, cases cited.(9) H, the holder of a usufructuary mortgage over the property of B, obtained against the latter a simple money decree, which had nothing whatever to do with the mortgage or the debt secured thereby. H transferred this simple money decree to M. Held that there was nothing to prevent M from bringing to sale in execution of this decree the property mortgaged by B to H.(10) A

(1) Venkayya *v.* Raghava Charlu, 22 M. 320 (1899); Mohsin Ali *v.* Masum Ali, 34 A. 20 (1911).

(2) Ib.

(3) Abdul Khadir *v.* Shaiva Ravuthar, 35 M. 670 (1911); 22 M. L. J. 35; Nathuram *v.* Krishna, 24 M. L. J. 270 (1913); Rai Sham Kissen *v.* Damar Kumari Debi, 11 C. W. N. 440 (1906).

(4) Bhagu Jetha *v.* Bawasaleb, 9 B. 318 (1885).

(5) Pattakara Annamalai *v.* Rangasami Chetti, 6 M. 365 (1883).

(6) Visalatihi Ammal *v.* Sivasankara Taker, 4 M. 292 (1881).

(7) Raghunath *v.* Kashi Prosad, 15 C. L. J. 678 (1911).

(8) See Mayabhai Prembhai *v.* Tribhuvandas, 6 B. 258 (1881); Ganapathi *v.* Balasundara, 7 M. 540 (1884); Futteh Narain Chowdhry *v.* Chundrabati Chowdhrain, 20 C. 551 (1892); Sreekrishna Doss *v.* Alumbi Ammal, 36 M. 10 (1911).

(9) Sinnu Pandaram *v.* Santhoji Row, 26 M. 428 (1902); Kristo Ramani Dassee *v.* Kedar Nath Chakravarti, 16 C. 619 (1889); Grish Chunder Sein *v.* Obhoy Churn Mullick, 6 C. L. R. 498 (1880); Kaim Ali Jawardar *v.* Lakhikant Chuckerbutty, 1 B. L. R. 23 F. B. (1868); Ram Chunder *v.* Mohendro Nath Bose, 21 W. R. 141 (1874).

(10) Banh Bal *v.* Manni Lal, 27 A. 450 (1905).

transferee was held prohibited from selling mortgaged property in execution of the decree transferred to him by sect. 232 of the last Code if not also by the present section.(1)

[s. 234.] **50.** (1) *Where* a judgment-debtor dies before the decree has been fully *satisfied*, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

Legal representative.

(2) *Where the decree is executed against* such *legal* representative, *he* shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel *such legal* representative to produce such accounts as it thinks fit.

"**Where a judgment-debtor dies.**"—The section contemplates the case of a person who, being alive when a decree is passed against him, dies before execution is fully had of that decree. Where, therefore, a party to a suit was dead before even the plaint was filed, and a decree was given against him, it was held incapable of enforcement.(2) Where, however, after the trial is concluded, judgment is reserved, and after that a party dies, then on the principle *actus curiæ neminifacit injuriam*, judgment may be entered up *nunc pro tunc* and the decree is a valid decree.(3) An attachment,(4) and execution proceedings generally,(5) do not abate, and the section does not apply to cases where the judgment-debtor dies after attachment but before sale.(6) Nor does it apply to a decree-holder seeking possession, if the order for it was passed prior to the death of the judgment-debtor; (7) nor does the Code contemplate the representatives of the judgment-debtor being placed on the record after the appellate decree has been passed.(8) This section applies to an appeal filed during the life of a judgment-debtor, but heard after his death.(9)

"**Holder of the decree.**"—That is the person whose name appears on the record as the person in whose favour the decree was made, or some person whom the Court by order has recognized as the decree-holder from the original plaintiff or his representatives.(10)

(1) Jwarathnam Mudaliar *v.* Srinivasa Mudaliar, 17 M. L. J. 503 (1907); 31 M. 33.

(2) *In re* Girendronath Tagore, 14 B. L. R. L. C. 334 (1875).

(3) Chetan Charan Das *v.* Balbhadra Das, 21 A. 314 (1899), and cases there cited.

(4) Sheo Prasad *v.* Hira Lal, 12 A. 440 (1889).

(5) Gulabdas *v.* Lakshman Narhar, 3 B. 221 (1879).

(6) Sheo Prasad *v.* Hira Lal, 12 A. 440 (1889); diss. from Romasami *v.* Bagirathi, 6 M. 180 (1883).

(7) Bryakka *v.* Fakira, 12 M. 211 (1889).

(8) Hirachand Harjivandas *v.* Kasturchand Kasidas, 18 B. 224 (1893); dist. in Purushotam *v.* Rajbai, 34 B. 142, 150 (1909).

(9) Narendra *v.* Gopal, 17 C. L. J. 634 (1912).

(10) Paupayyah *v.* Narasannah, 2 M. 216 (1880).

"May apply to the Court."—It was held, under the last Code, by the Calcutta High Court, that an application to execute a decree against the legal representative might also be made to the Court to which a decree was transferred for execution.(1) More recently a Full Bench of the Madras High Court held that where a decree of one Court had been transferred to another Court for execution, an application by the decree-holder under this section to execute the decree against the legal representatives of the deceased judgment-debtor must be made to the Court which passed the decree, and not to the Court executing the same.(2) But the same Court has held that an order made by the executing Court is not wholly void, and that an objection on this ground may be waived.(3)

"To execute the same."—The substantive application should be, in the words of the section, one for execution of the decree. But an application for substitution of the legal representatives of a deceased judgment-debtor has been considered in substance an application for execution.(4)

Liability of representative.—This section provides that the Court executing the decree is to ascertain the liability, that is to inquire whether any particular property in the hands of the representative or which came to his hands, was the property of the deceased debtor, and if it has been disposed of, whether it has been duly applied. The question whether property is available for execution is a question relating to execution under sect. 47, and must, when it arises between the persons mentioned in that section, be determined thereunder and not by separate suit.(5) "*He shall be liable only to the extent, etc.,*" indicates that two kinds of property can be attached: first, property of the debtor found in the hands of the representative; and secondly, property of the representative from whatever source derived, to the extent to which he has wasted the assets descended to him without satisfying the debts of the deceased.(6) The representative is, however, liable, summarily, only in respect of the property actually

(1) Sham Lal Pal *v.* Modhu Sudan Sircar, 22 C. 558 (1895).

(2) Swaminatha Ayyar *v.* Vaidyanatha Sastri, 28 M. 466 (1905); and see Hirachand Harjivandas *v.* Kasturchand Kasidas, 18 B. 224 (1893).

(3) Thamboo Pillai *v.* Sriramulu Naidu, 17 M. L. J. 300 (1907).

(4) Jogendra Nath Roy *v.* Rasik Chandra Banerjee, 2 C. L. J. 544 (1905).

(5) Kuriyali *v.* Mayan, 7 M. 255, 257, 258 (1883); Punchanan Bundopadhya *v.* Rabia Bibi, 17 C. 711 (1890); Rajrup Singh *v.* Ramgolam Roy, 16 C. 1 (1888); Mungeshar Kuar *v.* Jamoona Prashad, 16 C. 603 (1889); Raghubar Dial *v.* Hamid Jan, 12 A. 73 (1889); Nimba Harishet *v.* Sitaram Paraji, 9 B. 458 (1885); Mulmantu *v.* Ashfak Ahmad, 9 A. 605 (1887); Ravunni Menon *v.* Kunju Nayar, 10 M. 117 (1886); Chintamoney Dutt *v.* Mohesh Chandra Banerjee, 23 C. 454 (1896). See other cases and notes to sect. 47, *ante*, Seth Chand Mal *v.* Durga Dei, 12 A. 313 (1889); Gokulsingh *v.* Kisansingh, 34 B. 546, 552 (1910).

(6) Rajrup Singh *v.* Ramgolam Roy, 16 C. 1, at p. 5 (1888); Chintamoney Dutt *v.* Mohesh Chundra Banerjee, 23 C. 454 (1896). As to whether creditors can sue and can follow property into the hands of third parties, see Bazayet Hossein *v.* Dooli Chand, 4 C. 402 (1878); s. c., 1 A. 211; Greender Chunder Ghose *v.* Mackintosh, 4 C. 897 (1879); Narsingh Das *v.* Najmooddin Hossein, 8 C. 20 (1881); Mirza Mahomed *v.* Widow of Balmakund, 3 I. A. 241, 245 (1876); Oriental Bank *v.* Gobinloll Seal, 10 C. 713 (1884); Mt. Wahiddunnissa *v.* Mt. Shubratton, 6 B. L. R. 54 (1870).

received by him or taken into his disposition.(1) When an application is made under this section the Court should, under O. XXI. r. 21, issue notice on the person named calling upon him to show cause why the decree should not be executed against him as such representative. If he denies that he is so, the Court which passes a decree decides whether the person against whom execution is sought is the legal representative, though it is for the Court executing the decree to decide to what extent such person is liable.(2) The decree-holder should show that property of the deceased has come into the possession of his representative, and it is then on the latter to show that he has properly applied the property.(3) The heirs are liable in respect of assets even though it may be pleaded that the debtor was a *benamidar*.(4) The right of the decree-holder to have his debt paid out of the assets of the deceased in the hands of the legal representative is not affected by the provisions of sect. 104 of the Probate and Administration Act.(5)

Legal representative.—The last Code did not contain any definition of the term "legal representative." The framers of the former section in using this term must either have understood it in some defined sense, or have intended thereby merely to refer to such persons as, under the law applicable to the particular case, might be held to be the legal representatives of a deceased person. The first supposition was negatived by the fact that the Legislature omitted to declare what were the characteristics of a legal representative for the purposes of this section.(6) It might have been said that such a definition was unnecessary, as the term has a well-known technical meaning. In their strictest and most ordinary sense the words "legal representatives" are understood to mean executors and administrators only.(7)

Though the decisions upon the construction of wills which hold it to be a flexible term and have given it another sense, such as next-of-kin or descendants, do not control its legal meaning in that they proceed upon the principle that if the Court finds that a testator attached to particular words a different meaning from that which is their proper legal sense, the Court is bound so to construe and give effect to the will, not in its strict legal sense, but in the way in which the testator himself used the words,(8) the term is yet one which is naturally capable of a more extended sense than that in which it is ordinarily and strictly employed. Had the Legislature, therefore, intended to confine it to particular persons only, viz., executors or administrators, it would have expressly named these persons and would not have used a term which, though in its most strict sense denoting executor or administrator only, is yet capable

(1) Khashrobhai *v.* Hormazsha, 11 B. 727 (1887); see Ram Golam Doby *v.* Ayma Begum, 12 W. R. 177 (1869).

(2) Seth Shapurji *v.* Shankar Das Dube, 17 A. 431 (1895); as to successful objector's cost, see Bishen Dayal *v.* Bank of Upper India, 13 A. 290 (1890).

(3) See Rajah Roodro Narain *v.* Nittyanund Doss, 8 W. R. 195 (1867); Ascemoonnissa *v.* Ameeroonissa, 15 W. R. 285 (1871).

(4) Doorga Soondaree *v.* Soorja Monee, 8 W. R. 101 (1867).

(5) Venkatarangayan Chetti *v.* Krishnasami Ayyangar, 22 M. 194 (1898).

(6) Dinamoni Chaudhurani *v.* Elahadut Khan, 8 C. W. N. 843, 855 (1904), in which the subject will be found fully discussed.

(7) Ib.; Price *v.* Strange, 6 Madd. 159.

(8) Eagleton *v.* Horner, 37 Ch. D. 703, 711.

of a wider meaning. Where there is an executor or administrator, they alone are the legal representatives of a deceased judgment-debtor.(1) But the section is also commonly applied, both in the case of heirs (2) as well as in that of executors and administrators, and the term "legal representative" has been defined to ordinarily mean all these classes of persons.(3)

When there is no executor or administrator, but succession by heirship as in cases governed by the Bengal School of Hindu Law, or in cases of separate and self acquired property under Mitakshara Law, the decree must be executed against the heir as the legal representative within the meaning of this section.(4) The section has, however, been applied to cases where the succession is otherwise than by heirship to the last holder of an estate, as also to cases where the estate accrues to the present holder by survivorship.(5) In these cases where a decree is passed against a judgment-debtor not in his or her personal capacity, but in a representative capacity, the decree may be executed against the person who, though not an heir of the judgment-debtor, the last holder of the estate, is entitled thereto after his or her death whether as reversioner or surviving co-parcener.(6) So inasmuch as a decree properly obtained against a Hindu widow in her representative capacity is binding upon her husband's reversioner.(7) where a suit has been instituted or defended by a Hindu widow in her representative capacity, the reversioners, though they do not claim through her but as heirs of her husband, have yet been held to be her legal representatives in respect of the estate held by her as such Hindu widow.(8) Again in the case of a joint Hindu family governed by the Mitakshara,

(1) Dinamoni Chaudhurani *v.* Elahadut Khan, 8 C. W. N. 843, 856 (1904), see sect. 179, Act X. of 1865; Pogose *v.* Catchick, 3 C. 708 (1878); Sukh Nandan *v.* Rennick, 4 A. 192 (1882); Shaikh Moosa *v.* Shaikh Essa, 8 B. 241 (1884); Mancharam *v.* Kalidas, 19 B. 821, 827 (1894).

(2) Greender Chunder Ghose *v.* Mackintosh, 4 C. 897, 908 (1879). In Rani Kanno Dai *v.* Lacy, 19 A. 235 (1896), rents of immoveable property in the hands of the widow of a deceased were held not to be his assets. And where a purely personal decree was given against a partner, execution, it was held, could only go against the heiress and not against an undivided brother: Veerappa Chettiar *v.* Rama Swami Aiyar, 27 M. 106 (1903); Gyanundra *v.* Rani Nihalo, 32 A. 404 (1910).

(3) Ishan Chunder Sirkar *v.* Beni Madhub Sirkar, 24 C. 62, 71 (1896).

(4) Dinamoni Chaudhurani *v.* Elahadut Khan, 8 C. W. N. 843, 856 (1904).

(5) Ib. For succession by Shebait, see Mohan Lalji *v.* Gordhan Lalji Maharaj, P. C., 35 A. 283 (1913).

(6) Dinamoni Chaudhurani *v.* Elahadut Khan, *supra*, in which case the principle of representation which exists by law in the case of decrees against Hindu widows and co-parceners was extended to cases of agreement and conveyance between parties (Woodroffe, J., dubit).

(7) Tribhuwan Sunder Kuar *v.* Sri Narain Singh, 20 A. 311 (1898).

(8) Ramkishore Chuckerbutty *v.* Kally Kanto Chuckerbutty, 6 C. 479 (1880); Prem Moyi Chowdhurani *v.* Preo Nath Dhur, 23 C. 636 (1896); Tribhuwan Sunder Kuar *v.* Sri Narain Singh, 20 A. 341 (1898); Musala Reddi *v.* Ramayya, 23 M. 125, 133 (1899); see also Hari Saran Moitra *v.* Bhubaneswari Debi, 16 C. 40 (1888) [decree against widow representing estate enforced against minor adopted son]; but the heir of the last full owner is not in regard to a mere personal money decree against the widow her representative; Rikhai Rai *v.* Sheo Pujan, 33 A. 15 (1910); Kameshwar Pershad *v.* Run Bahadur Singh, 12 C. 458 (1886); Mungeshwar Kuar *v.* Jamoona Prashad, 16 C. 603 (1889).

though it has been held by the Madras and Allahabad, and formerly by the Calcutta,(1) High Courts, that in the case of a personal decree for money obtained against the father the interest of the latter in the joint ancestral properties is not assets in the hand of the son when he dies, and consequently, notwithstanding his obligation to pay his father's debt, proceedings cannot be taken against him under this section as the legal representative of his father, the contrary view has been adopted by the Bombay High Court in that the obligation of a son to satisfy his father's debt is within the scope of the decree against the father whether on the ground of representation of the sons by their father,(2) or on the ground that the creditor has the power to attach and sell the entire interest in the property in execution proceedings against the father; (3) and the Calcutta High Court has recently held that the liability may be determined in the execution proceedings if the legal representative has been properly brought on the record under this section.(4) This question is now settled by sect. 53, *post*. Where, moreover, the interest of the father has been attached during his lifetime,(5) or a decree directing a sale of hypothecated property has been passed in the lifetime of the judgment-debtor,(6) or the judgment-debtor has been expressly sued as representing the undivided family,(7) or the decree charges the family property; (8) in all these cases the decree, it has been held, may be executed against those who in succession, in time, take by the legal title of survivorship and not by that of heirship.

The principle under consideration has been still further extended to the case of a person who, without title as administrator, executor, heir, reversioner or surviving co-parcener, is the *de facto* possessor of the estate of a deceased Hindu, it having been held that he must be treated for some purposes as his representative, and that a judgment obtained against such a representative is not a mere nullity.(9) The first of these cases proceeds upon the assumption

(1) See Juga Lal Chaudhuri *v.* Audh Behari Prasad Singh, 6 C. W. N. 223 (1900), and cases there relied on, and Periasami Mudaliar *v.* Seetharama Chettiar, 27 M. 243, 248 (1903); Natasayyan *v.* Ponnusami, 16 M. 99, 101, 103 (1892); Anabudra *v.* Dorasami, 11 M. 413 (1888).

(2) Jagabhai *v.* Vijbhukandas, 11 B. 37 (1886).

(3) Umed Hathi Sing *v.* Ghoman Bhaije, 20 B. 385 (1895); followed in Chander Pershad *v.* Sham Koer, 33 C. 676 (1905); Shivram *v.* Sakharam, 33 B. 39 (1908).

(4) Amar Chandra Kundu *v.* Sebak Chand Chowdhury, 34 C. 642 (1907), F. B.; s. c., 11 C. W. N. 593; Chander Pershad *v.* Sham Koer, 33 C. 676 (1905); but a question which raises the validity of the decree cannot, Hira Lal Sahu *v.* Parmeshar Rai, 21 A. 356 (1899).

(5) Lachmi Narain *v.* Kunji Lal, 16 A. 455, 456 (1894); Suraj Bunsi Koer *v.* Sheo Prasad Singh, 5 C. 148 (1879); Kamataka *v.* Audukari, 5 M. 232, 233 (1882); see as to attachment during lifetime of judgment-debtor, Abdur Rahman *v.* Shankar Dat Dube, 17 A. 162 (1895).

(6) Sivagiri Zemindar *v.* Tiruvengada, 7 M. 339 (1884).

(7) Muttia *v.* Virammal, 10 M. 286, 288 (1886); Karpa Kambal *v.* Subbayyan, 5 M. 234 (1882).

(8) Muttia *v.* Virammal, *supra*.

(9) Prosanno Chunder Bhattacharjee *v.* Kristo Chaitunno Pal, 4 C. 342. This case, which was followed in Janaki *v.* Dhanu Lal, 14 M. 454 (1891), and Chuni Lal Bose *v.* Osmond Beeby, 30 C. 1044, 1057 (1903), has been described as a peculiar one; Ram Chandra Mookherjee *v.* Raja Ranjit Singh, 4 C. W. N. 405, 413 (1899); Erava *v.* Sidramappa, 21 B. 424 (1895).

that under the law as it existed prior to 1881 the executor did not represent the deceased until he had obtained probate, and the hardship in the particular case which led the Court to take the view it did, no longer exists. The Madras High Court has more recently held that there is no authority for holding that the words "legal representative" include any person who has taken possession of the property of a deceased judgment-debtor, and that a stranger in possession of property who was not a party to the decree ought not to be proceeded against in execution or otherwise than by a regular suit, and that the words "legal representative" cannot be taken to include any person who does not in law represent the estate of the deceased.(1) And though in the two former cases the question arose with reference to a suit brought by the creditor against the representative, and not with reference to proceedings taken in execution of a decree, the Calcutta High Court has expressed an opinion that the principle underlying the observations in these cases are equally applicable to proceedings in execution as to proceedings by regular suit.(2)

From this review of the authorities it will appear that judicial decisions prior to this Code extended the sense of the term "legal representative" beyond that of its ordinary meaning of "administrator, executor and heir," and though such extension has been attended with doubt and has in some cases been the subject of conflicting decisions, it was too late to endeavour, however convenient it might have been, to secure for the term that which is perhaps its strict and legitimate sense. The term was therefore not limited to administrators, executors and heirs, and must have been held to include any person who in law represented the estate of a deceased judgment-debtor.(3) And the term has now been so defined in sect. 2, clause (11).

A decree passed against the *Valiya* Rajah of a *Kovilagom* is *primâ facie* binding on his successor and his *Kovilagom*.(4) The successor to an unsettled *polliem* is not liable for the debts of the person whose heir he is as respects that *polliem*. The *polliem* reverts absolutely to the Government, and by the fresh grant to the successor a newly created estate for life becomes vested in him.(5) In the undermentioned case an impartible *Raj* in the possession of the respondent was held not to be assets of the deceased, nor was he the legal representative of the deceased; (6) and a decree against a limited company was held unenforceable against another company.(7) A decree containing an injunction can be enforced against a legal representative under this section.(8)

(1) Chathakelan *v.* Govinda Karumar, 17 M. 186 (1893).

(2) Chuni Lal Bose *v.* Osmond Beeby, 30 C. 1044, 1058, 1059 (1903).

(3) Dinamoni Chaudhurani *v.* Elahadut Khan, 8 C. W. N. 843 (1904).

(4) Kerala Varma *v.* Shangaram, 16 M. 452 (1892).

(5) Arbuthnot *v.* Oolagappa Chetty, 5 M. H. C. R. 303 (1870).

(6) Kali Krishna Sarkar *v.* Raghunath Deb, 31 C. 224 (1903); dist. in Zamindar of Karvetnagar *v.* Trustee of Tirumalai, 32 M. 429, 436 (1909).

(7) Harish Chandra Tewary *v.* Chandpore Co., Ltd., 30 C. 961 (1903); Arbuthnot's Industrials, Ltd. *v.* Muthu Chettiar, 31 M. 464, (1908).

(8) Sakarlal Jaswantrai *v.* Ba Parvatibai 26 B. 283 (1901); s. c., 4 Bom. L. R. 14.

Execution has been allowed under this section against the legal representative of the legal representative.(1)

There may be an estoppel. Thus, though ordinarily a Court has no power to put a debtor's vendee on the record,(2) where a person filed a petition in a suit, saying that all the property of the judgment-debtor had passed to him and for several years opposed execution, it was held that though his name was not on the record he had yet made himself liable as a defendant.(3) The legal representative binds all property in his possession, and where an adult legal representative was in possession a sale was held good and not affected by the non-appointment of a guardian *ad litem*.(4)

The Code of 1859 gave power to execute a decree *against the estate of* a deceased judgment-debtor. A proposal to revive this provision having been excepted to, the criticisms were met by a further proposal to give a remedy against the person in possession of the estate. As already stated in the last paragraph, it was formerly a question whether the term legal representative in sect. 239 of the last Code included a stranger who, not being a party to the decree, was in possession of the property of the deceased. It was held (5) under the Code of 1859, and this appears to be law now, that if no other legal representative can be found, the decree-holder may then proceed against persons in possession of the estate belonging to the deceased. The definition in sect. 2, clause (11), includes a person intermeddling with the estate.

It was proposed to enact that the death of a judgment-debtor before the decree had been fully executed should not be deemed to affect the validity as against such legal representative of any proceeding lawfully taken during his lifetime. Where property has actually been sold by order of the Court executing the decree, probably no difficulty arises. This clause was, however, thought at one time to be necessary to meet the case of a judgment-debtor dying before the sale is effected.(6) It has not, however, been introduced.

PROCEDURE IN EXECUTION.

Powers of Court to enforce execution.

51. *Subject to such conditions and limitations as may be prescribed the Court may, on the application of the decree-holder, order execution of the decree—*

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without attachment of any property;

(c) by arrest and detention in prison of any person;

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require.

(1) Jafri Begam *v.* Saira Bibi, 22 A. 367 (1900).

(2) Dhoroni Dhur Sen *v.* Agra Bank, 3 C. L. R. 421 (1878); as to estoppel in execution, see Trimbak *v.* Hari Laxman, 34 B. 575 (1910).

(3) Lalla Poorhit Lall *v.* Mt. Sabeeran, 7 W. R. 382 (1867).

(4) Kunhammad *v.* Kutti, 12 M. 90 (1888).

(5) Syud Nadir Hossein *v.* Bissen Chand Bassarat, 3 C. L. R. 437 (1878).

(6) See Stowell *v.* Ajudhia Nath, 6 A. 255 (1884); but see Krishnayya *v.* Unnissa Begam, 15 M. 399 (1891).

Powers in execution.—See following section up to sect. 74 and O. XXI. with notes thereon. Sects. 51–54 deal with procedure in execution generally; 55–59 with arrest; 60–64 with attachment; 65–67 with sale; and various rules in the Order mentioned deal with the same subjects. See notes to O. XXI., *post*.

Enforcement of **decree against** *legal* **representative.**

52. (1) *Where a* decree *is passed* against a party as the legal representative of a deceased person, and the decree *is* for *the payment of* money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) *Where* no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property *in respect of which he has failed so to satisfy the Court* in the same manner as if the decree had been against him personally.

Decrees against legal representatives.—This section corresponds with sect. 203 of Act VIII. of 1859 save for some slight verbal alterations and the substitution of the words "*remains in the possession of the judgment-debtor and he*" by s. 252, Act XIV. of 1882, for the words "*can be found and the judgment-debtor*" of the Code of 1859, and the words "*in respect of which he has failed so to satisfy the Court*" by the present Code for the words "*not duly applied by him*" previously appearing. The Code of 1859 also had a section (211) providing the same procedure where the decree was ordered to be executed against the legal representative.

"**Where a decree is passed.**"—A decree passed against a person already dead, cannot however, be executed against his legal representatives.(1)

"**Legal representative of the deceased.**"—This includes persons who have been legal representatives in execution proceedings; (2) and the heir of an intestate.(3) A person taking possession of the estate of a deceased Hindu leaving a will may be treated as the legal representative until Probate is taken; (4) and the widow of a Hindu insolvent may be his legal representative notwithstanding order vesting his estate in the Official Assignee; (5) but a person is not the legal representative where another has obtained grant of administration,(6) nor if he does not represent the estate of the deceased.(7)

(1) In matter of Gurendronath Tagore, 14 B. L. R. 334, *note* (1868).

(2) Jafur Hossein *v.* Hingun Jan, 8 W. R. 161 (1867).

(3) Greender Chunder Ghose *v.* Mackintosh, 4 C. L. R. 210 (1878).

(4) Prosunno Chunder Bhuttacharjee *v.* Kristo Chaitunno, 4 C. 342 (1878).

(5) Chandmull *v.* Soondery Dossee, 22 C. 259 (1894); Grey *v.* Hazari Lal, 30 A. 486 (1908).

(6) Sukh Nandan *v.* Rennick, 4 A. 192 (1882).

(7) Subbanna *v.* Venkatakrishnan, 11 M. 408 (1888); Kaliappan *v.* Varadarajulu, 33 M. 75 (1909).

Where a Hindu widow is sued as such and as guardian of her son and a decree obtained against her as her husband's representative, the sale in execution of property includes the son's interest therein,(1) as also where the son was an adopted son; (2) but where the widow in the plaint was described as the widow of A deceased and the mother of D and B minors, and the decree (on a bond due by her husband) was against her personally it was held the sale of the minor's property was invalid.(3) So also where a Hindu defendant died leaving a widow and a minor son and the suit was continued against the widow, not as guardian of her son, and after the widow's death, against the sister of the deceased though not appointed guardian *ad litem* of the minor or administrator of his estate, the minor son was not bound.(4) So where a widow borrowed, not as administrator and without pledging any specific property of the estate, it was held to be her personal debt,(5) that is so where the debt is for rent,(6) but not where it was for necessary repairs.(7) Where, however, the mother of the deceased obtained a personal decree against his widow for maintenance payable after his death, only the widow's interest in the estate of the deceased could be sold in execution.(8) The test as to whether a decree against a Hindu widow binds the reversioners is whether the cause of action was one personal to her or one affecting the estate of the reversioner; (9) and the question must be decided from the decree and the execution record.(10)

As to Mahomedans, a decree against one of the heirs cannot bind the other heirs,(11) and a decree by consent against some of the heirs for a debt due by the deceased only binds those who are parties.(12) [This is not so in the case of Hindus.(13)] A sale under a decree against a Mahomedan daughter, who though sued as representative, did not represent the whole estate, there being a widow and another daughter, carried only the share of the judgment-debtor; (14) so also a Mahomedan daughter is not bound by a decree made against the widow of her father in respect of his debts or by a subsequent sale by the widows to the judgment-creditor, but could only recover her share of the property on payment of her share of her father's debts; (15) Mahomedan

(1) Court of Wards *v.* Ramaput Sing, 10 B. L. R. 294 (1872); 17 W. R. 459; 14 M. I. A. 605.

(2) Norendro Nath Pahari *v.* Bhupendra Narain, 23 C. 375 (1895).

(3) Alukmonee *v.* Ban Madhub, 3 C. L. R. 473 (1878).

(4) Jatha Naik *v.* Venktapa, 5 B. 14 (1880).

(5) Gadgeppa *v.* Apaji, 3 B. 237 (1879); Ramasami *v.* Sellattammal, 4 M. 375 (1881).

(6) Kristo Gobind *v.* Hem Chunder, 16 C. 511 (1889).

(7) Hurry Mohun *v.* Gonesh Chunder, 10 C. 823 (1884).

(8) Baijun Doobey *v.* Brij Bhookun, 1 C. 133 (1875); 2 I. A. 275.

(9) Jotendro Mohun *v.* Jogul Kishore, 7 C. 357 (1881); Narana Maiya *v.* Vasteva, 17 M. 208 (1893); Gadgeppa *v.* Apaji, 3 B. 237 (1879).

(10) Radha Mohun *v.* Soshi Bhoosun, 3 C. L. R. 530 (1878).

(11) Sitanath *v.* Roy Luchmiput, 11 C. L. R. 268 (1882).

(12) Assamathen *v.* Luchmeeput, 4 C. 143 (1878).

(13) Jutadhari *v.* Rughoobeer, 9 C. 508 (1883).

(14) Hendry *v.* Mutty Lall Dhur, 2 C. 395 (1876).

(15) Hamir Singh *v.* Zakia, 1 A. 57 (1875). See also Jafri *v.* Amir Muhammed, 7 A. 822 (1885); Muhammad Awais *v.* Har Sahai, 7 A. 716 (1885); Datta Mal *v.* Hari Das, 23 A. 263 (1901).

heirs, who are not parties to a suit, not being bound by a sale in execution but cannot recover their shares without paying their share of the debts; (1) as the purchaser does not acquire the whole estate but acquires it subject to all legal and equitable rights of inheritance.(2) Thus in a mortgage sale the heirs of the mortgagor who were not parties to the suit were given an opportunity to redeem.(3) The Bombay High Court, however, held that a daughter though not a party was bound by the sale.(4) When, however, an heir in possession is sued and a decree made against the assets of the deceased the decree binds the other heirs.(5)

"**Decree is for the payment of money.**"—A decree for accounts within a specified period which the defendant survived without proceedings being taken against him cannot, after his death, be executed against his widow and representative.(6)

"**Out of the property of the deceased.**"—The legal representative can set up an answer that the property in her possession is her own and does not belong to the deceased's estate.(7) A decree obtained against the remainder-man, a brother of the deceased, will not enable the creditor to touch the estate in the hands of the widow; (8) but in execution of a decree against a joint family property bought by a member of the family with joint funds may be taken in execution.(9) The Court in execution proceedings will look at the substance of the transaction.(10) See also sect. 53.

"**May be executed.**"—The legal representative is not entitled in the execution stage to reopen the whole case and to inquire into the nature of the debt; (11) but can bring a suit.(12) Sect. 282 of the Indian Succession Act, where applicable, does not prevent a decree-holder having the whole of his decree satisfied out of the assets of the deceased so far as they go to the exclusion of other creditors whose claims are admitted but who have not obtained decrees.(13) Where successive applications have been made for years against a party merely as representative of a deceased defendant, execution cannot be taken out against him personally as one of the original defendants, even if he were liable in both capacities.(14)

(1) Hamir Singh *v.* Zakia, 1 A. 57 (1875).

(2) Sham Coomar *v.* Juttun Bibee, 14 W. R. 448 (1870); see also Raj Kristo Singh *v.* Bungshee, 14 W. R. 448, *note* (1868).

(3) Shaik Abdulla *v.* Haji Adbulla, 5 B. 8 (1884).

(4) Khurshetbibi *v.* Keso, 12 B. 101 (1887); see also Nuzeerun *v.* Ameerooddeen, 24 W. R. 3 (1875).

(5) Motijan *v.* Misrijan, 10 C. L. R. 346 (1882); Muttyjan *v.* Ahmed Ally, 8 C. 370 (1882) [followed in Amir Dulhin *v.* Baij Nath, 21 C. 311]; Davalava *v.* Bhimali, 20 B. 338 (1895).

(6) Bidhoo Mookhee *v.* Beejoy Keshul, 12 W. R. 495 (1869).

(7) Ameeroonnessa *v.* Meer Mahomed, 20 W. R. 280 (1873).

(8) Natha Hari *v.* Jamni, 8 B. H. C. A. J. 37.

(9) Bissessur Lall *v.* Luchmessur, 6 I. A. 233.

(10) Ib.; Sheo Persaud *v.* Saheb Lal, 20 C. 453 (1892).

(11) Sheo Sahoy *v.* Ram Bhunjun, 23 W. R. 127 (1874).

(12) Bustoo *v.* Ram Purmessur, 24 W. R. 364 (1875).

(13) Nil Komul *v.* Reed, 17 W. R. 513 (1872).

(14) Prem Lall *v.* Hosseinoddeen, 13 W. R. 36 (1870).

"**Any such property.**"—Under a decree on a bond against the widow of the deceased obligor, a Hindu, the property of the debtor, described as the property of the widow, was sold, and it was held that the sale was good against the son and heir of the deceased; (1) so, where property is described at the time of the execution sale as the property of the judgment-debtors, who were sued as mere representatives of the deceased judgment-debtor, *primâ facie* what is sold is the property of the deceased debtor, and even if the decree is in terms as if it were a personal decree yet it must be construed as if it was for the debt of the deceased.(2) But in a case where in the judgment, though not in the decree, the widow (who was only entitled to maintenance) was described as the representative of her deceased husband, the suit being for the husband's debt, the sale of her interest did not affect the deceased's estate.(3) To ascertain what was sold under the right title and interest of the widow the Court is at liberty to look at the judgment. If the judgment bound the reversionary heir, the purchaser took the estate absolutely.(4) Under a decree against a widow as representative of her deceased husband, a member of a joint Mitakshara family, property of the deceased, passing by survivorship to the other members, cannot be sold.(5) This confines the procedure to property remaining in the possession of the legal representative, leaving the creditor to follow property improperly aliened by the legal representative by a separate suit.(6) The onus of proving the legal necessity of a sale by a Hindu widow is on the purchaser; and recitals in mortgages or sale-deeds are not sufficient evidence.(7) A Hindu widow can, with the consent of the next reversioners, transfer her inherited estate *inter vivos*,(8) though not by bequest.(9)

"**If no such property remains.**"—The decree-holder must satisfy the Court as to this before the Court will proceed under the second clause of this section.(10) If the legal representative has sold such property to a third party, the former is personally liable for the debt to the extent of the assets he has received.(11)

"**Has duly applied.**"—This should be proved by filing and proving an inventory,(12) and unless he proves that he has duly applied, his property is liable; (13) whether the debt became due before or after the death of the debtor.(14) He has only to account up to the full value of the assets he received

(1) Ishan Chunder *v.* Buksh Ali, 1 Marsh, 614 (1863); see also Jairam Bajabasheb *v.* Joma, 11 B. 361 (1886).

(2) Lalla Seeta *v.* Ram Buksh, 24 W. R. 383 (1875).

(3) Ramasami Chetti *v.* Saluckai, 8 M. H. C. 186 (1875).

(4) Jugol Kishore *v.* Jotendro Mohun Tagore, 11 I. A. 66 (1884).

(5) Sadabart Prasad *v.* Foolbash, 3 B. L. R. (F. B.) 31 (1869).

(6) Greender Chunder Ghose *v.* Mackintosh, 4 C. L. R. 210 (1878).

(7) Lala Birg Lal *v.* Inda Kunwar, P.C., 19 C. L. J. 469 (1914).

(8) Bajrangi Singh *v.* Manokarnika Baksh Singh, P.C., 35 I. A 1; 30 All. 1 (1907).

(9) Durga Sundari *v.* Ramkrishna Poddar, 18 C. L. J. 163 (1913).

(10) Indro Narain *v.* Kristo Chunder, 14 W. R. 362 (1870).

(11) Unnopoorna *v.* Gunga Narain, 2 W. R. 296 (1865).

(12) Joogul Kishore *v.* Kalee Churn, 25 W. R. 224 (1876).

(13) Mooktakashee *v.* Wooma Churn, 12 W. R. 233 (1869).

(14) Ib.

as legal representative, and if he has properly done so, the decree can no longer be executed even though he may still hold property which originally belonged to the deceased judgment-debtor. If the decree be against him as representative, it is a legal and reasonable presumption, until the contrary is proved, that payments made by him were as representative alone.(1)

"**Such property of the deceased.**"—The question whether the entire estate in a zemindary (and not merely the zemindar's life-interest) was sold in execution and bought by a purchaser is a question of mixed law and fact to be determined according to the circumstances of each case,(2) and the state of the law as understood at the time of the sale is to be considered in such determination.(3) *Ghatwali* lands in Birbhoom are not liable to be seized in the hands of the son in execution of a decree against the deceased father; (4) the surplus proceeds of such tenure collected during the lifetime of the judgment-debtor are liable,(5) but not those accrued after his death.(6) A *shikmi ghatwali* tenure is not liable, (7) but *ghatwali* tenures in Kharukpore are.(8)

"**Proved to have come into his possession.**"—The onus is on the decree-holder to do this; (9) he has to show that some assets came to the legal representative, and the onus is then shifted to the latter to prove how much came and how it has been applied.(10) The legal representative may admit receipt of assets by implication, *e.g.* by asking time to pay the amount of the decree.(11)

"**In the same manner.**"—This may be by detention in the civil jail.(12)

Appeal.—Under sect. 11 of Act XXII. of 1861 an appeal lay from orders passed against a representative under sect. 203 of Act VIII. of 1859, corresponding with the first clause of the present section.(13) See now sects. 104 and 47.

(1) Ram Golam *v.* Ayma Begum, 12 W. R. 177 (1869).

(2) Alaguraya Gounder *v.* Ramanuja Naidu, 37 M. 22 (A. C.) (1914); and see Veerabadra Aiyar *v.* Marudaga Nachiar, 34 M. 188 (1911); Veera Soorappa Nayani *v.* Errappa Naidu, 29 M. 484 (1906); Avalapa Naicker *v.* Murugappa Chettiar, 36 M. 325 (1912).

(3) Abdul Aziz Khan *v.* Appayasami Naicker, P. C., 27 M. 131 (1904).

(4) Nilmoni Singh *v.* Bukronath, 5 C. 389 (1878-9); 9 I. A. 104 (1882).

(5) Kustoora *v.* Binoderam, 4 W. R. Mis. 5 (1865); Rajkeshwar *v.* Bunshidhur, 23 C. 873 (1896).

(6) Bindo Ram *v.* Dy Collector Santhal Perg, 6 W. R. 129 (1866); s. c., 7 W. R. 178 (1867).

(7) Bally Dobey *v.* Ganei Deo, 9 C. 388 (1882).

(8) Anundo Rai *v.* Kali Prosad, 10 C. 677 (1884); Kali Pershad *v.* Anand Roy, 15 C. 471 (1887 P. C.).

(9) Shurfun *v.* Collector of Sarun, 10 W. R. 199 (1868).

(10) Joogul Kishore *v.* Kalee Churn, 25 W. R. 224 (1876).

(11) Ghotta Shayee *v.* Gour Monee, 21 W. R. 117 (1873).

(12) Mahatab Chunder *v.* Munmohinee, 12 W. R. 517 (1869).

(13) Ameeroonnessa *v.* Meer Mahomed, 20 W. R. 280 (1873).

53. *For the purposes of section* 50 *and section* 52, *property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.*

Liability of ancestral property.

Ancestral property.—See as to this sect. 50, *ante*, "Legal representative." This section, which is new, has been added in order to set at rest a question on which the High Courts are divided in opinion.(1) It is true that where a son or grandson takes any ancestral property by survivorship, he is bound to pay out of such property all debts of his ancestors not incurred for immoral or illegal purposes; but whether the creditor can follow the property in the hands of the son or grandson in execution is a debatable point under the Code. The question is merely one of procedure, and the Legislature has come to the conclusion that any controversy between the parties with regard to the liability of the son or grandson to pay the debts of his ancestor should be determined in execution, it being open to them to raise any objection or defence in such proceedings which they might have raised in a separate suit instituted by the creditor, the section not imposing upon them a greater liability than that imposed by the Hindu law.

In execution of a decree on mortgage, executed by a Mitakshara father as manager of and for the benefit of the family, a son's share is saleable.(2) But a member of a Mitakshara joint-family cannot alienate any particular share as his own.(3)

For the meaning of "the property of the deceased" see note on the last section.

[s. 265.]

54. *Where* the decree *is* for the partition of an undivided estate *assessed to the payment of* revenue to *the* Government, *or* for the separate possession of a share *of such an estate*, the partition of the estate or the separation of the share shall be made by the Collector or *any gazetted subordinate of the Collector deputed by him in this behalf, in* accordance *with* the law (if any) for the time being in force *relating to* the partition, or the separate possession of shares, of such estates.

Partition of estate or separation of share.

Decrees for partition.—This section corresponds with sect. 225 o. Act VIII. of 1859; that section, however, provided that the division made by the Collector should be "*under the orders of the Court according to the rules in*

(1) See Amar Chandra Kundu *v.* Lebak Chand Chowdhury, 34 C. 642 (1907) F. B., and cases there cited.

(2) Deva Singh *v.* Ram Manohar, 2 A. 746 (1883); see also Jumoona *v.* Dig Narain, 1 C. 1 (1883).

(3) Sheikh Abdul *v.* Jadunandan, 1 L. J. 344 (1913).

orce for the partition of an estate paying revenue to Government." These words were repealed by sect. 265, Act X. of 1877, and the words "*and according to the aw, if any, for the time being in force for the partition or the separate possession of hares, of such estates*" inserted by Act XIV. of 1882. The words in italics were added by the present Code, the words "*assessed to the payment of undivided*" being substituted for "*paying.*"

"**The decree is for the partition.**"—A decree for partition being a oint declaration of the rights of persons interested in the property, an application or execution by one party may be continued by another.(1) Such a decree loes not operate as a severance so long as it remains under appeal.(2) If the lecree be simply for possession of certain definite land, this section does not empower the Collector to partition property amongst the co-sharers.(3)

"**Estate.**"—The word must be read in its ordinary signification and not n the limited and defective sense in which it is used in Act VIII. of 1876.(4) It does not include *raiyat-wari* tenures in Madras, but includes permanently settled estates; (5) but formerly that did not apply to Bombay.(6) It does not nclude a plot of land which falls short of being the share of a co-sharer of a *mahal*.(7)

"**Shall be made.**"—A Court cannot depart from a decree for partition by allowing certain property, directed to be partitioned, to remain joint unless all the co-parceners consent.(8)

"**By the Collector.**"—It must be made solely by the Collector,(9) ncluding the delivery of the shares to their respective allottees; (10) and the execution is entirely in his hands; (11) the Court cannot interfere with him,(11) nor examine his work or direct him to make a fresh partition.(12) The Collector cannot, however, refuse to partition according to the decree; (13) and the Court is not deprived of its judicial power to hear and decide objections to the division of the estate made by the Collector.(14) The partition must, t was held, be made by the Collector only in cases where the partition sought ncludes the partition of revenue so as to convert the estate into several

(1) Khoorshed *v.* Nubbee Fatima, 3 C. 551 1878) [doubted in Hikmat *v.* Wali-un-nessa, 12 A. 506 (1889)]; Mohun Chunder *v.* Mohesh Chunder, 9 C. 568 (1883).

(2) Sakharam *v.* Hari Krishna, 6 B. 113 1881).

(3) Narayan *v.* Vithu, 8 B. 539 (1884).

(4) Secretary of State *v.* Nundun Lall, 10 C. 435 (1884).

(5) Muttuvayyangar *v.* Kudalalagayyangar, 3 M. 97 (1882); Muttuchidambara *v.* Karuppa, 7 M. 382 (1884).

(6) Dattatraya *v.* Mahadji, 16 B. 528 (1891).

(7) Ram Dayal *v.* Megu Lal, 6 A. 452 1884).

(8) Rajcoomaree *v.* Gopal Chunder, 3 C. 514 (1878).

(9) Ramjoy Ghose *v.* Ram Runjun, 8 C. L. R. 367 (1881).

(10) Parbhudas *v.* Shankarbai, 11 B. 662 (1886).

(11) Dev Gopal *v.* Vasudev, 12 B. 371 (1887).

(12) Shrinivas *v.* Gurunath, 15 B. 527 (1890).

(13) Ganoji Utekar *v.* Dhondu, 14 B. 450 (1890).

(14) Chunna Seetayya *v.* Krishnavanamma, 19 M. 435 (1896).

revenue paying estates.(1) Later, however, it was held that partition of lands in a revenue paying estate could only be made by a Collector.(2) This, however, was overruled by a Full Bench decision holding that a Civil Court could partition revenue paying estates save when the partition sought a separate allotment of revenue.(3) Under sect. 107 of the U.I. Land Revenue Act, the partition cannot be made by the Collector until the decree-holder's name is recorded in the revenue papers.(4) Where a person was entitled in pursuance of an order to be put into possession of a particular village, and in execution of this order the Collector put him in possession, under this section, of a wrong village, it was held that the order of the Collector was a mere nullity, and that such person was entitled to sue for possession of the village he was rightfully entitled to.(5)

ARREST AND DETENTION.

[s. 336.] **55.** (1) *A* judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his *detention* may be in the civil *prison* of the district in which the Court ordering the *detention* is situate, or, where such *civil prison* does not afford suitable accommodation, in any other place which the Local Government may appoint for the *detention* of persons ordered by the Courts of such district to be *detained :*

Arrest and detention.

Provided, *firstly, that,* for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset *and* before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open *unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto,* but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may *break* open the door of any room in which he has reason to believe the judgment-debtor to be found :

Provided, thirdly, that, if the room *is* in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer *authorized to make the arrest,* shall give notice to her that

(1) Debi Singh *v.* Sheo Lall Singh, 16 C. 203 (1889); Zarhun *v.* Gowri Sunkar, 15 C. 198 (1898).

(2) Meherban Rawoot *v.* Behari Lal, 23 C. 679 (1896).

(3) Jogodishury *v.* Kailash Chundra, 24 C. 725 (1897); 1 C. W. N 374.

(4) Tulsi Das *v.* Sheo Narain, 28 A. 375 (1906); 3 A. L. J. 336.

(5) Maharajah of Vijiânagram *v.* Somasekara, 17 M. L. J. 147 (1906).

she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter *the* room for the purpose of making the arrest:

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for *the payment of* money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) *The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government on this behalf.*

(3) *Where* a judgment-debtor is arrested in execution of a decree for *the payment of* money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of *the* application and if he *complies with the provisions of the law of insolvency for the time being in force.*

(4) *Where a* judgment-debtor expresses his intention to apply *to be declared an insolvent* and furnishes security, *to the satisfaction of the Court*, that he will within one month *so* apply, *and* that he will appear, when called upon, *in any proceeding upon the application or upon the decree in execution of which he was arrested*, the Court shall release him from arrest, *and*, if he fails so to apply *and to appear*, the Court may either direct the security to be realized or commit him to *the civil prison* in execution of the decree.

Arrest.—This section corresponds with sect. 336 of Act X. of 1877 save that the 2nd and 3rd provisos did not then appear. These provisos, as also the words, "*In the case of a surety, such security may be realized in manner provided by sect.* 253," were added by sect. 336 of Act XIV. of 1882. In such Code the words in the first sub-clause, "*detention*," "*civil prison*," and "*detained*," were expressed by "*imprisonment*," "*civil jail*," or "*jail*" and "*imprisoned*." The second proviso then commenced "*no outer door of a dwelling house shall be broken open; but.*" This has now been altered as indicated in italics by the present Code, which substitutes "*break*" for "*unfasten and.*" The words in italics in the 3rd and 4th proviso and in the 2nd and 4th sub-clauses have been added by the present Code, the words "*furnishes security to the satisfaction of the Court*" being substituted for "*furnish sufficient security.*" The third sub-clause in the Codes of 1877 and 1882 was prefaced by "*The Local Government may by*

notification published in the official Gazette, direct that whenever" instead of "*Where,*" and ended with the words "*places all his property in possession of a receiver appointed by the Court*" instead of the words in italics: it also provided that the application to be declared an insolvent was to be "*under Chapter XX.*" See now Provisional Insolvency Act III. of 1907. The provision as to the method of realizing the security has been omitted, as it comes within the provisions of sect. 145.

"**A judgment-debtor may be arrested.**"—A purdanasheen lady was not exempt from arrest: (1) but see sect. 56, which was introduced into the Code in 1888.

"**May be arrested.**"—The officer arresting a judgment-debtor must have the warrant of arrest in his possession at the time of making the apprehension, otherwise it is illegal.(2) A decree against the hypothecated property and against the defendants personally, and containing no condition for execution first against the property, may be enforced against the person or the property of the judgment-debtor, whichever the decree-holder thinks best; (3) but a decree merely against mortgaged property and making no personal order for payment, cannot be executed against the person of the judgment-debtor.(4)

"**On any day.**"—An arrest may be made on Sunday under process of a Mofussil Court.(5)

"**In any other place.**"—A list of such places has been notified for Burma,(6) and also for Madras.(7)

Sub-clause (1), second proviso.—Under the former Code an outer door could not be broken open. It was proposed to enact that if the judgment-debtor or any person in whose dwelling-house the officer authorized to make the arrest had reason to believe the judgment-debtor was to be found, refused access to his house, such officer might remove or open any lock or bolt and might break open any outer door. The amendments in this proviso were suggested to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees. Afterwards, however, the amendment took its present form, the Select Committee stating that they had carefully considered the provisions as to breaking open dwelling-houses, and that they had come to the conclusion that it should be limited to dwelling-houses in the occupancy of the judgment-debtor.

"**Who is not the judgment-debtor.**"—It was formerly held that no order was necessary to enter a zenana of a purdanasheen judgment-debtor,(8) but that decision was before sect. 56 was included in the Code.

(1) **Maharani of Burdwan** *v.* **Barada Sundari, 1 B. L. R. 31 (1868).**

(2) **Empress** *v.* **Amar Nath, 5 A. 318 (1883).**

(3) **Joharimal** *v.* **Sant Lal, 9 A. 484 (1887).**

(4) **Budan** *v.* **Ramchandra, 11 B. 537 (1887).**

(5) **4 M. H. C. lxii. (1869).**

(6) **Notification No. 217,** *Burma Gazette,* **1897, Pt. I., p. 256.**

(7) *Fort St. George Gazette,* **1903, Pt. I., p. 646.**

(8) **Kadumbinee** *v.* **Koylashkaminee, 7 C. 19 (1881).**

Sub-clause (2).—This sub-clause is intended to cover the cases of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public.

Sub-clause (3).—Under the Codes of 1877 and 1882 this provision only extended to such provinces as were notified by the Local Governments. Such notifications were published as to Assam,(1) Bengal,(2) Bombay,(3) Burma,(4) Central Provinces,(5) Madras,(6) N.W.P. and Oudh,(7) and the Punjab,(8) As to the Provincial Insolvency law, see now Act III. of 1907, which takes the place of Chapter XX. of the former Code.

"**Apply to be declared.**"—Under the Codes of 1877 and 1882 this provision ran "*apply under Chapter XX. to be declared.*" That Chapter did not apply to the towns of Calcutta, Madras, or Bombay.(9) In such Presidency towns the judgment-debtor might have applied under the Act for the Relief of Insolvent Debtors, 11 & 12 Vict. c. 21.(10)

"**Expresses his intention to apply.**"—If he does not, and is committed to jail, he might from jail apply under Chapter XX. of the previous Code (but now the Provincial Insolvency Act, 1907), and may be released under its provisions.(11) This section only applies to judgment-debtors who are under arrest and not already committed to jail. When a debtor is imprisoned he can only be discharged under sect. 58.(12) See also O. XXI. r. 40.

"**Furnishes security.**"—The surety was under the Code of 1882 discharged on the judgment-debtor filing his petition in insolvency ; (13) but under the present section apparently the surety would not be discharged until the judgment-debtor had "appeared" also.(14) A surety is discharged by the death of the judgment-debtor before expiration of the time specified in the security bond ; (15) or if the proceedings taken in execution of the decree wherein the security was furnished comes to an end or are struck off ; (16) or if security is

(1) Assam Manual of Local Rules and Orders, ed. 1893, p. 191.

(2) Bengal Local Statutory Rules and Orders, 1903, vol. ii., p. 70.

(3) Bombay List of Local Rules and Orders, ed. 1896, vol. i., p. 406.

(4) Lower Burma Courts Manual, 1905, para. 602.

(5) No. 3751, dated 28th Sept., 1877, Judicial Commissioner's Civil Circular, 1-43.

(6) Madras List of Local Rules and Orders, ed. 1898, vol. i., p. 195.

(7) N. W. P. and Oudh List of Local Rules and Orders, ed. 1894, p. 112.

(8) Rules and Orders of C. C. of Punjab, vol. i., p. 2 (2nd edition).

(9) S. 360A of Act XIV. of 1882 (repealed by the Provincial Insolvency Act, 1907).

(10) *Ex parte* Pinsent, 8 M. 276 (1885).

(11) *In re* William Hastie, 11 C. 451 (1885).

(12) *In re* Quarme, 8 M. 503 (1885).

(13) Koylash Chandra *v.* Christophoridi, 15 C. 171 (1887) ; Ramzan *v.* Gerard, 13 A. 100 (1890) ; Dwarkadas *v.* Isabhai, 19 B. 210 (1894) ; Banna Mal *v.* Jamna Das, 15 A. 183 ; Imbichunni *v.* Lalji, 24 M. 560 (1901) ; Krishnaiyar *v.* Krishnasamy, 26 M. 366 (1902) ; Langtu *v.* Baijnath, 28 A. 387 (1906) ; 3 A. L. J. 143.

(14) In Ashiq Ali *v.* Moti Lal, 29 A. 466 (1907), the security furnished was not in accordance with the section.

(15) Krishnan *v.* Ittinan, 24 M. 637 (1901), ref. Ashiq Ali *v.* Moti Lal, 29 A. 466 (1907) ; and see Nabin Chandra Hazari *v.* Mirtunjoy Barick, 41 C. 50 (1913) (because the event which occurred was not in contemplation of either party, and so put an end to the contract).

(16) Lalji Sahoy *v.* Odoya, 14 C. 757 (1887).

deposited on conditions and the judgment-debtor dies before an order is made on his application to be declared an insolvent.(1) Where the judgment-debtor has applied for declaration of insolvency, and proceedings in insolvency are pending on his application, no application for execution can be made against the judgment-debtor's surety.(2)

"**Shall release him from arrest.**"—A judgment-debtor expressing his intention to file a petition and schedule under 11 & 12 Vict. c. 21, and complying with the conditions of this section, is entitled to be discharged from custody; (3) but he will be liable, though he has taken the benefit of the insolvency sections and while yet undischarged, to arrest in execution in respect of an unscheduled debt.(4) A judgment-debtor, who being arrested and released on furnishing security under this section, but who failed to apply to be declared an insolvent within the prescribed time, is liable to arrest, but not being arrested may apply to be declared an insolvent at a subsequent date.(5)

"**Security to be realized.**"—A transferee decree-holder whose transfer has been recognized is entitled to execute against the surety.(6) Where the surety by his bond undertook to pay the amount of the decree if the judgment-debtor did not do so within a specified time and agreed that execution might issue under the bond without suit, it was held, that though the bond was somewhat outside the scope of this section, as it was then worded, summary execution could be taken out.(7) But where the bond, besides the usual covenants, contained further stipulations as to what should happen if the judgment-debtor's application in insolvency were refused, it was held that the latter stipulations did not come within the purview of this section as it was then worded.(8) The enforcement of the liabilities of sureties is now governed by sect. 145. See notes thereto.(9)

Revision.—An order refusing a surety's discharge not being appealable, is open to revision under sect. 115.(10)

[s. 245A.] **Prohibition of arrest or *detention* of women in execution of decree for money.**

56. Notwithstanding anything in this *Part*, the Court shall not order the arrest or *detention in the civil prison* of a woman in execution of a decree for *the payment of* money.

(1) Ashiq Ali *v.* Moti Lal, 29 A. 466.

(2) Langta Pande *v.* Baijnath Pande, 28 A. 387 (1906).

(3) *Ex parte* Pinsent, 8 M. 276 (1885).

(4) Panna Lall *v.* Kanhaiya, 16 C. 85 (1888).

(5) Alagappa *v.* Satathambal, 25 M. 724 (1902).

(6) Chathoth *v.* Saidindavida, 26 M. 258 (1902).

(7) Kamezuddi *v.* Fauzdar, 4 C. L. J. 311 (1906); 10 C. W. N. 830.

(8) Janki Das *v.* Ram Partap, 16 A. 37 (1893).

(9) And as to waiver by sureties of right to have suit brought against them, Kamezuddi *v.* Fauzdar, 10 C. W. N. 830 (1906).

(10) Banna Mal *v.* Jamna Das, 15 A. 183 (1893).

Arrest of women.—This section was inserted in the last Code by sect. 2, Act VI. of 1888.

Subsistence-allowance.

57. The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors. [s. 338.]

Subsistence allowances.—For notifications (1) by the Local Government of Madras, see Madras List of Local Rules and Orders, ed. 1898, vol. i., p. 195; see Burmah Rules Manual, ed. 1897, p. 115; and for N.W.P., see North Western Provinces and Oudh List of Local Rules and Orders, ed. 1894, p. 113. Sects. 339 and 340 are now O. XXI. r. 39, *post*.

Detention and release.

58. (1) *Every* person *detained* in *the civil* prison in execution of a decree shall be *so detained*,— [s. 342.]

(*a*) *where* the decree *is* for the payment of a sum of money exceeding fifty rupees, for a period *of* six months, and,

(*b*) *in any other case*, for a period *of* six weeks:

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,— [s. 341.]

(i) on the amount mentioned in the warrant *for his detention* being paid to the officer in charge of the *civil prison*, or

(ii) on the decree *against him* being otherwise fully satisfied, or

(iii) *on* the request of the person on whose application he has been *so detained*, or

(*iv*) *on the omission by the person, on whose application he has been so detained*, to pay *subsistence*-allowance:

Provided, *also*, that *he* shall not be *released from such detention under clause* (*ii*) *or clause* (*iii*), without the order of the Court.

(2) A judgment-debtor *released from detention* under this section *shall* not *merely by reason of his release be* discharged from his debt, but he *shall* not *be liable to* be re-arrested under the decree in execution of which he was *detained in the civil prison*.

Duration of imprisonment.—The first portion of the section down to the Proviso corresponds with sect. 278 of Act VIII. of 1859 and sect. 342 of the last Code, though the form of the section has been remodelled (*vide post*).

(1) O'Kinealy, note to sect. 338.

The section after the Proviso corresponds (with verbal alterations) to sect. 341 of the last Code, omitting clause (*f*) of that section, which is no longer necessary owing to the remodelled form of the former sect. 342. A prisoner once discharged for want of deposit of subsistence-money should not be retaken.(1) Where a person is imprisoned under sect. 481 (now O. XXXVIII. r. 4), *post*, imprisonment suffered after decree must be taken into consideration in calculating the six months.(2) On the expiration of the period, the prisoner is entitled to his discharge, whether the imprisonment has been continuous or only at intervals.(3) The imprisonment is not a satisfaction of the decree, and the debtor can be adjudicated an insolvent for it; (4) or his personal property may be taken in execution under the same decree.(5) This section does not empower a Judge to fix a term of imprisonment at his discretion within the maximum. If none of the conditions mentioned in the proviso are fulfilled before the expiry of six months, or six weeks as the case may be, the judgment-debtor remains in jail the full time.(6) The language of clause (1) has thus been recast to show that this provision does not confer on the Court a discretion to fix shorter periods of imprisonment than those prescribed. This section does not apply to cases of imprisonment for contempt of Court.(7)

[s. 653.] **59.** (1) At any time after a warrant *for the* arrest *of a judgment-debtor* has been issued the Court may cancel it on the ground of *his* serious illness.

Release on ground of illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to *be detained in the civil prison.*

[s. 653 (3) and (4).] (3) *Where* a judgment-debtor has been committed to *the civil prison*, he may be released therefrom—

(*a*) by the Local Government, on the ground of *the existence of* any infectious or contagious disease, or

(*b*) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his *detention in the civil prison* shall not in the aggregate exceed that prescribed *by* section 58.

(1) *In re* Dwarkalall Mitter, Bourke's Rep. I. p. 109; Janoki Singh Roy *v.* Kaloo Mundul, B. L. R. F. B. 889 (1868).

(2) Ghanashamdas *v.* Johuri Mull, 7 B. 431 (1883).

(3) Khoda Buksh *v.* Shukroolah, 5 All. H. C. 220 (1873).

(4) In the matter of Raghubhai Ramchandra, 6 Bom. H. C. 86 (1869).

(5) Janoki Singh Roy *v.* Kaloo Mundul, B. L. R. F. B. 889 (1868).

(6) Subudhi *v.* Surji, 13 M. 141 (1889), foll. Surjan Bibi *v.* Sagai Mandal, 5 C. W. N. 145 (1900).

(7) Martin *v.* Lawrence, 4 C. 655 (1879). An interim discharge in Insolvency proceedings is not a discharge within the meaning of this section, Suraj Din *v.* Mahabir, 33 A. 279, 282 (1910).

Illness of judgment-debtor.—This section corresponds with sect. 653 of the last Code. Sect. 653 was added to that Code by sect. 8 of Act VI. of 1888.

ATTACHMENT.

60. (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in *a* corporation and, *save* as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf: [s. 266.]

Property liable to attachment and sale in execution of decree.

Provided that the following particulars shall not be liable to such attachment or sale, namely:—

(*a*) the necessary wearing-apparel, *cooking vessels, beds* and bedding of the judgment-debtor, his wife and children, *and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;*

(*b*) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, *and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;*

(*c*) houses and other buildings (*with* the materials *and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment*) belonging to *an* agriculturist and occupied by *him;*

(*d*) books of account;

(*e*) *a* mere right to sue for damages;

(*f*) any right of personal service;

(*g*) stipends and gratuities allowed to pensioners of *the* Government, *or payable out of any service family pension fund notified in the Gazette of India by the Governor General in Council in this behalf,* and political pensions;

(*h*) *allowances* (*being less than salary*) *of any* public officer or of any servant of a railway company or local authority *while absent from duty;*

(*i*) the salary *or allowances equal to salary* of *any such* public officer *or servant as is referred to in clause* (*h*), while on duty, to the extent of—

(*i*) the whole of the salary, where the salary does not exceed twenty rupees monthly;

(*ii*) twenty rupees monthly, where the salary exceeds twenty rupees and does not exceed forty rupees monthly; and

(*iii*) one moiety of the salary in any other case;

(*j*) the pay and allowances of persons to whom the Indian Articles of War apply;

(*k*) *all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment;*

(*l*) the wages of labourers and domestic servants *whether payable in money or in kind;*

(*m*) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(*n*) a right to future maintenance;

(*o*) any allowance declared by any law passed under the Indian Councils Acts, 1861 *and 1892,* to be exempt from liability to attachment or sale in execution of a decree; *and,*

(*p*) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law *for the time being* applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation.—The particulars mentioned in clauses (*g*), (*h*), (*i*), (*j*), (*l*) and (*o*) are exempt from attachment or sale whether before or after they are actually payable.

(2) Nothing in this section shall be deemed—

(*a*) to exempt houses and other buildings (*with* the materials *and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment*) from attachment or sale in execution of decrees for rent *of any such house, building, site or land,* or

(*b*) to affect the *provisions of the* Army Act or *of* any similar law for the time being in force.

Property attachable.—The first sub-clause of this section corresponds with sect. 205 of Act VIII. of 1859 save that the words "*or other buildings,*" "*saleable*" and "*or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit*" were added by sect. 266 of Act X. of 1877, while the words "*the capital or joint stock of any railway, banking or other public Company or*" after the words "*shares in*" have been omitted by the present Code. Act X. of 1877 added the provisos. According to that Act (*i*) ran "*one moiety of the salary of a public officer or of the servant of a Railway Company*" and the final proviso (*b*) "*to affect the Statute for the time being in force for punishing mutiny and desertion and for the better payment of the Army and their quarters.*" The final proviso (*b*) was given its present form, save for the words in italics, by Act XIV. of 1882, which also altered the wording of the first proviso (*b*) and added the words "*and gratuities*" to proviso (*g*). Act VII. of 1888 gave proviso (*i*) its present form save that it then made no reference to "*allowances equal to salary*" and "*while on duty,*" and the same Act added provisos (*o*) and (*p*), and the words "*and bedding*" in proviso (*a*), and "*and seed grain*" in proviso (*b*), and "*and* (*o*)" in the Explanation. The word "*Indian*" in proviso (*j*) was substituted for "*Native*" by Act XII. of 1891. The portions appearing in italics were added by the present Code. Besides the additions thus noted proviso (*c*) has been extended, its form under the Code of 1882 being "*the materials of houses and other buildings belonging to and occupied by agriculturists,*" and proviso (*h*) has been added.

In Ajmere certain further properties are exempt from attachment.(1)

"**Goods.**"—Spears and daggers are goods.(2)

"**Money.**"—Money paid into Court as the pre-emptive price by the holder of a decree for pre-emption is not attachable by a creditor of such decree-holder; (3) nor is compensation-money payable to a mortgagor in the hands of a Collector attachable in execution of a mortgage decree, as the mortgagee should himself have applied for compensation.(4)

"**Debts.**"—A debt must be a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time, or the payment of which depends upon contingencies which may or may not happen; it must at least be an existing debt, though it may be payable on a future date; (5) it must be specific, existing and definite.(6) Debts are payable at present or in the future, and in England are called "debts owing and accruing," and there, not only can an order be made attaching an accruing debt, but also an order for payment of such debt when it becomes payable.(7) A mere claim for unliquidated damages cannot be attached; (8) nor can liquidated damages

(1) Ajmere Reg. I. of 1877, s. 30.

(2) Wala Hiraji *v.* Hira Patel, 9 B. 518 (1885).

(3) Abdus Salam *v.* Wilayat, 19 A. 256 (1897).

(4) Basa Mal *v.* Tajammal, 16 A. 78 (1893).

(5) Haridas *v.* Baroda, 27 C. 38 (1899); 4 C. W. N. 87; foll. Maharani Dambar Koeri *v.* Rai Sham Kissen Das, 9 C. W. N. 703 (1905).

(6) Tuffuzzool *v.* Rughoonath, 14 M. I. A. 40 (1871); 7 B. L. R. 186. See last case in last note.

(7) Tapp *v.* Jones, L. R., 10 Q. B. 591 (1875).

(8) Randall *v.* Lithgow, 12 Q. B. D. 525 (1884).

on a verdict until judgment has been signed.(1) Money in the hands of a garnishee which he is bound to pay is a debt,(2) so is rent that is due; (3) but claims over which no Court in British India has jurisdiction are not debts liable to be attached, but the mere circumstance that the garnishee is at the time of the application for execution beyond the limits of British India would not of itself render the debt not liable to be attached.(4) A gratuity sanctioned by a Railway Company, the money being in the hands of its paymaster, is not a debt, and cannot be attached, as the gift is not complete; (5) but a monthly allowance given in payment of an antecedent debt is attachable, and an attachment may be made of half the monthly allowance when 3 weeks have expired, inasmuch as 3 weeks of the allowance had become an existing debt though payable on a future date.(6) Money due by an agent or a vendee to his principal or vendor is a debt, and may be attached, and it is not necessary that the exact amount due should be ascertained prior to attachment,(7) but a vendor's right or interest in the balance of purchase money of immoveable property payable on execution of a conveyance is not a debt so long as the conveyance remains unsigned.(8) The salary of a private person is not attachable until it becomes due and is an existing debt.(9) It was questionable whether arrears of interest due on Government Promissory Notes was attachable.(10) A decree can be attached,(11) but a decree for money, though a judgment debt, is not liable to sale in execution, and sect. 273 of the former Code (corresponding with O. XXI. r. 53 of the present Code) provide the procedure in execution.(12)

"**Government securities.**"—Money or other security deposited by the judgment-debtor with a Railway Company as security for the performance of his duties is attachable subject to the lien of the Railway Company, but not saleable until the deposit is at the disposal of the judgment-debtor freed from such lien.(13)

"**All other saleable property.**"—As regards partnership property, it was held that it could not be attached and removed from the possession of the partners in execution of a decree against only one of the partners; (14) nor

(1) Jones *v.* Thompson, 27 L. J. R., N. S. 234 (1858).

(2) Booth *v.* Trail (1883), 12 Q. B. D. 8.

(3) Mitchell *v.* Lee, L. R. (1867), 2 Q. B. 259.

(4) Ghamshamlal *v.* Bhansali, 5 B. 249 (1881).

(5) Janki Das *v.* East Indian Railway, 6 A. 634 (1884).

(6) Dambar Koeri *v.* Rai Sham Kissen, 9 C. W. N. 703 (1905).

(7) Madho Das *v.* Ramji Patak, 16 A. 286 (1894).

(8) Ahmad-ud-din *v.* Majlis Rai, 3 A. 12 (1880).

(9) Ayyavayyar *v.* Virasami, 21 M. 393 (1897); Devi Prasad *v.* A. H. Lewis, 31 A. 309 (1909). It has been held that the non-payment of a loan does not constitute a debt which can be attached under this section, Phul Chand *v.* Chand Mal, 30 A. 252 (1908).

(10) Boistubchurn *v.* Battye, 1 Tay. & Bell, 313 (1850).

(11) Golam Mahomed *v.* Indro Chand, 15 W. R. 34 (1871).

(12) Sultan Kuar *v.* Gulzari Lal, 2 A. 290 (1879); Tiruvengada *v.* Vythilinga, 6 M. 418 (1888).

(13) Karuthan *v.* Subramanya, 9 M. 203 (1885).

(14) Karimbhai *v.* Conservator of Forests, 4 Bom. 222 (1879).

could one partner attach the interest of another partner in the partnership business in the hands of a Receiver,(1) and debts due from one partner to another were not attachable.(2) The share of a partner in the partnership in the hands of another partner might be attached, which should be done by prohibitory order,(3) and even the sale in execution of the interest of one partner, in a partnership dissolved by the death of his father and co-partner, was good; (4) but where the interest attached and sold was in a subsisting partnership, the purchaser could sue for dissolution and accounts.(5) The effect of these decisions have been partially codified in O. XXI. r. 49. The interest of an undivided father, a member of a Mitakshara family, can be attached and sold. This is the law in Bengal, Madras, Allahabad and Bombay. But the purchaser merely acquires the right to compel a partition as against the other co-sharers of the judgment-debtor.(6) The interest of a son,(7) and of any other member of the joint family, is in the same position; (8) even that of a grandson in the lifetime of his father and grandfather.(9) And property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed shall be deemed to be the property of the deceased.(10) The equity of redemption in mortgaged property can be attached and sold in execution of a decree against the mortgagor,(11) but not if the person applying for attachment and sale is also the mortgagee.(12) Mortgaged property may be attached but cannot be sold without a suit by the mortgagee under sect. 67 of the Transfer of Property Act.(13) Property is attachable even though it cannot be brought to sale without suit.(14) A tenant's hereditary and beneficial interest in property can be attached and sold,(15) but an interest in an occupancy tenure, which is not transferable by custom or usage, is not saleable in execution, save for rent under the Bengal Tenancy Act.(16) A judgment-debtor has a saleable interest in land upon which he was permitted to erect a mud house and occupy it for forty years, without any reservation by the landlord that he could be ousted, but for which he paid rent.(17) The right to get back from the donee certain lands reserved to the judgment-debtor

(1) Abbot *v.* Abbott, 5 B. L. R. 382 (1870).

(2) Dwarka Mohun *v.* Luckhimoni, 14 C. 384 (1887).

(3) Thama Sing *v.* Kalidas, 5 B. L. R. 386 (1870).

(4) Parvatheesam *v.* Bapanna, 13 M. 447 (1890).

(5) Jagat Chunder *v.* Iswar Chunder, 20 C. 693 (1893); see also *In re* Bainbridge, 8 C. D. 218, p. 224.

(6) Deendyal *v.* Jugdeep, 3 C. 198 (1877 P. C.); 4 I. A. 247.

(7) Jallidar *v.* Ram Lall, 4 C. 723 (1878).

(8) Rai Narain *v.* Nowrut, 4 C. 809 (1879).

(9) Jogul Kishore *v.* Shib Sahai, 5 A. 430 (1883).

(10) Sect. 53.

(11) Saraswati *v.* Nabadwip, 5 B. L. R. 380 (1870); Gossain Munraj *v.* Deen Dyal, 20 W. R. 20 (1873).

(12) Kamini *v.* Ramlochan, 5 B. L. R. 450 (1870); Bhuggobutty *v.* Shamachurn, 1 C. 337 (1876).

(13) Chundra Nath *v.* Burroda, 22 C. 813 (1895).

(14) Gouri Sunkur *v.* Aubhoyessury, 1 C. W. N., xliv. (1896).

(15) Ramessur Nath *v.* Golamee Sahoo, 24 W. R. 309 (1875).

(16) Bhiram *v.* Gopi Kanth, 24 C. 355 (1897); 1 C. W. N. 396; Durga Charan *v.* Kali Prasanna, 26 C. 727 (1899); 3 C. W. N. 586.

(17) Doorga Pershad *v.* Brindabun, 15 W. R. 274 (1871); 7 B. L. R. 159.

by a deed of gift is transferable and therefore attachable; (1) so also is a life interest in trust funds in the hands of the Official Trustee; (2) but property in the hands of the Receiver of the High Court cannot be proceeded against by attachment in the Mofussil, but the High Court can order attachment and direct the Receiver to sell the interest of the judgment-debtor.(3) Property of which the judgment-debtor had been in possession for 12 years after he had filed his petition in insolvency was attachable, his title being by adverse possession.(4) Property the subject of an existing suit is attachable, but in such a case the Court would order the sale at the fittest and most proper time.(5) A decree also is attachable.(6) The right to manage a religious trust is not attachable,(7) nor the right to officiate at worship or to receive the offerings at a shrine; (8) nor can voluntary offerings which may in future be made to an idol, as being entirely uncertain.(9) So also a thing utterly incapable of being estimated or valued, such as "all the claims of Ramnath against all his debtors," cannot be attached.(10) The doors and window shutters of a pucca building cannot be separately attached, as they formed part of immoveable property.(11) Trees growing on the *sir* land of an ex-proprietary tenant under sect. 7 of Act XII. of 1881 (N.W.P. Rent Act) cannot be sold in execution.(12) A portion of a *bhag* cannot be attached under a mortgage decree against that portion, the mortgage of a portion of a *bhag* being unlawful.(13) Future rents and profits of a *ghatwali* tenure cannot as such be attached.(14)

"**Immoveable.**"—In Oudh no ancestral property can be sold in execution without permission of the Chief Commissioner, and no self-acquired property without permission of the Commissioner.(15)

"**The profits of which.**"—Attachment of property includes attachment of the profits thereof, but if after attachment the original owner be allowed to remain in possession of the property, the profits from the moment they found their way into the owner's pocket cease to be liable for the judgment-debtor.(16)

"**A disposing power.**"—A letter containing notes in the Post Office can be attached as in the disposing power of the addressee; (17) but not money

(1) Rudra Perkash *v.* Krishna Mohun, 14 C. 241 (1886).

(2) Abdul Lateef *v.* Doutre, 12 M. 250 (1889).

(3) Hem Chunder *v.* Prankristo, 1 C. 403 (1876).

(4) Surja Hossein *v.* Monohur Das, 24 C. 244 (1896).

(5) Ram Chunder *v.* Nund Lall, 19 W. R. 132 (1873).

(6) Golam Mahomed *v.* Indro Chand, 15 W. R. 34 (1871); 7 B. L. R. 318.

(7) Ayancheri *v.* Acholathil, 5 M. 89 (1882).

(8) Durga Bibi *v.* Chanchal Ram, 4 A. 81 (1881).

(9) Sri Sri Isvar *v.* Peary Churn Dey, 6 C. W. N. 728 (1902); 29 C. 470.

(10) Tuffuzzool *v.* Rughoonath, 14 M. I. A. 40, p. 51 (1871); 7 B. L. R. 186.

(11) Peru Bepari *v.* Ronou Maifarash, 11 C. 164 (1885).

(12) Jugal *v.* Deoki Nandan, 9 A. 88 (1886).

(13) Narbheram *v.* Collector of Broach, 22 B. 737 (1897).

(14) Udoy Kumari *v.* Hari Ram, 28 C. 483 (1901).

(15) Act XVIII. of 1876, s. 20.

(16) Ram Coomar *v.* Gobind Nath, 12 W.R. 391 (1869).

(17) Narasimhulu *v.* Adiappa, 13 M. 242 (1890).

payable to an auctioneer by purchasers of goods entrusted to him for auction, except as to such amount as the judgment-debtor had a disposing power exercisable for his own benefit.(1) When the judgment-debtor contracted to lay down a pavement for B and deposited materials for the work and received an advance from B equal to the value, the materials vested in B and could not be attached.(2) The corpus of trust property in the hands of a trustee cannot be attached; (3) nor an insolvent's property vested in the Official Assignee; (4) nor land assigned to a widow by way of maintenance with a proviso against alienation; (5) nor land assigned in lieu of maintenance without any mention of such proviso, as coming under clause (*n*) of this section; (6) but land let under a lease prohibiting the lessee assigning the property either by sale or gift is attachable; (7) so is a donee's share in property given with a proviso that it should be held impartible.(8) Joint family property is attachable in execution of a decree against the father, so as to affect the interests of his sons, unless the sons can show that their shares were not answerable for the decree.(9) In Madras, the attachment of the interest of an undivided member in a joint property in execution of a decree on a personal debt against him, constitutes a valid charge in favour of the judgment-creditor and prevents the accrual to the other coparceners of the right of survivorship on the death of the judgment-debtor pending attachment.(10) The income of property subject to a restraint upon anticipation accruing due after the date of the judgment cannot be attached in execution of a decree against the separate property of a married woman.(11)

"**Necessary wearing-apparel.**"—This was the effect of a Bombay High Court decision in 1872.(12) A *mangalsutra* or necklace worn by a married woman during the lifetime of her husband and never removed, is exempt (13) (and see now amendment); so are the clothes, equipment and arms of a person subject to the Indian Marine Act; (14) so is the *stridhan* property of a Hindu wife, when execution is sought of a decree against her husband.(15) Property in zenanas is not exempt from attachment.(16)

"**May, in the opinion of the Court, be necessary.**"—Beasts used in agriculture are not privileged until the Court has declared them to be so.(17)

(1) Smith *v.* Allahabad Bank, 23 A. 135 (1901).

(2) S. C. C. Reference, 2 N. W. P. H. C. R. 337 (1870).

(3) Moheeput *v.* Etbari Chowdhry, 19 W. R. 226 (1873); Bishen Chand *v.* Nadir Hossein, 15 C. 329 (1887 P. C.); 15 I. A. 1.

(4) Donobundhoo *v.* Shushi Mohun, 12 C. L. R. 60 (1882).

(5) Dewali *v.* Apaji, 10 B. 342 (1886).

(6) Gulab *v.* Bansidhar, 15 A. 371 (1893); see also Bansidhar *v.* Gulab, 16 A. 443 (1894).

(7) Golak Nath *v.* Mathura, 20 C. 273 (1871).

(8) Narayanan *v.* Kannan, 7 M. 315 (1884).

(9) Jagabhai *v.* Bhukandas, 11 B. 37 (1886).

(10) Bailur Krishnu *v.* Lakshmana, 4 M. 302 (1881).

(11) Goudoin *v.* Venkatesa Moodelly, 17 M. L. J. 363 (1907). As to question when a Policy of Insurance is attachable, see Shankar *v.* Umabai, 15 Bom. L. R. 320, 326 (1913).

(12) Gangaram *v.* Parbhu, 9 B. H. C. 272 (1872).

(13) Appana *v.* Tangamma, 9 B. 106 (1884).

(14) Act XIV. of 1887, s. 81.

(15) Tukaram *v.* Gunaji, 8 B. H. C., A. J. 129 (1871).

(16) Doorga Churn *v.* Huree Mohun, 17 W. R. 86 (1872).

(17) Bakhir *v.* Doorga Churn, 10 C. 39 (1883); 13 C. L. R. 200.

"**Houses and other buildings.**"—Previous to the present Code, this proviso only referred to the material of houses and other buildings, but it was held to extend to any house in the physical occupation of an agriculturist, or his representatives after his death, for the purposes of his agricultural calling; (1) but "agriculturist" must be construed in its strictest sense.(2) The privilege refers to a house occupied by an agriculturist as an agriculturist, not to his town residence.(3) If the agriculturist does not raise the question that a house is exempt from attachment when it was attached and sold he cannot raise it in a suit for possession by the purchaser.(4) If sold in execution of a decree for rent, other judgment-creditors are not entitled to rateable distribution of the proceeds under sect. 73.(5) This exemption does not prohibit their sale in execution of a mortgage decree if specifically mortgaged.(6) The superstructure of a house belonging to a *bhag* in a *bhagdari* village is exempt from attachment under the provisions of the Bhagdari Act (Bom. Act V. of 1862).(7) Where a judgment-debtor, whose house had been attached, claimed the benefit of clause (*c*), and it was found that he was both an agriculturist and a zemindar, it was held that it was incumbent on him to prove that the house in question was occupied by him as an agriculturist.(8)

"**Books of account.**"—This was introduced as the effect of a decision of the Bombay High Court in 1866.(9) The Court may however direct their production in Court to prevent the judgment-debtor making away with them.(10)

"**Mere right to sue for damages.**"—This is the effect of the decisions of the Calcutta and Allahabad High Courts.(11) The right to bring a suit to set aside a sale is not attachable; (12) nor the right to sue for mesne profits; (13) but if a decree has been passed it may be attached.(14) The right to appeal is not attachable.(15)

"**Any right of personal service.**"—The right of worship of a Hindu idol cannot be sold in execution; (16) nor the right to the surplus profits of shebaitship; (17) nor a priestly office with emoluments; (18) but where a

(1) Radhakisan *v.* Balvant, 7 B. 530 (1883).

(2) Jivan Bhaga *v.* Hira Bhaiji, 12 B. 363 (1887).

(3) Manecklal *v.* Manilal, 7 B. L. R. 685 (1905).

(4) Pandurang *v.* Krishnaji, 28 B. 125 (1903); Narayan *v.* Gowbai, 15 Bom. L. R. 278 (1912).

(5) Venilal *v.* Lakha, 4 B. 429 (1880).

(6) Bhagvandas *v.* Hathibhai, 4 B. 25 (1879); but see Ram Dial *v.* Narpat, 33 A. 136 (1909); Bhola Nath *v.* Mt Vashori, 34 A. 25 (1912).

(7) Collector of Broach *v.* Venilal, 21 B. 588 (1896).

(8) Jamna Prasad Raut *v.* Raghunath Prasad, 35 A. 307 (1913).

(9) *In re* Pestonji, 3 B. H. C. 42 (1866).

(10) Adjoodhya *v.* Middleton, 3 N. W. P. H. C. R. 334 (1871).

(11) Tuffuzzool *v.* Raghunath, 7 B. L. R. 186 (1871); 14 Moo. I. A. 40; Mahomed *v.* Sheo Sevuk, 6 N. W. P. H. C. R. 95 (1874).

(12) Carapiet *v.* Panna Lall, 14 W. R. 152 (1870).

(13) Shyam Chand *v.* Land Mortgage Bank, 9 C. 695 (1883); 12 C. L. R. 440.

(14) Golam Mahomed *v.* Indro Chand, 15 W. R. 34 (1871); 7 B. L. R. 318.

(15) Bipro Protap *v.* Deo Narain, 3 W. R. Mis. 16 (1865).

(16) Dubo Misser *v.* Srinibas, 5 B. L. R. 617 (1870); Kalee Churn *v.* Bungshee, 15 W. R. 339 (1871); 6 B. L. R. 727.

(17) Juggurnath *v.* Kishen Pershad, 7 W. R. 266 (1867).

(18) Mallika *v.* Ratanmani, 1 C. W. N. 493.

property was bequeathed to an idol with directions that the surplus income was to go to the family of the deceased, the interest in such surplus of a member of the family could be attached and sold,(1) but the vendee would not be entitled to enter on the land.(2) If the surplus profits of shebaitship be sold to the next shebait, his right to succeed to the management would be quite unaffected by execution proceedings during the lifetime of the former shebait.(3) The interest of a servant of a temple in land which he held as remuneration for his service can be attached.(4) A *Birth Moha Brahminy* or right to officiate at funeral ceremonies, being intangible and impalpable, cannot be attached; (5) so also a *upadhikpana vritti* (a hereditary priestly office) on the Godavari at Nasik, as being a right of personal service; (6) so is a *jotishi vritti;* (7) and a *vritti* cannot be sold in execution, though its private alienation is not absolutely prohibited; (8) but it may be sold in execution if expressly ordered by the decree.(9).

"**Stipends.**"—This includes all pensions of a political nature payable directly by the Government; (10) also stipends allowed by Government to the members of the Mysore family.(11) The stipend of a Carnatic Stipendiary is not attachable.(12)

"**Gratuities.**"—This is not confined to those payable to pensioners, but includes gratuities granted in consideration of past services.(13) A bonus granted in addition to a pension is also privileged; (14) so is the balance of pension unpaid at the time of the pensioner's death.(15) When the decree sought to be attached was passed before the Pensions Act (XXIII. of 1871) came into force, the application for execution was not barred for want of a certificate under sect. 4 of that Act.(16) A *Zora garas hak* is not a pension and is not privileged.(17)

"**Pensions.**"—A private pension, though not privileged, is not attachable save as to arrears accrued due.(18) Arrears of Yeomiah pension accidentally accumulated are not liable to attachment.(19) Land granted by Government, but not revenue free, as reward for services rendered is

(1) Ashutosh *v.* Doorga Churn, 6 I. A. 182 (1879 P. C.).

(2) Sibchunder *v.* Sibkissen, 1 Boulnois, 73 (1854).

(3) Trimbak *v.* Narayan, 7 B. 188 (1882).

(4) Lotlikar *v.* Wagle, 6 B. 596 (1882).

(5) Jhumman *v.* Dinoonath, 16 W. R. 171 (1871).

(6) Ganesh Ramchandra *v.* Shankar Ramchandra, 10 B. 395 (1886).

(7) Govind *v.* Ramkrishna, 12 B. 366 (1887).

(8) Rajaram *v.* Ganesh, 23 B. 131 (1898).

(9) Sadashiv *v.* Jayantibai, 8 B. 185 (1883).

(10) Bishambar *v.* Imdad Ali, 18 Cal. 216 (1890 P. C.); L. R. 17 I. A. 181; Muthusami *v.* Alagia, 26 M. 423 (1902).

(11) Mohamed Kuzulbash *v.* Mohamed Buseeroodeen, 7 W. R. 169 (1867).

(12) Mahomed Abdul *v.* Comandur, 4 M. H. C. 277 (1869).

(13) Bawan Das *v.* Mul Chand, 6 A. 173 (1884).

(14) Muhammed Khasim *v.* Carlier, 5 M. 272 (1882).

(15) Valla Tramburatti *v.* Amijani, 26 M. 69 (1902).

(16) Dharamdas *v.* Hafasji, 19 B. 250 (1894).

(17) Secretary of State *v.* Khemchand, 4 B. 432 (1880).

(18) Bhoyrub Chunder *v.* Madhub Chunder, 6 C. L. R. 19 (1880).

(19) Referred Case, 5 M. H. C. 371 (1870).

not a pension and is attachable; (1) similarly the grant of an annual sum made by Government as compensation for loss sustained by the grantee on account of improper resumption by Government of rent-free lands.(2) In England, superannuation allowance already accrued due to a retired police constable is attachable; (3) and pensions solely in respect of past services are liable to sequestration, though half pay, being to some extent for future services, is not.(4) A zemindari granted (not revenue free) by Govermnent as a reward for services rendered is not a pension.(5) Pensions were exempted by Act XXIII. of 1871. In clause (*g*) the words "military or civil" have been omitted as being of no value. The word "pensioners" of itself covers every class of pensioner.

"**Salary of any public officer.**"—Under sect. 236 of Act VIII. of 1859, salaries of Railway servants had to be actually due before they could be attached; (6) similarly the salary of a Telegraph Officer; (7) but now the unprivileged portion can be attached in advance.(8) The Calcutta High Court has held that while the pay of an Indian Staff Corps officer, as being of a public officer, comes within the meaning of this section, that of an officer of the Regular Forces, not being of a public officer, does not; (9) and the Allahabad High Court has also held that an officer of the Regular forces is not a public officer and that his pay cannot be attached;(10) but in Madras it has been held that he is a public officer and his pay is attachable.(11) Half the pay of persons subject to military law other than soldiers of the regular forces is liable to attachment.(12) An attachment upon the salary of a Railway servant ceases to be operative after he has filed his petition in Insolvency, and should be withdrawn on notice being received of the making of the vesting order.(13) For definition of "public officer," see sect. 2 (17). Under the Code of 1859, the whole of the salary of a peon in the service of a *Mamlatdar* under Government could be attached, if it had become due.(14) The remuneration of a *Watandar* cannot be attached while in the hands of the Collector or other disbursing officer, but otherwise if in the hands of the *watandar* himself.(15) A *khot* is not a public officer and the percentage on collections received by him is not salary and is attachable.(16) The salary of a private person cannot be attached until it becomes due and a debt

(1) Lachmi Narain *v.* Makund Singh, 26 A. 617 (1904).

(2) Jiban Krishna *v.* Sripati Charan, 8 C. W. N. 665 (1904).

(3) Booth *v.* Trail, 12 Q. B. D. 8 (1883).

(4) Dent *v.* Dent, L. R. 1 P. & D. 366 (1867); Willcock *v.* Terrell, L. R. 3 Ex. D. 323 (1878).

(5) Lachmi Narain *v.* Makund Singh, 26 A. 617 (1904); Amna Bibi *v.* Najnum Nissa, 31 A. 382 (1909).

(6) In matter of Hollick, 10 W. R. 447 (1868); 2 B. L. R. 108.

(7) Hussen Bhamjee *v.* Hicks, 18 W. R. 124 (1872).

(8) Bhoyrub Chunder *v.* Madhub Chunder, 6 C. L. R. 19 (1880).

(9) Calcutta Trades Association *v.* Ryland 24 C. 102 (1896); Velchand *v.* Bourchier, 37 B. 26 (1912); 14 Bom. 777.

(10) Lecky *v.* Bank of Upper Burma, 33 A. 529 (1911).

(11) Watson *v.* Lloyd, 25 M. 402 (1901).

(12) 44 & 45 Vict. c. 58, s. 151.

(13) In matter of Donoghue, 19 B. 232 (1894).

(14) Tejram *v.* Kusalji, 7 B. H. C., A. J. 110 (1870).

(15) Ganpatlal *v.* Samptram, 10 B. H. C. 400 (1873).

(16) Ravji *v.* Sayajirao, 13 W. R. 673 (1889).

exists.(1) Formerly it was held that money given by Government to its servants, not only for past services but also as a retainer for future services, cannot be attached, and that the pay of a Government official was not attachable.(2)

"**One moiety of the salary.**"—That under the Code of 1882 was half the salary or leave allowance actually payable,(3) but under the present Code it refers only to salary or allowance equal to salary while on duty. In a recent case it has been held that a salary is "property" of an insolvent within the meaning of the Provincial Insolvency Act (sect. 16, sub-sect. 2, clause *a*), by which provision, read with this section, the amount of the appropriation of the income of a public officer for the benefit of his creditors has been fixed.(4)

"**Pay and allowances.**"—Nor is the pay or allowance of a person subject to the Indian Marine Act, below the position of a gazetted officer, liable to attachment.(5)

"**Wages of labourers and domestic servants.**"—Labourers are persons who earn their daily bread by personal, manual labour or in occupations which require little or no art, skill, or previous education. Their wages may depend on the amount they do.(6) For what is included in domestic servant, see cases noted.(7) In England the attachment by any Court of Record or inferior Court of the wages of any servant, labourer, or workman was abolished in 1870.(8)

"**An expectancy of succession.**"—This includes the right of a reversioner to succeed on the death of a Hindu widow if he happen to survive her (9) Also the life interest in the residue of the property of a testator ascertainable after full administration; (10) or a son's interest in his father's estate which was bequeathed to his mother for life; (11) or the life interest which a judgment-debtor would be entitled to in an estate after the payment of certain charges, cannot be sold in execution.(12) Where however a Mahomedan by deed granted property to his wife on condition that if she had a child by him, the grant should be a perpetual *mokurruri*, and if no child, then a life *mokurruri* with remainder to the settlor's two sons, the interest of one of such sons was attachable; (13) so is the interest of a person who makes a gift of land to a Hindu widow for her maintenance, such interest being a vested interest in the land.(14)

(1) Ayyavayyar *v.* Virasami, 21 M. 393 (1897); Devi Prasad *v.* Lewis, 31 A. 304 (1909).

(2) Rajbullub Seal *v.* Mackenzie, Fulton 82 (1859).

(3) Beard *v.* Egerton, 6 B. 179 (1883).

(4) Ram Chandra Neogi *v.* Syama Charan, 19 C. L. J. 83 (1913).

(5) Act XIV. of 1887, s. 81.

(6) Jechand *v.* Aba, 5 B. 132 (1880).

(7) Dhanno Serang *v.* Upendro Mohun, 8 B. L. R. 244 (1872). See also Bhim Das *v.* Upendro Mohun, 9 B. L. R. Ap. 4 [1872].

(8) The Wages Attachment Abolition Act, 33 & 34 Vict. c. 30.

(9) Koraj Koonwar *v.* Komol Koonwar, 6 W. R. 34 (1866); Ram Chunder *v.* Dhurmo, 15 W. R., F. B. 17 (1871); 7 B. L. R. 341; see also Gour Surun *v.* Ram Surun, 8 W. R. 253 (1867).

(10) Beebee Tokai *v.* Davod Mullick, 4 W. R. 87 (1865).

(11) Anandibai *v.* Rajaram, 22 B. 984 (1897).

(12) Beebee Tokai *v.* Beglar, 6 Moo. I. A. 510 (1856); 7 B. L. R. 244.

(13) Umes Chunder *v.* Zahur Fatima, 17 I. A. 201 (1889).

(14) Kachwain *v.* Sarup Chand, 10 A. 462 (1888).

"**Other merely contingent or possible right or interest.**"—As, for instance, a vendor's right in the balance of purchase-money payable on the execution of a conveyance, so long as the conveyance is not executed; (1) or a claim under a future award of arbitration; (2) the interest in pre-empted property of a successful pre-emptor who has not yet paid the pre-emptive price fixed by his decree; (3) but property the subject of an existing suit is attachable, though the Court would order its sale at the fittest and most proper time.(4) A vested remainder in a house is attachable.(5) A mere right to receive profits which are not yet due is not attachable.(6)

"**Right to future maintenance.**"—The mere right to future maintenance cannot be attached.(7) This includes land assigned to a widow in lieu of maintenance,(8) but without any right of alienation.(9) The right of a Hindu widow to reside in her husband's family house is a purely personal right and cannot be attached under this section.(10) Formerly, the Court might order the party chargeable with the payment of an instalment of maintenance about to become due not to pay and the judgment-debtor not to receive, so that it be paid either to such person as the Court should direct or that an arrangement under sect. 268 (O. XXI. r. 46) for its collection or administration be made.(11) This, however, has not been the practice since.(12) An annuity given by will, not by any right of maintenance, but out of the testator's bounty, is attachable; (13) so are arrears of maintenance already accrued due.(14) The income of a fund in hands of trustees payable half yearly to the judgment-debtor cannot be attached after the last payment has been made and before the next is payable, there being no debt "owing or accruing;" (15) but under the Code of 1859, an annuity charged on an estate could be attached at the instance of the person by whom it was then payable, he having inherited the estate from the grantor of the annuity;(16) so can maintenance charged by deed on the grantor's property and recoverable by suit on non-payment; (17) also, in execution of a mortgage decree, the right to receive an allowance assigned to the judgment-debtor's deceased wife in lieu of her share of landed property and inherited by him from

(1) Ahmad-ud-din *v.* Majlis Rai, 3 A. 12 (1880).

(2) Tuffuzzool *v.* Rughoonath, 14 Moo. I. A. 40 (1871); 7 B. L. R. 186.

(3) Gorakh Singh *v.* Sidh Gopal, 3 A. L. J. 183 (1906); 28 A. 383.

(4) Ram Chunder *v.* Nund Lall, 19 W. R. 132 (1873).

(5) Annaji *v.* Chandrabai, 17 B. 503 (1892).

(6) Sher Singh *v.* Sri Ram, 30 A. 246 (1908).

(7) Duloon *v.* Sungun, 7 W. R. 311 (1867); Monessur *v.* Kishen, 23 W. R. 427 (1875).

(8) Gulab Kuar *v.* Bansidhar, 15 A. 371 (1893).

(9) Manisami *v.* Ammani, 15 M. L. J. 7.

(10) Salakshi *v.* Lakshmaya, 31 M. 500 (1908).

(11) Monessur *v.* Beer Protap, 15 W. R. 188 (1871); B. L. R. 646; Chukowrie *v.* Numoodah, 24 W. R. 5 (1875).

(12) Haridas *v.* Baroda Kishore, 27 C. 38 (1899); 4 C. W. N. 87.

(13) Gopal Lal Seal *v.* Marsden, 10 C. W. N. 1102 (1906).

(14) Kasheeshuree *v.* Greesh Chunder, 6 W. R. 64 (1866); Hoymobutty *v.* Koroona, 8 W. R. 41 (1867).

(15) Webb *v.* Stenton, 11 Q. B. D. 518 (1883).

(16) Dheraj Mahtuh *v.* Dhun Coomaree, 17 W. R. 254 (1871).

(17) Enaet Hossein *v.* Nujeeboonessa, 11 W. R. 138 (1869).

her and mortgaged by him.(1) So where a person sells property in consideration of a payment down and an annuity, the annuity is attachable even where the purchaser is the Court of Wards.(2) But the income of property belonging to a married woman, subject to a restraint on anticipation accruing due after the date of a decree against such married woman's separate property under sect. 8 of the Married Woman's Property Act, is not liable to attachment in execution of such decree.(3) An hereditary grant of an allowance of paddy out of the *melwaram* of certain land is not a right to future maintenance.(4) It has been recently held that this exemption of a right to future maintenance does not affect property or an interest in property which was granted for maintenance, and that thus the crop standing on land allotted to a widow for maintenance can be attached.(5) A distinction has been recognized between a right to receive money for purposes of maintenance properly so called, and a right or interest in property which forms a fund or estate out of which an annuity is paid to the grantee;—the former is a personal right and inalienable, the latter can be alienated. Where an appellant conveyed his estate to his son, but retained a right to receive from him a certain sum annually, it was held that this was not a right to future maintenance, but a valuable interest in the property.(6)

Partial exemption of agricultural produce.

61. *The Local Government, with the previous sanction of the Governor General in Council, may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.*

Attachment of agricultural produce."—See O. XXI. rr. 44 and 45. These provisions, which in the original Bill affected "growing crops" only, have been extended to all "agricultural produce." While it has been considered that the Court should attach such produce, which will now in all cases be treated as moveable property, by taking it into its possession and custody: at the same time, the procedure relating to the "actual seizure" of moveables cannot be applied, in its entirety, to a growing crop, and, having regard to the special provisions contained in O. XXI. r. 74 with respect to the sale of "agricultural produce," considerable objection has been deemed to exist against allowing such produce to be ordinarily removed on attachment. In these

(1) Salamat Hossein *v.* Luckhi Ram, 10 C. 521 (1884).

(2) Har Shankar *v.* Baijnath Das, 23 A. 164 (1901).

(3) Goudoin *v.* Venkatesa, 30 M. 378 (1907).

(4) Vardyanatha *v.* Eggia, 30 M. 279 (1907); s. c., 17 M. L. J. 373.

(5) Gobinda *v.* Meenatchi, 22 M. L. J. 204 (1911).

(6) Padmanund *v.* Rama Proshad, 16 C. L. J. 354 (1912); 17 C. W. N. 662; Asad *v.* Haidar, 38 C. 13 (1910); 12 C. L. J. 130; Tara Sundari *v.* Saroda, 12 C. L. J. 146 (1910).

circumstances, in order to give proper effect to O. XXI. r. 74, it has been enacted by O. XXI. r. 44, *post*, that attachment should be effected by affixing a notice *in situ* on the field or threshing-floor and also, by way of greater caution, on the judgment-debtor's ordinary place of residence. To meet special cases of persons not residing in the actual neighbourhood, under the special orders of the Court, affixture on the house in which the judgment-debtor carries on business, or personally works for gain, or in which he is known to have last resided or personally worked for gain, is allowed.

"**Agricultural produce.**"—The original proposal was to authorize the Court only to declare a fixed proportion of any growing crop to be exempted, but it was universally considered impracticable. It has been considered to be clear that the amount to be exempted, not merely of growing crops but of all "agricultural produce," must depend upon the circumstances of each particular case. As a matter of working practice, the original proposal to treat a proportion of growing crops as free from liability to attachment and sale could not be conveniently carried into effect. It was therefore proposed that the growing crop, as such, should be attached, but that the proportion to be exempted should, when ascertained, be "released from attachment," and should be free from liability to sale. Subsequently, however, the words "be exempted from liability to attachment or sale in execution of a decree" were substituted for the words "be released from attachment and shall be free from liability to sale in execution of a decree," in order, it was said, to make it clear that the exemption extends to produce which has been hypothecated. The provisions of O. XXI. r. 44 authorizing the judgment-debtor to attend to his crop while under attachment, were thought sufficient to prevent any hardship arising from this procedure. The proviso, originally appended to the draft of this section by way of greater caution, saving any first charge which by any law is vested in the Government for the recovery of revenue, or in a landholder for the recovery of rent, has been omitted, because it was considered that the special and local enactments, by which the first charges in favour of rent or revenue are created, are sufficiently safeguarded by sect. 3, *ante*.

[s. 271.] **62.** (1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

Seizure of property in *dwelling-house.*

(2) *No* outer door of a dwelling-house shall *be broken* open *unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto*, but when *the* person *executing any such process* has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) *Where a* room *in a dwelling-house is* in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the

process shall give notice to *such woman* that she is at liberty to withdraw; and, after allowing reasonable time for *her* to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

Seizure of property.—This section, save for the first sentence, corresponds with sect. 271 of Act X. of 1877, with the exception that in that Act the words "*house or other building*" were used instead of "*dwelling-house.*" The first sentence was added by Act XIV. of 1882. According to that Act, sub-clause (2) commenced with the words "*or shall break open any outer door of a dwelling-house*" instead of the words in italics, while sub-clause (3) commenced "*Provided that if the room be*" instead of "*Where a room in a dwelling-house,*" while the word "*break*" in sub-clause (2) has been substituted for "*unfasen and.*" The second sub-clause has been amended to bring it into line with sect. 55, *ante*.

"**Any outer door.**"—It was formerly held that he might break open the door of a shop; (1) or remove locks on the door of a golah and put on other locks for safe custody.(2) Under the earlier Codes, which prohibited the breaking open of any outer door of a dwelling-house, it was held the privilege extended to an out-house or other office annexed to the dwelling-house but not to a building, such as a storehouse or barn, standing at a distance and not forming parcel of it.(3) By the amendment introduced by the present Code the judgment-debtor's refusal to grant access to his dwelling-house justifies the person executing to break open any outer door, that is, any outer door of the dwelling-house of the defendant but not of the house of a stranger.

"**Break open.**"—A person executing a process for attachment of moveables, having gained access to the house, was held to have a right to remove the lock from the door of a room in which he had reasonable ground for supposing moveable property was lodged.(4) A bailiff who breaks the doors of a third person in execution of a decree against the judgment-debtor is a trespasser if it turns out that the person or goods of the debtor are not in the house.(5)

"**Actual occupancy of a woman.**"—This provision does not apply to the arrest of a purdanasheen woman.(6)

As to arrest, see sects. 55 and 132.

63. (1) Where property not in the custody of any Court *is under attachment* in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall [s. 285.]

Property attached in execution of decrees of several Courts.

(1) Damodar Parsotam *v.* Ishvar Jetha, 3 Bom. 89 (1878).

(2) Sowdaminee *v.* Buggessur Soor, 13 W. R. 339 (1870); 5 B. L. R. App. 27.

(3) Bai Kuvar *v.* Venudas, 8 B. H. C. A. J. 127 (1871).

(4) Kondasawmy *v.* Krishnasawmy, 5 M. H. C. 189 (1870).

(5) Reg. *v.* Gazi, 7 B. H. C. Cr. Ca. 83 (1870).

(6) Kadumbinee *v.* Koylashkaminee, 7 C. 19 (1881).

determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

Attachment under several decrees.—This section is the same as sect. 285 of Act X. of 1877, save that the words "*is under attachment*" have been substituted for "*has been attached*" and sub-clause (2) added by the present Code. It only applies to cases of attachment and not to sales.(1) It is doubtful if it applies to immoveable property; (2) but the Madras High Court has held that it does.(3) It only applies where the Courts are all either Civil Courts or Revenue Courts and not to cases of conflict between Civil and Revenue Courts.(4)

"**Decrees of more Courts than one.**"—This section does not apply where there is not more than one existing attachment. Thus where in execution of a mortgage decree of the first mortgagee the Munsif attached, and then the Subordinate Judge attached and sold in execution of a decree of the second mortgagee, the subsequent sale by the Munsif was valid.(5)

"**The Court which shall receive or realize such property and shall determine.**"—This includes the sale of the attached property; (6) also the power of deciding objections to the attachment, of determining claims made to the property, of ordering the sale thereof, and receiving the sale proceeds, and of providing for their distribution under sect. 73.(7) It has been held that the words "claim thereto and any objection to the attachment" refer to claims and objections of a sort which can be summarily decided in execution-proceedings.(8)

"**Shall be the Court of highest grade.**"—It was held under the former Code that this does not take away the jurisdiction of the inferior Court, and its proceedings in contravention would be vitiated only where there had been notice of the proceedings in the superior Court; (9) but if there were notice, a sale by the inferior Court would be bad.(10) Thus where sales were held by the Subordinate Judge and the Small Cause Court (the latter having notice of the former's attachment) on the same day, it was held that the purchaser at the Subordinate Judge's sale had the better title.(10)

(1) Chunni Lal *v.* Debi Prasad, 3 A. 356 (1880).

(2) Obhoy Churn *v.* Golam Ali, 7 C. 410 (1881).

(3) Muttukaruppan *v.* Mutturamalinga, 7 M. 47 (1883).

(4) Raghubar *v.* Banke Lal, 22 A. 182 (1900).

(5) Stowell *v.* Ajudhia Nath, 8 A. 255 (1884).

(6) Abdul Karim *v.* Thakordas, 22 B. 88 (1896).

(7) Badri Prasad *v.* Sarun Lal, 4 A. 359 (1882); Bhagwan Chandra Kritiratna *v.* Chandra Mala Gupta, 1 C. L. J. 97 (1902).

(8) Ramjas *v.* Guru Charan, 14 C. W. N. 396 (1909).

(9) Kunhayan *v.* Ithukutti, 22 M. 295 (1898); Bykant Nath *v.* Rajendro, 12 C. 333 (1885).

(10) Abdul Karim *v.* Thakordas, 22 B. 88 (1896).

So where a house attached by a Subordinate Judge was attached and sold by a Munsif and subsequently sold by the Subordinate Judge, the Munsif's sale was invalid; (1) but where property is sold by an inferior Court by mistake (due to its not having received notice of the proceedings in the superior Court) the sale should not be set aside, but the superior Court should adopt the sale and distribute the assets.(2) The Calcutta High Court, following this last case and dissenting from the two Allahabad and the Madras cases just referred to (but apparently overlooking the question of notice), held that where the first Munsif's Court attached property, and thereafter the second Munsif's Court attached and sold the same property, the sale was valid though the two Courts were of the same grade.(3) The Bombay High Court then held (the question of notice not being mentioned) that where the second Subordinate Judge attached and sold property which, however, was attached by the first Subordinate Judge before the sale, the sale was valid.(4) So where the Munsif attached and sold, while an attachment subsisted of the Subordinate Judge, the Calcutta High Court held the sale was valid, this section being merely one for procedure to prevent different claims arising out of attachment and sale by different Courts.(5) Where the same property has been attached by two Courts of different grades, a sale by the Court of lower grade is not less invalid because it was ignorant of the attachment by the Court of higher grade, all the rulings of the Allahabad High Court being this way, though opposed to the rulings of Madras and Bombay.(6) The Calcutta High Court has recently held that where the same property is under attachment by two Courts of different grades, a sale effected by the Court of a lower grade is not a nullity.(7) The fact that prior to the attachment by the superior Court, proceedings subsequent to attachment had been taken by the inferior Court, was held not to affect the operation of this section.(8) Again, where a Subordinate Judge made an order for attachment before judgment, which became operative on a decree being subsequently obtained, after attachment, but the day before sale, by a Munsif, and thereupon the Subordinate Judge called for the Munsif's record for the purpose of making a rateable distribution, held the Munsif had no power to distribute the sale proceeds amongst the decree-holders in his Court; but no question as to the validity of the sale was raised in the second clause.(9)

In the N.W.P. the Court of a Munsif must for the purposes of this section

(1) Muttukarùppan *v.* Mutturamalinga, 7 M. 47 (1883); Aghore Nath *v.* Shama Sundari, 5 A. 615 (1883); Badri Prasad *v.* Saran Lal, 4 A. 359 (1882).

(2) Bykant Nath *v.* Rajendra, 12 C. 333 (1885).

(3) Dwarka Nath *v.* Banku Behari, 19 C. 651 (1891).

(4) Patel Naranji *v.* Haridas, 18 B. 458 (1893); Turmuklal *v.* Kalyandas, 19 B. 127 (1894).

(5) Ram Narain *v.* Mina Koery, 25 C. 46 (1897); Gopi Chand Bothra *v.* Kasemunnessa 34 C. 836 (1907).

(6) Chiranji Lal *v.* Jawahir Mal, 26 A. 538 (1904); foll. Har Prasad *v.* Jagan Lal, 27 A. 56 (1904); Durpati Bibi *v.* Ramrach Pal, 13 A. 527 (1909).

(7) Gopi Chand Bothra *v.* Kasemunnessa Khatun, 34 C. 836; s. c., 6 C. L. J. 130 (1907).

(8) Balkishen *v.* Narain Das, 18 A. 348 (1896).

(9) Bhagwan Chandra *v.* Chandra Mala, 1. C. L. J. 97 (1902).

be regarded as of a higher grade than a Court of Small Causes.(1) Where there is a conflict between a Civil Court and a Revenue Court, this section does not apply, and whichever Court first sells conveys a good title.(2) Sect. 73 does not require the transfer of a decree to the Court where the process of realization is taking place as a condition precedent to an application under this section.(3)

[s. 276.]

Private alienation of property after attachment to be void.

64. *Where* an attachment has been made, any private *transfer or delivery* of the property attached *or of any interest therein* and any payment to the judgment-debtor of *any* debt, dividend *or other monies contrary to such attachment*, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

Alienation after attachment.—This section corresponds with sect. 240 of Act VIII. of 1859, save that the words "*as against all claims enforceable under the attachment*" were added by sect. 276 of Act X. of 1877, and that the wording of the earlier portion of that section which ran, "*When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise,*" has been replaced by the words (except those italicized) down to "*interest therein*" in this section. The words italicized and the Explanation are new. As to the latter, see last paragraph, *post*.

"**Where an attachment has been made.**"—The attachment must be effectual.(4) An attachment does not create any charge or interest upon property in favour of the attaching creditor as against other creditors; (5) it only prevents alienation and does not confer title; (6) but under a mortgage decree an attachment supplemented by an order for sale created a valid charge on the share of a Mitakshara co-parcener who died thereafter.(7) It has been held that this section includes an attachment before judgment in a suit which is subsequently decreed.(8) But in a recent case in the Bombay High Court where attachment before judgment had been obtained against a Mitakshara co-parcener and he died before execution, it was held that execution could not

(1) Ballu Ram *v.* Raghubar Dial, 16 A. 11 (1893).

(2) Raghubar Dayal *v.* Banke Lal, 22 A. 182 (1900).

(3) Har Bhagat *v.* Anandaram, 2 C. W. N. 126 (1897).

(4) Satya Charan Mukerji *v.* Madhub Chunder Karmokar, 9 C. W. N. 693 (1905).

(5) Soobul Chunder *v.* Russick Lall, 15 C. 202 (1888).

(6) Moti Lal *v.* Karrabuldin, 24 I. A. 170; 25 C. 179 (P. C. 1897); 1 C. W. N. 639; Peacock *v.* Madan Gopal, 6 C. W. N. 577 (1902); Krishnasawmy *v.* Offi. Assignee, 26 M. 673 (1903).

(7) Suraj Bunsi *v.* Sheo Persad, 5 C. 148, p. 174 (P. C. 1879).

(8) Ganu Singh *v.* Jangi Lal, 24 C. 531 (1899).

be granted, since the other co-parcener's right by survivorship defeated such attachment.(1) If no attachment were made but the property advertised for sale and the judgment-debtor incumbered the property, the decree-holder could sell the property subject to the incumbrances which were not collusive,(2) for a debtor may, although unsatisfied decrees are outstanding against him, prior to attachment, make an alienation for adequate consideration or give a preference to a particular creditor over others notwithstanding that it may defeat an anticipated execution.(3) When an order for attachment was made but was not executed and the property was sold in execution, an alienation after the order of attachment was good as against the execution purchaser.(4) Failure to affix a copy of the notice in the Court House under sect. 268 (O. XXI. r. 46), renders the attachment invalid as against a subsequent assignment.(5) So where the copy was not posted in the Court House or sent to or posted in the office of the Collector,(6) or where the wrong property was described in the application and in the order for attachment,(7) or where the prohibitory notice was not issued and published, the attachment was not such as was required by this section ; (8) but the question of the non-observance of the formalities of attachment cannot be raised for the first time on appeal to the Privy Council.(9) The invalidation of a private transfer made pending an attachment of the property transferred only results from a subsisting attachment. An attachment ceases to be operative from the moment money is paid into Court, or at the latest from the time satisfaction is entered.(10)

"**Private Transfer.**"—These are alienations which, if permitted, would defeat claims legally enforceable under the attachment,(11) and so far as they prejudice the execution-creditor they are void.(12) They include a *zar-i-peshgi* lease and also an ordinary agricultural lease,(13) and a sale after attachment to the mortgagee under a mortgage executed before attachment (14) as also an assignment of a Hindu widow's life interest in the profits of immoveable property left her by her husband's will; (15) but the consent of a Mahomedan heir to a bequest by a Mahomedan of more than one-third of his estate is not an alienation under this section,(16) nor the vesting of an insolvent's estate in

(1) Subra Mangesh Chandavarkar *v.* Mahadevi *kom* Manjibhatta, 38 B. 105 (1913); dist. Suraj Bunsi *v.* Sheo Persad, *supra*, and citing Moti Lal *v.* Karrabuldin, 25 C. 179 (1897).

(2) Sahoo Gund *v.* Geetum Singh, 2 N. W. P. H. C. R. 206 (1867).

(3) Stephenson *v.* Baumgartner, 3 Agra, 104 (1868).

(4) Rameswar *v.* Ramtanu, 4 B. L. R. A. J. 24 (1869).

(5) Satya Charan *v.* Madhub Chunder, 9 C. W. N. 693 (1905).

(6) Nur Ahmad *v.* Altaf Ali, 2 A. 58 (1878).

(7) Gumani *v.* Hardwar, 3 A. 698 (1881).

(8) Dwarkanath *v.* Ram Chunder, 13 W. R. 136 (1870).

(9) Ramkrishna *v.* Surfunnissa, 6 C. 129 (1880 P. C.).

(10) Kunhi Moossa *v.* Makki, 23 M. 478, 482 (1899); Vibhudhapuya *v.* Suthaswami, 28 M. 380 (1905).

(11) Abdul Rashid *v.* Gappo Lal, 20 A. 421 (1898).

(12) Dinobundhu *v.* Jogmaya, 29 I. A. 9 (1901); 29 C. 154; 6 C. W. N. 209.

(13) Debi Prasad *v.* Baldeo, 18 A. 123 (1895).

(14) Annavundavan *v.* Iyasawmy, 6 M. H. C. 65 (1871).

(15) Natha Kerra *v.* Dhunbaiji, 23 B. 1 (1898).

(16) Daulatram *v.* Abdul Kayum, 26 B. 497 (1902).

the Official Assignee under a vesting order,(1) nor the renewal of a mortgage, originally made before attachment, which does not enhance the charge,(2) nor the execution of a conveyance directed by a decree made after attachment in terms of an award of arbitrators made before attachment,(3) nor an alienation made in compliance with the conditions of O. XXI. r. 83.(4) The law in the Mofussil as to alienations by debtors is the *lex rei sitæ*.(5) Even a mortgage after a grant of a certificate under O. XXI. r. 83, will not affect the judgment-creditor's lien under this section unless it be in strict conformity with the provisions of O. XXI. r. 83.(6) A mortgage to pay off an incumbrancer prior to the attaching creditor, whose rights are not prejudiced thereby, is not one within this section.(7)

"**Contrary to such attachment.**"—The former words were "during the continuance of the attachment." A lease prior to the attachment is good; (8) so is a *bonâ fide* sale even when the purchaser knew that the decree-holder was seeking to attach the property,(9) and notwithstanding that it may defeat the anticipated execution.(10) Prior to attachment a debtor may give priority to one creditor over another, notwithstanding judgment has been obtained against him.(11) A conveyance executed by the judgment-debtor after one attachment has been permanently struck off and before a new attachment is issued is valid;(12) but the striking off of execution proceedings does not necessarily withdraw an attachment so as to make an alienation valid; (13) though where the first execution proceeding was stayed by mutual agreement and a subsequent attachment was considered necessary and was made, a mortgage executed prior to the second attachment was valid; (14) but if a subsequent attachment were superfluous it does not neutralize the attachment already subsisting.(15) Where after the property was by an order released from attachment, a mortgage is valid though on appeal from the order an order for partial attachment was made by consent; (16) but it is doubtful whether a conveyance executed during the continuance of an attachment becomes valid or ceases to be void as against the judg-

(1) Sarkies *v.* Bundho, 1 N. W. P. H. C. R. 99 (1869); Sadayappa *v.* Ponnama, 8 M. 554 (1885).

(2) Mahadevappa *v.* Srinivasa, 4 M. 417 (1881); see also Dinobandhu *v.* Jogmaya, 29 I. A. 9 (1901); 29 C. 154; 6 C. W. N. 209.

(3) Qurban *v.* Ashraf, 4 A. 219 (1882).

(4) Shivlingappa *v.* Chanbasappa, 30 B. 337 (1905); 8 Bom. L. R. 16.

(5) Gopee Chunder *v.* Ram Kumul, W. R. 1864, 179.

(6) Gurusami *v.* Venkatsami, 14 M. 277 (1890).

(7) Abdul Rashid *v.* Gappo Lal, 20 A. 421 (1898).

(8) Fegredo *v.* Mahomed Mudessur, 15 W. R. 75 (1871).

(9) Ram Barun *v.* Jankee Sahoo, 22 W. R. 473 (1874); Rajan Harji *v.* Ardeshir, 4 B. 70 (1879).

(10) Stephenson *v.* Baumgartner, 3 Agra 104 (1868).

(11) Doorga Tewaree *v.* Naipal, 2 N. W. P. H. C. R. 224 (1870).

(12) Puddomonee *v.* Roy Muthoora, 20 W. R. 133 (1873); 12 B. L. R. 411; Indurjeet *v.* Luchmon, 24 W. R. 56 (1875).

(13) Jugobundhoo *v.* Bhugwan, 17 W. R. 15 (1871); Soondur *v.* Bihooria, 24 W. R. 36 (1875).

(14) Matonginy *v.* Chowdhry, 25 W. R. 513 (1870); Zaibunnissa *v.* Jairam, 1 A. 616 (1878); Gungagotti *v.* Lam Sunder, 8 C. L. R. 157 (1881).

(15) Mookhesur *v.* Rampaul, 5 N. W. P. H. C. R. 70 (1873).

(16) Kishory Mohun *v.* Mahomed Mujaffer, 18 C. 188 (1890).

ment-creditor, and those claiming under him, by reason of the attachment being subsequently struck off,(1) but this has been so held.(2) If the decree in execution of which the attachment was made be set aside the attachment is invalid and an alienation during its continuance is valid; (3) but on the other hand where an attachment was released and thereupon the judgment-debtor mortgaged the property and thereafter the order releasing the attachment was set aside, the mortgage was invalid.(4) Where, however, the judgment-debtor sold a part of the attached property and partly paid the attaching creditor, who withdrew the attachment, the sale was valid; (5) similarly where a mortgage was executed to pay off an attachment, the decree being satisfied before the mortgage was executed, but the attachment withdrawn after the mortgage.(6) Under the Code of 1859 it was held an alienation made pending attachment was not made valid by the subsequent removal of the attachment.(7) A sale in pursuance of an attachment being set aside does not displace the attachment; (8) nor does the death of the judgment-debtor; (9) even though he be a Mitakshara co-parcener and his interest in the property attached passed to the surviving co-parceners.(10) But it has been recently held that when the attachment is merely one before judgment it will be displaced by the death of a Mitakshara co-parcener.(11) An attachment nine years old in execution of a decree twelve years old in the absence of other information must be assumed to have been removed.(12) A purchase in execution under a decree by a landlord under the Rent Recovery Act of property previously attached is subject to such attachment; (13) so also where the Collector attached under the Madras Abkari Act I. of 1886, a subsequent attachment and sale under a civil decree was subject to the Collector's attachment.(14) A mortgagee whose mortgage was prior to the attachment privately purchased, subsequently to attachment, and whose purchase was void as against an auction purchaser, could fall back on his mortgage.(15)

"**All claims enforceable under the attachment.**"—An alienation is void only to the extent of all claims enforceable under the attachment,(16)

(1) Puddomonee *v.* Roy Muthoora, 20 W. R. 133 (1873); 12 B. L. R. 411.

(2) Gobind Singh *v.* Zalim Singh, 6 A. 33 (1883); Kunhi *v.* Makki, 23 M. 478 (1899).

(3) Juggut Narain *v.* Toolsee, 10 W. R. 99 (1868); 1 B. L. R., A. J. 71.

(4) Bonomali *v.* Prosunno, 23 C. 829 (1896), Ali Ahmad *v.* Bhansi Dhar, 31 A. 367 (1909).

(5) Prannath *v.* Shumboo, 7 W. R. 430 (1867).

(6) Buldeo *v.* Kanaha, 1 N. W. P. H. C. R. 25 (1869).

(7) Ram Churn *v.* Shubboo, 14 W. R. 25 (1870); Mahatab *v.* Surno Moyee, 15 W. R. 222 (1871); 12 B. L. R. 414 note.

(8) Gossain Munraj *v.* Deen Dyal, 20 W. R. 20 (1873).

(9) Sheo Prasad *v.* Hira Lal, 12 A. 440 (1889).

(10) Beni Pershad *v.* Parbati, 20 C. 895 (1892).

(11) Subra Mangesh Chandavarkar *v.* Mahadevi *kom* Manjibhatta, 38 B. 105 (1913).

(12) Goonjessur *v.* Luchmee, 20 W. R. 418 (1873).

(13) Subramanya *v.* Rajaram, 8 M. 573 (1885).

(14) Sarangapani *v.* Secretary of State, 16 M. 479 (1893).

(15) Gopal Sahoo *v.* Gunga Pershad, 8 C. 530 (1882).

(16) Shivlingappa *v.* Chanbasappa, 30 B. 337 (1905); 8 Bom. L. R. 16.

that is, only against the execution creditor and persons claiming under him; (1) and only so far as may be necessary to secure the execution of the decree; (2) and not as against all persons who at any future time may possibly obtain executions.(3) So where the sale was held at the instance of the second attaching creditor and the judgment-creditor had incumbered the property after the first attachment, but before the second, the sale was subject to the incumbrance, even though the first attaching creditor was paid out of the sale proceeds.(4) Where the private alienation in no way interferes with the rights secured by his decree to the attaching creditor it is not void; (5) and if the decree were paid off the attachment ceased and the rights acquired pending that attachment became valid; (6) and this would be so although the attachment were not formally withdrawn; (7) and even if the attachment were wrongly continued to secure payment of subsequent instalments under the decree not then payable, the instalment in respect of which the attachment was made having been paid off.(7)

"All claims" means all legal claims.(8) "All claims enforceable under the attachment" is not synonymous with "the claim of the attaching creditor" as used in the interpretation of sect. 240 of Act VIII. of 1859,(9) but means all claims enforceable under attachments which have actually been made and are perfected.(10) This section is for the benefit of the attaching creditor and of those claiming under or through him, and not for the benefit of puisne attaching creditors whose attachments are laid on later than the private alienation.(11) *The Allahabad High Court held that orders under sect. 295 (now 73) did not amount to such attachments.*(10) The Bombay High Court held that claims under sect. 73 are claims enforceable under the attachment, and an assignment of monies subsequently realized in execution, pending attachment, is void as against persons coming in subsequently and claiming distribution under sect. 73.(12) This question has been set at rest by the Explanation to this clause.(13) It was, however, held that if the "monies realized" are the proceeds of a private alienation brought into Court, in payment of the existing attachment on the property alienated, the alienation is good as against creditors claiming distribution under the former section corresponding to sect. 73 after the date of the alienation.(14) See now notes to that section. The attachment must, however, be a subsisting one; if it is removed the alienation made

(1) Puddomonee *v.* Roy Muthoora, 20 W. R. 133 (1873); 12 B. L. R. 411.

(2) Dinendranath *v.* Ramkumar, 7 C. 107, p. 118 (1881); 10 C. L. R. 281; 8 I. A. 65.

(3) Anund Lall *v.* Jullodhur, 17 W. R. 313 (1872); 10 B. L. R. 134; 14 Moore I. A. 543; Bal Mokund *v.* Ramhit, 13 W. R. 134 (1869).

(4) Guru Prosad *v.* Binda Bibi, 9 B. L. R. 180 (1872).

(5) Abdul Rashid *v.* Gappo Lal, 20 A. 421 (1898).

(6) Umesh Chunder *v.* Raj Bullubh, 8 C. 278 (1882); 10 C. L. R. 204; Khushalchand *v.* Nandram, 35 B. 516 (1911).

(7) Ramdhun *v.* Koylash, 12 W. R. 457 (1869); 4 B. L. R., A. J. 20.

(8) Abdool Rashid *v.* Gappo Lal, 20 A. 421 (1898).

(9) Sorabji *v.* Govind Ramji, 16 B. 91, p. 106 (1891).

(10) Ganga Din *v.* Khushali, 7 A. 702 (1885).

(11) Babaji *v.* Gajanan, 11 B. H. C. 169 (1874).

(12) Sorabji *v.* Govind Ramji, 16 B. 91 (1891).

(13) Velchand *v.* Musson, 14 Bom. L. R. 633 (1912).

(14) Vibredhapriya *v.* Yusuf Sahib, 28 M. 380 (1905); 15 M. L. J. 202.

during its pendency is valid against a subsequent attaching creditor, who, if the attachment had continued and the money were realized, might have claimed distribution under sect. 295 (now 73).(1) Where there has been an attachment, followed first by a private alienation and then by petitions for rateable distribution by other creditors, and the attachment is then removed, the subsequent claims to rateable distribution go with it; because they are merely claims enforceable under the attachment if it results in the realization of assets which the Court can distribute.(2) The Bombay High Court held under the Code of 1882, that, notwithstanding sect. 276 (sect. 64 of the present Act), a private alienation becomes absolute even against all claims enforceable under the attachment on compliance with the conditions of sect. 305 (r. 83, O. XXI.), which is an enabling section and qualifies the prohibition contained in sect. 276.(3)

A purchaser in execution acquires the right, title, and interest of the judgment-debtor freed from all alienations and incumbrances affected by him after the attachment; (4) but if he bought the attached property privately he would get no better title than the vendor had.(4) Such a private sale would not however, be bad as being made pending attachment if it were accepted by the decree-holder in satisfaction of his decree and thereafter sanctioned by the Court.(5) There is no inconsistency between this Explanation and O. XXI. r. 48 cl. (2).(6)

Explanation.—See last note.

SALE.

65. *Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.*

Purchaser's title.

Purchaser's title.—The Code of 1859 (sect. 259) provided for the grant of a certificate on a sale becoming absolute (that is confirmed) to the purchaser to the effect that he had purchased the right, title, and interest (7) of the defendant in the property sold "*and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest.*" It did not provide for the date of the certificate. Sect. 316 of the Code of 1877 (Act X.) as published ran: "*when a sale of immoveable property has become absolute in a manner aforesaid the Court shall grant a certificate stating the name of the person, who at the time of sale, is declared to be the purchaser and the date of such sale.*" There the section

(1) Kunhi *v.* Makki, 23 M. 478 (1899).

(2) Jetha Bhima & Co. *v.* Lady Janbai, 14 Bom. L. R. (1912); 37 B. 138.

(3) Shivlingappa *v.* Chanbasappa, 30 B. 337 (1905); 8 Bom. L. R. 16.

(4) Dinendranath *v.* Ramkumar, 7 C. 107 (1880 P. C.); 10 C. L. R. 281; 8 I. A. 65; Ganesh *v.* Purshottam, 33 B. 311, 316 (1908).

(5) Annavunadavan *v.* Iyasawmy, 6 M. H. C. 65 (1871).

(6) Velchand *v.* Musson, 14 Bom. L. R 633 (1912).

(7) See as to this Balvant *v.* Hirachand, 27 B. 334, at p. 339 (1903).

ended. Sect. 49 of Act XII. of 1879, amending the Code of 1877, substituted for sect. 316 of that Code another section which was in the same terms as sect. 316 of the Code of 1882. Under that Code a certificate was to be granted on the sale becoming absolute (that is under sect. 314 confirmed) stating the property sold and the name of the purchaser. It then provided "*such certificate shall bear the date of the confirmation of the sale, and so far as regards the parties to the suit and persons claiming through or under them the title to the property sold shall vest in the purchaser from the date of such certificate and not before.*" All these Codes agreed in this, that confirmation was necessary to make a sale absolute, and that when a sale became thus absolute a certificate was to be granted to the purchaser.

Questions of difficulty formerly arose as to the following points, viz., whether it was the sale or certificate which conferred title; the date when such title vested and the necessity for the production of a certificate as evidence of such title. It is not easy to reconcile all the decisions on the points mentioned.

Under the Code of 1859 it was sometimes thought,(1) upon a construction of the concluding words of sect. 259 of that Code, that it was the sale-certificate which transferred the title. The Privy Council, however, pointed out that that section did no more than create statutory *evidence* of transfer in place of the old mode of transfer by Bill of sale,(2) and the Code of 1877 omitted the words which afforded the ground for the contention that it was the certificate which created the interest.(3) The title became complete upon payment and confirmation.(4) It was in reality in both cases the sale itself, perfected by payment of the purchase-money and the order of confirmation, which passed the title,(5) and in many cases it was held that before the grant of the certificate the purchaser had an interest which was sometimes described as equitable or inchoate.(6)

(1) Srinivasa Sastri *v.* Seshayangar, 3 M. 37 (1881) [ref. to in Velam *v.* Kumara Sami, 11 M. 296 (1887) at p. 298]; Padu Malhari *v.* Rakhmai, 10 B. H. C. R. 435 (1873), at p. 439. It is this view which is the ground of the reasoning in Harkisandas Narandas *v.* Bai Ichha, 4 B. 155 (1879), where it was held that the plaintiff had no *right of action* because he had no certificate. His *right of action* was based on the sale, though it might, in one view, be that his suit might fail by reason of want of the necessary evidence of that right; though this might properly be supplied after suit brought, if the certificate was not part of the cause of action but mere evidence of it. And see Khushal Panachand *v.* Bhimabai, 12 B. at p. 593 (1886).

(2) Mt. Buhuns Kower *v.* Lalla Bahooree Lall, 14 M. I. A. 496 (1872), at p. 523.

(3) Srinivasa Sastri *v.* Seshayyangar, 3 M. 37, at p. 41 (1881); Prokash Chunder Das *v.* Tarachand Dass, 9 C. 82, 87 (1882).

(4) Nayar Timapa *v.* Bhaskar Parmaya, 10 B. 444 (1886) [a sale before the amending Act of 1879].

(5) Doorga Narain Sen *v.* Baney Madhub Mozoomdar, 7 C. 199, 207 (1881) ["We do not think that these words contemplate that nothing would pass to a purchaser unless a certificate was issued; the order approving the sale would pass title; certificate is merely evidence that property so passed"]; Tara Prasad Mytee *v.* Nund Kishore Giri, 9 C. 842 (1883); Velan *v.* Kumarasami, 11 M. 296, 300 (1887); Jagan Nath *v.* Balkeo, 5 A. 305 (1883) P. B.

(6) Khushal Panachand *v.* Bhimabai, 12 B. 589, 594 (1886); Shivram Narayan *v.* Ravji Sakharam, 7 B. 254, 256 (1882); Nayar Timapa *v.* Bhaskar Parmaya, 10 B. 444 (1886); Yeshvant Babarav *v.* Govind Shankar, 10 B. 453 (1886); Chintamanrav Natu *v.* Yethabai, 11 B. 588 (1887); Nanjundepa *v.* Hemapa, 9 B. 10 (1884); Krishaji Ravji *v.* Ganesh Bapuji, 6 B. 139 (1881).

and on confirmation the title related back to, and the property vested at, the date of sale.(1)

Assuming, however, that the certificate was only evidence of and was not necessary to pass title, the question arose under the Code of 1859, or at a period when the influence of the practice of that Code had force, whether it was the only evidence and whether a party whose title by purchase was confirmed could uphold it without the production of a sale-certificate. The case-law was conflicting. It was held by the Bombay High Court that for suits on a legal title, as in ejectment against a stranger, a certificate was necessary,(2) but not in suits of an equitable character.(3) It was also held that where the sale was admitted (4) or the question arose between judgment-debtor and purchaser (5) or persons bound by the decree,(6) and apparently in other cases (7) a certificate was not necessary. A lax practice existed under the Code of 1859, under which possession was often given before issue of the sale certificate. Under the Code of 1877, and subsequently, an order for delivery of possession only issued after the grant of a certificate,(8) and with greater regularity of practice in this respect, the importance of the question discussed appears to have gradually diminished.

The Code of 1877 was amended in 1879, and the certificate was required to bear the date of confirmation and "*so far as regards the parties to the suit, and persons claiming through or under them*," the title to the property vested in the purchaser from the date of the certificate, that is the date of confirmation, and not the date of sale.(9) This provision also gave rise to considerable difficulty, a question naturally arising as to the state of the title between the date of sale and the date of confirmation, which might be and often was a considerable period.(10) It was, therefore, held that when sect. 316 of the last Code referred to the title to the property sold, it meant the full perfected title, which did not vest in the purchaser till confirmation. But this was not inconsistent with an equitable interest arising from the sale. After sale and before

(1) Bhyrub Chunder Bundopadhya *v.* Soudamini Dabee, 2 C. 141, 145 (1876) F. B.; Chatraput Singh *v.* Grindra Chunder Roy, 6 C. 389, 391, 392 (1880) [title held to accrue from date of sale].

(2) Khushal Panachand *v.* Bhimabai, 12 B. 589 (1886), at p. 593.

(3) Id.; Krishnaji Ravji *v.* Ganesh Bapuji, 6 B. 139, 142 (1881).

(4) Sadagopa *v.* Jamuna Bhai, 5 M. 54, 60 (1882); Tara Prasad Mytee *v.* Nund Kishore Giri, 9 C. 842, 843 (1883); Nayar Timapa *v.* Bhaskar Parmaya, 10 B. 444 (1886); Doorga Narain Sen *v.* Baney Madhub Mozoomdar, 7 C. 199, at p. 207 (1881); Velan *v.* Kumarasami, 11 M. 296, at p. 300 (1887).

(5) Benode Lal Ghose *v.* Tamizuddin, 7 C. L. R. 115, 116 (1880); Khushal Panachand *v.* Bhimabai, 12 B. 589, 594 (1886).

(6) Shivram Narayan *v.* Ravji Sakharam, 7 B. 254 (1882).

(7) Jagan Nath *v.* Baldeo, 5 A. 305 (1883), ref. to in Velan *v.* Kumarasami, 11 M. 296 (1887), where it was held that assuming a certificate should be registered, the plaintiff was not bound to rely on the certificate to prove his title. In this case the sale was denied.

(8) Basapa *v.* Marya, 3 B. 433 (1879); Khushal Panachand *v.* Bhimabai, 12 B., at p. 594 (1886).

(9) Prem Chand Pal *v.* Purnima Dassee, 15 C. 546, 551, 552 (1882); Shiam Lal *v.* Nathe Lal, 33 A. 63 (1910).

(10) See Adhur Chunder Banerjee *v.* Aghore Nath Aroo, 2 C. W. N. 589, 590 (1898).

confirmation, the purchaser had an inchoate title contingent on subsequent confirmation.(1)

From the date of sale the purchaser had a good equitable or inchoate title to the property sold, and when the certificate was actually granted it made the title absolute and made that title relate back to the date of the sale.(2) Further, the provision of the section was not general and did not apply to third parties.(3) The certificate was as before, only evidence. The Court in granting it had not to determine what property was to pass by the sale, but merely to record an already accomplished fact, and to state what had been sold. Of this the certificate was evidence, but it was not conclusive.(4)

The amended sect. 316 (O. XXI. r. 94 of the present Code) does not deal with this point, but the present section does. According to O. XXII. r. 92, a sale becomes absolute after the expiry of the period for an application for setting it aside or if such application is made when it is disallowed and upon confirmation. And under this section when the sale has become absolute the property is deemed to have vested in the purchaser from the *date* of *sale* and *not* from the time *when the sale becomes absolute.*

Though, therefore, the certificate bears date the day when the sale became absolute, the title in such case is deemed to have accrued before then, viz., when the sale took place. Where a mortgagee obtained a decree and had the mortgaged property, which was part of a revenue paying estate, sold in execution, and purchased it himself, but the sale was not confirmed till a month later, during which time the revenue fell in arrears and the whole of the estate was sold for arrears of revenue, it was held that he became owner of the mortgaged property from

(1) Dagdu *v.* Panchamsing Gangaram, 18 B. 375 (1892); appd. in Chiddo *v.* Peari Lal, 19 A. 188 (1896); Banke Lal *v.* Jagat Narain, 22 A. 168, 174 (1900); see Prangour Mozoomdar *v.* Hemanta Kumari Debya, 12 C. 597, 601 (1886).

(2) Adhur Chunder Banerjee *v.* Aghore Nath Aroo, 2 C. W. N. 589, 590 (1898).

(3) Id.; Dagdu *v.* Panchamsing Gangaram, 17 B. 375 (1892); and see Hasan Ali *v.* Mian Jan, 33 A. 63 (1910). *Contra* Prem Chand Pal *v.* Purnima Dasi, 15 C. 546, 551, 552 (1882).

(4) Balvant *v.* Hira Chand, 27 B. 334, 339 (1903); Rama Chandra Joshi *v.* Hazi Hussien, 16 M. 207 (1892); nor exclusive, for in order to determine what was sold, the whole execution-proceedings might be looked at; Rai Babu Mahabir Pershad *v.* Rai Markunda Sahai, 17 I. A. 11, at p. 14 (1889); and see Baluji Dass *v.* Nimaye Chunder Sircar, 17 W. R. 511 (1872); Mt. Malcebun *v.* Mt. Radeeha, 25 W. R. 401 (1876); Ram Gopal Barick *v.* Sheo Pershad Sircar, 12 W. R. 483 (1869); General Manager Raj Darbungah *v.* Coomar Ramaput Singh, 17 W. R. 459 (1872); Manson *v.* Golam Kebria, 15 W. R. 490 (1871). In some early cases the Court refused to go behind the sale-certificate: Lalla Bissessar Dyal *v.* Doolar Chand, 22 W. R. 181 (1874); Shaikh Kulee-mooddeen *v.* Ashruf Ali Khan, 19 W. R. 276 (1873); Mookhya Huruckraj *v.* Ram Lall Gomastha, 14 W. R. 435 (1870). Though in Baroda Kanta Bose *v.* Chunder Kanta Ghose, 29 C. 682, 686 (1902), the sale-certificate was still spoken of as conferring title. In a recent case, Barhamdeo *v.* Ram Narain, 19 C. L. J. 183 (1913), it was held that while evidence could not be given to contradict a sale-certificate granted in 1907, evidence is admissible to explain ambiguous terms in it, and the Court may then determine the question with reference to the whole proceeding. See also Abdul Aziz Khan *v.* Appayasami Naicker, P.C., 31 I. A. 1 (1903).

the date of his purchase and was responsible for the revenue payable on it.(1) In a recent case it has been held that a Court has an inherent jurisdiction to amend a certificate in which the property sold was wrongly described.(2)

The amended O. XXI. r. 94 (corresponding with sect. 316 of the last Code), omits the last paragraph of sect. 316 of that Code.(3) Under the present Code (r. 92), a sale becomes absolute on confirmation.(4) The sale is not complete until such order is made, and it is only after such order that a sale-certificate should issue. The result, therefore, is that though if a decree is reversed after issue of certificate (and, therefore, after confirmation), the title of the purchaser is not affected by the reversal of the decree; if, however, the decree is reversed, and therefore ceases to be a subsisting decree before the sale is complete, that is before confirmation and issue of certificate, the executing Court has no jurisdiction to proceed further in execution by the confirmation of a sale and issue of a certificate held under a decree no longer in force.(5) In short, the Court cannot proceed to complete execution of a decree which has itself ceased to exist. When a decree is set aside all processes in execution are avoided to the extent to which it has been set aside. If no sale has taken place the attachment, if any, goes. If there has been a sale and the decree is set aside before it has become absolute, it would seem that the sale also must fall. It has been recently held that the title of an auction-purchaser at a sale held in execution of a decree did not become absolute if the decree under which the sale took place is reversed at any time before a certificate of sale is granted to the purchaser.(6) If, however, the sale has become absolute, then the purchaser is entitled to a certificate, and unless the purchaser is himself the decree-holder (in which case he is bound by the ultimate result of the litigation), the sale is not avoided by the reversal of the decree. For the setting aside of a decree does not avoid a sale made to a *bonâ fide* purchaser for value unless such purchaser is the decree-holder himself.

The section merely deals with the date of the vesting of the title. But the question of defect of title and what passes by a sale may be here conveniently alluded to. There is no implied warranty at an execution-sale that the title is good. All that is guaranteed is that the purchaser shall have the right and interest, whatever they may be, of the judgment-debtor; in other words, that the judgment-debtor shall not recover back the lands.(7) And a purchaser

(1) Musst Bhawani *v.* Mathura Prasad, 16 C. W. N. 985 (P. C. 1912); and see Shiam Lal *v.* Nathu Lal, 33 A. 63 (1910); Hasan Ali *v.* Mian Jan, 33 A. 45 (1910).

(2) Nasiruddin *v.* Sayudur Rahman, 19 C. L. J. 209 (1913).

(3) "*Provided that the decree under which the sale took place was still subsisting at that date.*" As to the meaning of "subsisting," see Mahomed Hussain *v.* Kokil Singh, 7 C. 91, 95 (1881); Saroda Churn Chuckerbutty *v.* Mahomed Isuf Meah, 11 C. 376 (1885).

(4) See notes to that order.

(5) Basappa bin Malappa *v.* Dundaya bin Shivlingaya, 2 B. 540 (1878), Mul Chand *v.* Mukta Prasad, 10 A. 83 (1887); Doyamoye Dasi *v.* Sarat Chunder Mojumdar, 25 C. 175 (1897); Adurmonee Dassee *v.* Kaminee Soondaree, 3 W. R. Act X. 145 (1865).

(6) Ram Sukh *v.* Ram Sahai, 29 A. 591 (1907).

(7) Dorab Ali Khan *v.* Khoosul Chand, 5 I. A. 116; s. c., 3 C. 806 (1878) [dist. between case where Sheriff acts within jurisdiction, and *ultra vires*]; Sowdamini Chowdhrani *v.* Krishna Kishor Poddar, 4 B. L. R. F. B. 11,

under the decree gets a good title against all persons whom the suit binds.(1) The quantity and nature of right and interest existing in the debtor at the time of attachment and advertisement for sale, alone pass by the sale.(2) But in mortgage-suits the right, title, and interest, both of mortgagor and the mortgagee, is passed: the right of the mortgagor as it stood when he made the mortgage, and not merely as it stood at the time of the Court-sale.(3) An auction-purchaser is bound to satisfy himself of the value, quantity, and title of the thing sold, just as much as if he were purchasing the same under private contract.(4) Where the sale is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by sect. 315 (now r. 93, *post*).(5) In the case of Registrar's sales in the High Court, compensation is also allowable for errors and misstatements as to particulars or description of the property.(6)

Ordinarily the purchaser buys merely the right, title, and interest of the judgment-debtor with all its defects.(7) This was expressly stated in the certificate under the Code of 1859 and is, in fact, ordinarily the case now, though what could have been and what was sold is a mixed question of law and fact to be determined on the whole of the proceedings and the facts of the particular case.(8) As stated ordinarily, the personal right, title, and interest of the debtor passes. In certain cases the estate passes: as in the case of a Hindu widow where the proceeding, though nominally against the heiress, is really against her as representing the estate; (9) or in those cases under the rent-law where a sale passes not merely the right, title, and interest of the tenant but the tenure itself.(10) Leaving out of consideration this latter case, which is subject to certain statutory rules, the purchaser simply gets what the debtor, whether

13, 15 (1869); Sundara Gopalan *v.* Venkata Varada Ayyangar, 17 M. 228 (1893); Hira Lal *v.* Karim-un-nissa, 2 A. 780, 783 (1880); Ram Narain Singh *v.* Mahtab Bibi, 2 A. 828, 829 (1880); Krishnapa *v.* Panchapa, 6 B. H. C. R. 258 (1869); Dhondu *v.* Ramji, 4 B. H. C. R., A. C. J. 114 (1867) [as to fraud, however, see at p. 116]; as to express warranty, see Mahomed Phaki *v.* Navroji Balabhai, 10 B. 214 (1885); as to decree-holder knowing of charge selling without mention of it, see Douglas *v.* Collector of Benares, 5 M. I. A. 271 (1857).

(1) Umes Chunder Sircar *v.* Zahur Fatima, 18 C. 164, 178 (1890).

(2) Ram Onoogroho Singh *v.* Mt. Montorun, 6 W. R. 223 (1866); Sundara Gopalan *v.* Venkata Varada, 17 M. 228, 230 (1893); Soojant Ali Khan *v.* Khoosal Chand, 5 S. D., N. W. 561 (1864).

(3) Shaik Abdulla *v.* Haji Abdulla, 5 B. 8 (1880).

(4) Jummal Ali *v.* Terbhee Lall Dass, 12 W. R. 41 (1869); Sheikh Mahomed Basirulla *v.* Sheikh Abdulla, 4 B. L. R. App. 35 (1870).

(5) Sundara Gopalan *v.* Venkata Varada Ayyangar, 17 M. 228 (1893).

(6) Ram Narain *v.* Dwarka Nath Khettry, 4 C. W. N. 13 (1899); Kishori Mohan Rai *v.* Kali Charan Ghosh, 1 C. W. N. 106 (1896).

(7) Dorab Ally *v.* Abdul Azeez, 5 I. A. 125; s. c., 3 C. 806 (1878); Deendyal *v.* Jugdeep Narain, 3 C. 198; 4 I. A. 247 (1877); Ram Tuhul Singh *v.* Bissesswar Lall Sahoo, 2 I. A. 131 (1875); Ali Saheb *v.* Kaji Ahmed, 16 B. 197 (1891); Sundara Gopalan *v.* Venkata Varada Ayyangar, 17 M. 228 (1893).

(8) Barhamdeo *v.* Ram Narain, 19 C. L. J. 182 (1913).

(9) See Mayne's Hindu Law, 7th ed., s. 642.

(10) Doolar Chand *v.* Lalla Chabeel, 6 I. A. 47 (1878); Niladri *v.* Bichitranand, 37 C. 823 (1910).

personally or representatively, had, (1) subject to the same bars, such as limitation,(2) and to all equities,(3) liens, mortgages and leases; (4) *patni* rent; (5) revenue and cesses.(6) His liability may be affected by estoppel. So if a person sells property covered by a mortgage, but, suppressing that fact, obtains the value of the property unencumbered, he may be estopped from saying that the purchaser took it subject to the lien.(7)

Though the possession of an auction-purchaser differs in some points (8) from that of a purchaser at a private sale, yet a purchaser at an ordinary execution sale is in privity with, and the representative in interest of, the judgment-debtor, so as to be affected by the latter's admissions affecting the property taken and estoppels binding on him.(9) An auction-purchaser's conduct in buying is only some evidence of an admission of title in the judgment-debtor, which he can explain or rebut. He is not estopped from setting up a title independent of that based on his purchase.(10)

The purchaser takes the property subject to that which affects what he has purchased, viz., the property. Mere personal obligations not affecting the land do not pass. So it has been held that without notice he is not bound

(1) See as to crops: Afatoola Sirdar *v.* Dwarka Nath Moitry, 4 C. 814 (1879); Land Mortgage Bank *v.* Vishnu Govind Patankar, 2 B. 670 (1878); Ramalinga *v.* Sarmappa, 13 M. 15 (1889); unsevered trees: Faqueer Sonar *v.* Khuderun, 2 A. H. C. R. 251 (1870); buildings: Abu Husan *v.* Ramzan Ali, 4 A. 381 (1882); Mookta Sundaree *v.* Muthoora Nath, 22 W. R. 209 (1874); Right to easements: Huree Madhub *v.* Hem Chunder, 22 W. R. 522 (1874).

(2) Shridhur Vinayak *v.* Balaji, 6 B. H. C. R. 220 (1869); Rajah Enayet Hossein *v.* Girdharee Lall, 12 M. I. A. 366; 11 W. R. P. C. 29 (1869); *per contra* the purchaser can add his possession to that of the debtor for the purpose of pleading limitation; Ali Saheb *v.* Kaji Ahmad, 16 B. 197 (1891).

(3) Ram Lochun *v.* Ram Narain, 1 C. L. R. 296 (1877); Yeshwant Babarav *v.* Govind Shankar, 10 B. 453, 455 (1886).

(4) Oojagur Roy *v.* Ram Khelawan, 10 W. R. 384 (1868); Mathura Das *v.* Kalia, 7 B. H. C. R. 24, at p. 26 (1870); Balal Bapuji *v.* Satya Chamabhai, 6 B. 490 (1892); Sobhag Chand *v.* Bhai Chand, 6 B. 193 (1882); Kishen Lal *v.* Ganga Ram, 13 A. 28 (1890); Land Mortgage Bank *v.* Ram Ruttun Neogy, 21 W. R. 270 (1874); Shyama Churn Bhuttacharjee *v.* Ananda Chandra Das, 3 C. W. N. 323 (1880); the rights of a judgment-creditor to be enforcible must be reserved or there must be notice; Doolee Chand *v.* Oomda Begum, 21 W. R. 263 (1875); Nursing Narain *v.* Raghoobur, 10 C. 609, 611 (1884).

(5) Obhoy Chunder *v.* Nilambur Mookerjee, 1864, W. R. 72; Sheikh Khoda Buksh *v.* Digumburee Dassee, W. R. 1864, 207.

(6) Chatraput Singh *v.* Grindra Chunder Roy, 6 C. 389 (1880).

(7) Douglas *v.* Collector of Benares, 5 M. I. A. 271 (1857); Dullab Sirkar *v.* Krishna Bakshi, 3 B. L. R. 407 (1869); McConnell *v.* Mayor, 2 A. H. C. R. 315 (1872); Baldeo Singh *v.* Kishan Lall, 9 A. 413 (1887); Bunwari Das *v.* Muhammad Mashiat, 9 A. 690 (1887); and as to decree-holder not disclosing his own charges, see note, p. 308, *ante*, and as to Estoppel generally, Authors' Evidence Act, and notes to s. 115.

(8) See *e.g.* Alukmonee Dabee *v.* Banee Madhub Chuckerbutty, 4 C. 677 (1878), where the doctrine that a party selling property of which he is not the owner is bound to make good the sale out of a subsequently acquired interest, was held inapplicable to an auction-sale. And as to limitations, Kali Das Mullick *v.* Kanhya Lal Pundit, 11 I. A. 218, at p. 229 (1884), and see Authors' Evidence Act.

(9) See the subject discussed in Authors' Evidence Act.

(10) Pandit Hanuman Dat *v.* Mufti Assadullah, 7 A. H. C. R. 145 (1875).

by an agreement to mortgage made by the judgment-debtor.(1) And similarly where A., as surety of B. for a loan, sued C., an auction-purchaser of the rights and interests of B. in a bond pledged for the debt, on the ground that he had purchased the bond with all its liabilities, and amongst them was the amount due to A. by B.: it was *held* that C., not being a party to the loan transaction, was not liable.(2) He is not affected by a custom binding purchasers by private sale only; (3) nor by a notice of foreclosure issued, after his purchase, on his predecessor.(4)

If between the time of attachment and time of sale the interest of the judgment-debtor is accelerated or enlarged the increment passes.(5) Under the last Code it was held that the purchaser's title to mesne profit or possession did not accrue till confirmation.(6) The title now accrues under this section at the date of sale. Where there has been attachment of decree after sale, but before confirmation, the attaching creditor has a right to have the sale confirmed.(7)

As to whether a purchaser is a party or representative within the meaning of sect. 244 (now 47), (8) see latter section and notes thereto.

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

66. (1) No suit shall be maintained against *any person claiming title under a* purchase certified *by the Court in such manner as may be prescribed* on the ground that the purchase was made on behalf of *the plaintiff* or on behalf of some one through whom *the plaintiff* claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of *any* purchaser certified *as aforesaid* was inserted in the certificate fraudulently or without the consent of the real purchaser, *or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.*

Suit against certified purchaser.—It has been said that the object of the section was to prevent judgment-debtors from purchasing their own property at auction in the name of another.(9) The first sub-clause of this section

(1) Bhuggobutty Dassee *v.* Shama Churn Bose, 1 C. 337 (1876).

(2) Shibjoy Thakur *v.* Pogose, S. D. 22 Aug. 1860, p. 144.

(3) Kalian Das *v.* Bhagerathi, 6 A. 47 (1883).

(4) Mohun Lall Sookool *v.* Goluck Chunder Dutt, 10 M. I. A. 1 (1863); Rameshwar *v.* Juggut Mewar, 11 C. 341 (1885).

(5) Umes Chunder Sircar *v.* Zahoor Fatima, 18 C. 164; 17 I. A. 201 (1889).

(6) Amir Kazim *v.* Darbari Mal, 24 A. 475 (1902).

(7) Boharia Rudravi Koer *v.* Ram Pertap Mull, 11 C. W. N. 158 (1906).

(8) Vishvanath Chârlu Naik *v.* Subraya Shivapa Shetti, 15 B. 290 (1890).

(9) Kishan Lal *v.* Paruruddhwaja Prasad Singh, 21 A., at p. 243 (1899). See Achhaibar Dube *v.* Tapasi Dube, 29 A. 557, 559 (1907); Khuda Baksh *v.* Aziz Alam, 27 A. 194 (1904); Hari Singh *v.* Sher Singh, 31 A. 282 (1909).

corresponds with a portion of sect. 260 of Act VIII. of 1859. The wording there was "*the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the certified purchaser was used.*" This was altered to "*the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims*" by sect. 317 of Act X. of 1877, and the same Act added the second sub-clause except the portions in italics. The present Code in the first sub-clause has substituted "*any person claiming title under a purchase certified by the Court*" (which will include both the purchaser and his successor in title) for "*the certified purchaser,*" and added the words in italics in the second sub-clause. It had been previously held that the expression "certified purchaser" included the person standing in the shoes of the Court purchaser.(1)

It only applies to certified purchasers at sales under this Code, and not to revenue sale purchasers.(2) It is not applicable to a case under the Public Demands Recovery Act (I. of 1895 B.C.).(3)

"**No suit.**"—That is a suit between a *benameedar* and the beneficial owner; (4) even where the beneficial owner has had previous possession.(5) But where the certified purchaser does not defend the suit against the beneficial owner, the corresponding section in the earlier Code did not bar the suit, and the defence could not be taken by a defendant who was not the certified purchaser; (6) so where the purchaser admitted the plaintiff's claim and stated he had made over the certificate to him.(7) Prior to the amendments made by the present Code there was a diversity of opinion as to whether this section included a suit by a judgment-creditor against the certified purchaser who purchased *benamee* for the judgment-debtor, the Calcutta High Court holding that such a suit was not barred by this section as it stood prior to this Code, and the Madras High Court and the Allahabad High Court holding otherwise,(8) and the additions now made to the second sub-clause affirm the latter decisions. The section does not preclude a suit by A, whose property was sold against the certified purchaser, who after the sale agreed to sell the property to A.(9) Nor does it preclude a suit by one joint-holder of a decree on a mortgage for a declaration that the property purchased by his co-decree-holder at the auction sale was the joint property of himself and the actual purchaser.(10)

(1) Hari Govind *v.* Ramchandra, 31 B. 61 (1906); Manji *v.* Hoorbai, 35 B. 342, 347 (1911) (the mortgagee of the certified purchaser).

(2) Fazal Rahaman *v.* Imam Ali, 14 C. 583 (1887); Brijo Beharee *v.* Shah Wajed, 14 W. R. 372 (1870).

(3) Ambica *v.* Gopal Buksh, 1 C. L. J. 550 (1901).

(4) Sheetanath *v.* Madhub Narain, 1 W. R. 329 (1864).

(5) Bykunt Chunder *v.* Khema Moyee Debia, 9 W. R. 360 (1868).

(6) Ramakrishnappa *v.* Adinarayana, 8 M. 511 (1885).

(7) Hazi Arjun *v.* Farutulla, 9 C. L. R. 295 (1881).

(8) Kanizak *v.* Monohur Das, 12 C. 201 (1885). Subha *v.* Hara Lal, 21 C. 519 (1894), and Sohun Lall *v.* Lala Gya, 6 N. W. P. H. C. R. 265 (1874), holding the suit would lie; and Rama Kurup *v.* Sridevi, 16 M. 290 (1892), and Kishan Lal *v.* Garuruddhwaja, 21 A. 238 (1899), holding the opposite view.

(9) Mor Joshi *v.* Muhammad Ibrahim, 10 B. H. C. A. J. 344 (1873); Kumara *v.* Srinivasa, 11 M. 213 (1887).

(10) Achaibar Dube *v.* Tapasi Dube, 29 A 557 (1907).

"**Against.**"—Where A in execution sold the share of B, the judgment-debtor, in a house, and it was purchased by C, the son of B, and subsequently A attached and sold the same share in execution, D being the purchaser, a suit for possession by D against C was dismissed as being within this section.(1) This section is not intended to interfere with *benamee* transactions generally, and a suit by a certified purchaser who purchased *benamee*, for the property purchased, against the real purchaser who was honestly in possession, failed; (2) and in such a suit the real owner might set up a defence that the certified purchaser was the apparent owner only and a mere trustee (3) So where the assignee of the certified purchaser sued for possession against a third party, the latter could show that the sale was *benamee* and in fraud of creditors; (4) and a person in possession of the purchased property, when sued for rents and profits by the certified purchaser, may set up a defence that the certified purchaser was only a *benameedar* on his behalf; (5) even a decree-holder may sue the certified purchaser for the properties purchased by him *benamee* for the judgment-debtor and of which the judgment-debtor was in possession.(6) When the certified purchaser purchased *benamee* for A and then conveyed the property to B for A's benefit, the property could, it was held, be taken in execution by the creditors of A, but it was doubted whether they could have done so if it had not been conveyed to B; (7) but that doubt has been set at rest by the additions made to sub-clause (2), and the creditors could proceed against the property even if it remained in the hands of the certified purchaser. The section does not preclude a person purchasing *benamee* from setting up his title against a person who is not the certified purchaser and does not claim through him.(8)

"**Purchase certified.**"—The section does not bar a suit where the certified purchaser does not defend the suit against the beneficial owner, and the defence cannot be taken by a defendant who is not the certified purchaser; (9) likewise where the certified purchaser admits the plaintiff's claim and states he has made over the certificate to him; (10) nor under the wording of the previous Codes did it preclude a suit against a person who derived his title from the certified purchaser,(11) such as his mortgagee or his heir.(12) The Bombay High Court dissented from this, holding that "certified purchaser"

(1) Khuda Bakhsh *v.* Aziz Alam, 27 A. 194 (1904).

(2) Bahuns Koonwur *v.* Lalla Buhoree, 18 W. R. 157 (1872 P. C.); 14 Moo. I. A. 496; 10 B. L. R. 159.

(3) Lokhee Narain *v.* Kallypuddo, 23 W. R. 358 (P. C. 1875); L. R. 2 I. A. 154; Muthoora *v.* Raiekomul, 24 W. R. 278 (1875); Jan Muhammad *v.* Ilahi Baksh, 1 A. 290 (1876).

(4) Mirza Khyrat *v.* Mirza Syfoollah, 8 W. R. 130 (1867).

(5) Ghazi-ud-din *v.* Bishan Dial, 27 A. 443 (1905); 2 A. L. J. 111.

(6) Sohun Lall *v.* Lala Gya Pershad, 6 N. W. P. H. C. R. 265 (1874).

(7) Satapa *v.* Karbasapa, 7 B. H. C. A. J. 21 (1870).

(8) Shorosutty Dassee *v.* Gopeesoondery, 1 Marsh. 423 (1863).

(9) Ramakrishnappa *v.* Adinarayana, 8 M. 511 (1885).

(10) Hazi Arjun *v.* Farutulla, 9 C. L. R. 295 (1881).

(11) Theyyavelan *v.* Kochin, 21 M. 7 (1897); Sibta Kunwar *v.* Bhagoli, 21 A. 196 (1899).

(12) Dukhada *v.* Sremonto, 26 C. 950 (1899); 3 C. W. N. 657; Nokori *v.* Sarup Chunder, 5 C. W. N. 341 (1900).

includes the person standing in the shoes of the Court purchaser,(1) and the amendments made to the first sub-clause by the present Code affirm such last decision.

Where the property was bought for an inadequate sum by a pleader of a party in the name of his mohurer, a suit against the pleader and his mohurer was maintainable.(2) It is also maintainable where the purchase is made by a member of a joint Hindu family with joint funds; (3) also where, in a suit for partition by a Hindu son, an outsider purchases *benamee* for the plaintiff's father with family funds.(4) It is not necessary that the certificate should have been actually granted to the certified purchaser, provided he obtains it pending the suit to impugn his purchase.(5)

"**On the ground.**"—A *benamee* purchase is not illegal, but if the *benamee* nature of the purchase is the sole ground, the suit is not maintainable, but otherwise if the purchaser acknowledges that his purchase is *benamee* and gives up possession or waives his right or restores the property to the real owner; (6) or where he was the manager of the real owner, a minor, and never asserted his right to the property purchased; (7) or where he purchased while the paid agent of, and with moneys of the real owner, who was the usufructuary mortgagee in possession of the property, and agreed to execute a conveyance and gave the real owner the sale certificate and delivery order.(8) Similarly where the plaintiff, having been in possession for eleven years, sued on a title acquired by long possession against the assignee of the certified purchaser,(9) or against the certified purchaser, on the ground of an existing possession which had continued eight years from the time of the sale, the suit was maintainable; (10) but the suit must not be based on the ground of the purchase being *benamee*, but on some other independent ground. So a suit by the alleged real owner, who was in possession against the certified purchaser for a declaration of title, is not maintainable; (11) nor where the certified purchaser acknowledged that he had bought a portion of the property on behalf of the plaintiff's predecessor in title unless that acknowledgment were accompanied by some act which would operate as a valid transfer of the property. So where the certified purchaser by a consent decree admitted that his mother was entitled to a share of his father's estate, and then purchased, in execution of a decree,

(1) Hari *v.* Ramchandra, 31 B. 61; 8 Bom. L. R. 873 (1906).

(2) Aghore Nath *v.* Ram Churn, 23 C. 805 (1896).

(3) Bodh Sing *v.* Guneschunder, 19 W. R. 356 (1873); 12 B. L. R. P. C. 317. The principle of this case, which related to a joint Hindu family, was held applicable to partnership: Achhaibar Dube *v.* Tapasi Dube, 29 A. 557, 561 (1907).

(4) Natesa Ayyar *v.* Venkatramayyan, 6 M. 135 (1882); Minakshi *v.* Kalianarama, 20 M. 349 (1897).

(5) Bunda Ali *v.* Bibee Ameerun, 25 W. R. 493 (1896); Aldwell *v.* Ilahi Bakhsh, 5 A. 478 (1883).

(6) Momappa *v.* Surappa, 11 M. 234; Tara Soondaree *v.* Oojul Monee, 14 W. R. 111 (1870).

(7) Sankunni *v.* Narayanan, 17 M. 282 1893).

(8) Kumbalinga *v.* Ariaputra, 18 M. 436 (1895).

(9) Karamuddin *v.* Niamut, 19 C. 199 (1891).

(10) Sasti Churn *v.* Annopurna, 23 C. 699 (1896).

(11) Bishan Dial *v.* Ghazi-ud-din, 23 A. 175 (1901).

property mortgaged to his father, the representatives of the mother were debarred under this section from recovering a portion of the property.(1)

"**Purchase was made on behalf of the plaintiff.**"—The former words were "on behalf of any other person." This does not include an agreement by the purchaser to sell after his purchase; (2) but it does include a case where the defendant as the alleged agent of the decree-holders, who had been refused permission to purchase, purchased the property, and the decree-holders, hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance after confirmation of the sale.(3) It does not apply to a case of a purchase made by a member of a joint Hindu family with joint funds; (4) nor in a suit for partition by a Hindu son, to a purchase by an outsider *benamee* for his, the plaintiff's, father with family funds.(5) Nor does it apply to a case where the person setting up the *benamee* character of the purchaser does not claim under the certified purchaser or the alleged real purchaser. So the purchaser in execution of a mortgage decree may prove that the certified purchaser of the interest of one of the mortgagors in a sale in execution made subject to the mortgage was *benamee* for the mortgagor,(6) and a decree-holder may sue the certified purchaser for sale of the properties purchased by him *benamee* for the judgment-debtor and of which the judgment-debtor is in possession.(7) But the Allahabad High Court held otherwise, holding that the question of who the plaintiff might be was not material, and that all suits against the certified purchaser were within the section.(8) The second sub-clause now provides an exception to this decision. It certainly cover suits by the beneficial owner or the successors in title of the beneficial owner.(9) This section contemplates a suit by a person claiming to be the beneficial owner against the certified purchaser and not a suit where a third party asserts the certified purchaser is not the beneficial owner, in a suit by the certified purchaser; (10) nor a suit by a creditor of the real owner.(11)

"**Fraudulently or without the consent,**" **etc.**—Of course where a case comes under the second paragraph the claim cannot be barred by the first.(12) The earlier portion of the second sub-clause of this section embodies

(1) Durga *v.* Bhagwan Das, 23 A. 34 (1900).

(2) Kumara *v.* Srinivasa, 11 M. 213 (1887); Mor Joshi *v.* Muhammad Ibrahim, 10 B. H. C., A. J. 344 (1873).

(3) Ganga Baksh *v.* Rudar Singh, 22 A. 434 (1900).

(4) Bodh Sing *v.* Guneschunder, 19 W. R. 356 (1873); 12 B. L. R. P. C. 317.

(5) Natesa Ayyar *v.* Venkatramayyan, 6 M. 135 (1882); Minakshi *v.* Kalianarama, 20 M. 349 (1897).

(6) Kollantavida *v.* Tiruvalil, 20 M. 362 (1897).

(7) Sohun Lall *v.* Lala Gya Pershad, 6 N. W. P. H. C. R. 265 (1874).

(8) Kishan Lal *v.* Garuruddhwaja, 21 A. 238 (1899).

(9) Ram Narain *v.* Mohanian, 26 A. 82 (1903); Sarju *v.* Bindeshri, 33 A. 382 (1911); Narain Dey *v.* Durga Dei, 35 A. 138, 142 (1913).

(10) Uncovenanted Service Bank *v.* Abdul Bari, 18 A. 461 (1893); Delhi and London Bank *v.* Chaudhri Partab, 21 A. 49 (1898).

(11) Kanizak *v.* Monohur Das, 12 C. 20 (1885).

(12) Ambika Prosad *v.* Gopal Baksh, 1 C. L. J. 550 (1901).

the decision in the cases noted.(1) Unless fraud or absence of consent is shown, the suit is not maintainable against the certified purchaser.(2)

67. The Local Government, with the *previous* sanction of the Governor General in Council, may, *by notification in the local official Gazette*, make rules for any local area imposing conditions in respect of *the* sale of any class of interests in land in execution of decrees for *the payment of* money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value. [s. 327.]

Power for Local Government to make **rules as to sales of land in execution of decrees for payment of money.**

Sales of land.—This section was introduced into the Code by sect. 327 of Act X. of 1877. The present section only re-enacts the first clause of that section, omitting the words "*from time to time*" after "*may*" and adding the words in italics. The remainder of the section formerly ran, "*and if, when this Code comes into operation in any local area, any special rules as to sale of land in execution of decrees are in force therein, the Local Government may continue such rules in force, or may, from time to time, with the sanction of the Governor-General in Council, modify the same. All rules so made or continued, and all such modifications of the same, shall be published in the local official Gazette, and shall thereupon have the force of law.*"

Rules have been published as regards Bengal,(3) Punjab,(4) and Coorg.(5)

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVEABLE PROPERTY.

68. The Local Government may, with the *previous* sanction of the Governor General in Council, declare, by notification in the *local* official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector. [s. 320.]

Power to prescribe rules for transferring to Collector execution of certain decrees.

(1) Sheetanath *v.* Madhub Narain, 1 W. R. 329 (1864); Koosumi'a *v.* Tufuzzul, 13 W. R. 85 (1870); Shama Keshee *v.* Raj Kissur, 14 W. R. 179 (1870); Gosmiah *v.* Taffuzzul, 4 B. L. R. App. 32 (1870).

(2) Ganga Baksh *v.* Rudar Singh, 22 A. 434 (1900).

(3) *Calcutta Gazette*, July 10th, 1878, Pt. I., p. 736, and Jan. 7th, 1880, Pt. I. p. 3.

(4) *Punjab Notification*, No. 3859, dated Oct. 3rd, 1877.

(5) *Mysore Gazette*, June 14th, 1879, Pt. I., p. 200.

69. *The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.*

Provisions of Third Schedule to apply.

[s. 320, second and third paras.]

70. (1) The Local Government may *make* rules consistent *with the aforesaid provisions*—

Rules of procedure.

(*a*) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court;

(*b*) conferr*ing* upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector;

(*c*) provid*ing* for orders *made* by the Collector or any gazetted subordinate of the Collector, or orders *made* on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders *made* on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

[s. 320, fourth para.]

(2) A power conferred by rules *made under sub-section* (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Jurisdiction of Civil Courts barred.

[s. 320, fifth para.]

71. In executing a decree transferred to the Collector under section *68* the Collector and his subordinates shall be deemed to be acting judicially.

Collector deemed to be acting judicially.

Transfer to Collector.—This subject is dealt with in these sections, in the next section, and in the third schedule to which the other sections of the last Code have been transferred. The provisions except in one particular are with some verbal alterations the same as those of the last Code. The exception referred to is the necessity for the record of reasons for an adjournment under clause 10 of the schedule. The words "*and rescind or modify*

any such declaration," which appeared in section 320 of the last Code, have been omitted. The last three paragraphs of sect. 320 of the last Code were added to that Code by sect. 30 of Act VII. of 1888.(1) The section provides that the Local Government may frame rules for regulating the procedure of the Collector and his subordinates in execution of decrees transferred to him.(2) The general provisions of the Code do not apply to proceedings held by the Collector for the execution of such decrees.(3) When a notification has been made, the Civil Courts cease to have jurisdiction to execute the decree.(4) It has been held that a Judge can recall a case sent to the Collector.(5) But this has also apparently been held to be not so,(6) or at least doubtful.(7)

The Collector may cancel his own order of postponement of the sale.(8) As to power to set aside sale,(9) application for payment by instalments under Dekhan Agriculturists' Relief Act in case of decree previously transferred to Collector,(10) disabilities of proprietor of property taken under management by the Collector; (11) see cases cited. The power of the local Government to make rules providing for claims not passed into decrees; (12) reference to the District Court.(13) In Allahabad it is held that where the Civil Court is satisfied that the land which is ordered to be sold or any portion of it is ancestral, it should transfer the decree for execution to the Collector so far as regards ancestral land only.(14)

Preclusion of Civil Court's powers.—It was proposed to insert the following clause, which, however, has not been done:—"*The Court shall be precluded from exercising any jurisdiction with respect to any matter relating to the exercise, by the Collector or any gazetted subordinate of the Collector, of all or any of*

(1) In Ganpat Ram Moti Ram *v.* Isaac Adamji, 15 B. 322 (1890), the rules were held not to be retrospective, and see Kalian Moti *v.* Pathubhai, 17 B. 289 (1892).

(2) The following notifications prescribing rules are cited in O'Kinealy: *Bombay*, Bombay list of Local Rules and Orders, ed 1896, Vol. I., pp. 398–406; *Burmah*, Burmah Rules Manual, ed. 1897, pp. 110–111; *N. W. P. & Oudh*, N. W. P. and Oudh List of Local Rules and Orders, ed. 1894, pp. 111–112; *Central Provinces*, Central Provinces Gazette, 1904, Pt. III., p. 218. The Government has power to prescribe rules providing for appeals from the Collector's Orders, Takaddas Fatima *v.* Baldeo Das, 12 A. 564 (1890).

(3) Sheo Prasad *v.* Muhammad Mohsin Khan, 25 A. 167 (1902) [in which s. 310A of the last Code was held to have no application]; Madha Prasad *v.* Hansa Kuar, 5 A. 314 (1883) [s. 244]; Keshab Deo *v.* Radhe Prasad, 11 A. 94 (1888) [s. 311]; Nathu Mal *v.* Lachmi Narain, 9 A. 43 (1886); Ragho *v.* Hanmati, 15 Bom. L. R. 389 (1913); 37 B. 488.

(4) Sukhdeo Rai *v.* Sheo Gulam, 4 A. 382 (1882); and as to ancestral property there dealt with, see Ram Prasad *v.* Radha Prasad, 7 A. 402 (1885).

(5) Mahadaji Karandikar *v.* Hari Chikne, 7 B. 332 (1883).

(6) See Madho Prasad *v.* Hansa Kuar, 5 A. 143 (1883).

(7) Hargovan Parbhudas *v.* Hira Hanbhai, 8 B. 301 (1884).

(8) Wazir Ali *v.* Janki Prasad, 28 A. 671 (1906).

(9) Peta *v.* Chunilal, 31 B. 207, 216 (1906).

(10) Mancherji *v.* Thakordas, 31 B. 120 (1906).

(11) Ganga Prasad *v.* Ganga Baksh, 29 A. 415 (1907).

(12) Regulation Collector *v.* Ramasami Chetti, 28 M. 489 (1905).

(13) Ibid.

(14) Ahmad Ghaus Khan *v.* Lalta Prasad, 28 A. 631 (1906).

the powers vested in him in regard to any decree transferred under this section; but it *shall not be precluded from exercising, in any other matter, all or any of the powers vested in it, notwithstanding that the decree has been so transferred; and a civil suit shall lie with respect to any act done or order made by the Collector or by any gazetted subordinate of the Collector with respect to which, if it had been done or made by the Court acting within its jurisdiction, a civil suit would have been maintainable.*" The proper principle has been enacted to be that the Civil Court should be precluded from interfering in any matter declared to be within the Collector's jurisdiction,(1) but that it is not divested of its ordinary jurisdiction in regard to any other matters merely because the decree has been transferred to the Collector; and that a Civil suit will lie (2) with respect to every order of the Collector upon which, if it had been made by the Court acting within its jurisdiction, an action could have been maintained.

[s. 326.] **72.** (1) *Where* in any local area in which no declaration under section *68* is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

Where Court may authorize Collector to stay public sale of land.

(2) In *every* such case the provisions of sections *69 to 71 and of any rules made in pursuance thereof* shall apply so far as they are applicable.

Stay of Sale. This section corresponds with sect. 244 of Act VIII. of 1859. The section then commenced, "*When in any district where land, paying revenue to Government, is ordinarily sold by the Collector as provided in sect. 248, the property attached consists,*" etc., and proceeded to provide that "*the Court may authorize the Collector, on security for the amount of the decree or for the value of such land or share being given, to make provision for such satisfaction,*" etc. The present wording of first sub-clause was adopted by sect. 326 of Act X. of 1877, which also eliminated the proviso as to security. The second sub-clause was added by sect. 326 of Act XIV. of 1882. The present Code has omitted the

(1) As to the Collector's duties and powers in execution, see Lallu Trikan *v.* Bhavla Methia, 11 B. 478 (1887); Ganpatram Motiram *v.* Isaac Adamji, 15 B. 322 (1890); Sunder Das *v.* Mansa Ram, 7 A. 407 (1884); Tapesri Lal *v.* Devkissendan Rai, 16 A. 1 (1893); Onkan Singh *v.* Mohan Kuar, 20 A. 428 (1898); Mathura Das *v.* Panha Lal, 19 B. 216 (1894); Muhammad Said Khan *v.* Payag Sahu, 16 A. 228 (1894); Nathu Mal *v.* Lachmi Narain, 9 A. 43 (1886); Ragho *v.* Hanmati, 37 B. 488 (1913); 15 Bom. L.R. 389.

(2) See Shib Singh *v.* Mukat Singh, 18 A. 437 (1896); Sadho Chaudhri *v.* Abhenandan Prasad, 26 A. 101 (1903) [where s. 244 of last Code was considered]; Sunder Das *v.* Mansa Ram, *supra;* Mathura Das *v.* Panha Lal, *supra;* Bande Bibi *v.* Kalka, 9 A. 602 (1887); Sham Behari Lal *v.* Rup Kishore, 20 A. 379 (1898).

words "*or management*" after the words "*temporary alienation*" and substituted "69 *to* 71 *and of any rules made in pursuance thereof*" for "320, *paragraph* 2, *to* 325 (*both inclusive*)."

The section does not apply to a decree which directs the sale of land or of a share of land in pursuance of a contract specifically affecting the same.(1)

"**The Court.**"—That is, the Court executing the decree. That Court should deal with it itself and not in deference to the opinion of a superior Judge who forwards the recommendation of the Collector.(2)

"**May authorize.**"—It is discretionary with the Court to authorize or not as it thinks fit. It is bound to hear any objections made by the decree-holder and any evidence adduced by him.(3) The only indulgence the Court may sanction is to allow the judgment-debtor a reasonable period for satisfying the decree by the temporary alienation of his property. A Court executing a decree cannot vary its terms by authorizing payment by instalments,(4) while the property remains in the possession of the judgment-debtor.(5)

For form of authorization see the First Schedule, App. E., Form No. 25.

"**Collector to provide.**"—Execution cannot be taken out against property under the management of the Collector. As against such property, the time it is under such management shall be excluded in reckoning limitation.(6) Possession cannot be given to an alienee of the judgment-debtor of property under such management, but damages can be awarded.(7)

DISTRIBUTION OF ASSETS.

Proceeds of execution-sale to be rateably *distributed* among decree-holders.

73. (1) *Where* assets are *held by a Court* and more persons than one have, *before the receipt of such assets, made application* to the Court for *the* execution of decrees for *the payment of* money *passed* against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably *distributed* among all such persons: [s. 295.]

Provided as follows:—

(*a*) *where* any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;

(*b*) *where* any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court

(1) Bhagwand Prasad *v.* Sheo Sahai, 2 A. 856 (1880).

(2) Muttra Pershad *v.* Ram Pershad, 6 N. W. P. H. C. R. 39 (1873).

(3) Huro Prosad *v.* Kali Prosad, 9 C. 290 (1882).

(4) Sheo Pershad *v.* Shiva Ram, 2 N. W. P. H. C. R. 59 (1870).

(5) Kashee Lall *v.* Ameer Jan, 2 N. W. P. H. C. R. 347 (1870); Muttra Pershad *v.* Ram Pershad, 6 N. W. P. H. C. R. 39 (1873).

(6) Girdhar Das *v.* Har Shankar, 20 A. 383 (1898).

(7) Seth Jaidayal *v.* Ram Sahae, 17 C. 432 (1889).

may, with the *consent* of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same *interest in* the proceeds of the sale as he had *in* the property sold;

(*c*) *where any* immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale;

secondly, in discharging the *amount* due *under* the *decree*;

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and,

fourthly, rateably among the holders of decrees for *the payment of* money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which *passed* the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) *Where* all or any of *the* assets *liable to be rateably distributed under this section are* paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

Object and scope of section.—Under the Code of 1859 the attaching creditor was entitled to be first paid out of the proceeds of the property attached and sold, the surplus only being liable to distribution rateably among subsequent attaching creditors: whereas under the Code of 1877 and subsequent and present Code it is immaterial at whose instance an attachment is placed. Every creditor who has applied is entitled to a rateable distribution.(1) The present provisions prevent multiplicity of procedure and that scramble by several judgment-debtors which used to take place under the Code of 1859.(2) The section draws a sharp distinction between attachment and realization,(3) and an attaching creditor is entitled to no priority over other creditors until a sale at his instance has actually taken place.

The object of the section is two-fold. Firstly, to prevent unnecessary multiplicity of execution proceedings; to obviate in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure

(1) Vishvanath Maheshwar *v.* Virchand Panachand, 6 B. 16 (1881); Peacock *v.* Madan Gopal, 6 C. W. N. 577, 580 (1902). The principle was applied to a case not falling within the Code in Sewdut Roy *v.* Sree Canto Maity, 33 C. 639 (1906); Butloo Khan *v.* Gomani Singh, 13 C. W. N. 1177 (1909).

(2) Bithal Das *v.* Nand Kishore, 23 A. 106, 113 (1900).

(3) Soobul Chunder Law *v.* Russick Lal Mitter, 15 C. 202, 209 (1888).

an equitable administration of the property by placing all the decree-holders upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property.(1)

Where it was contended on behalf of the defendants that, having regard to the terms of the action, an attachment made by the plaintiffs enured for the benefit of all persons holding decrees for money against the same judgment-debtor, and who complied with the conditions specified in the section, that is to say that, provided the defendants have, prior to the realization, applied to the Court holding the assets for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, they are, without any attachment of their own, entitled to share rateably with the plaintiffs in the proceeds of the sale, although in the absence of the plaintiff's attachment they could not themselves, after the judgment-debtor's death, have enforced execution against this property, it was *held* that argument was to some extent favoured by the language of the section, but that it was clear that this section cannot be read absolutely literally. If it were to be read literally, without any regard to its real object and policy, the result would be an absurdity, because the only condition expressly required is the existence of an application for execution made by the persons specified prior to the realization, irrespective altogether of the result of such applications or any objections to them however well founded. But it has been held, and it could not otherwise have been held, that an application for execution which was barred by limitation,(2) or an application which had for any reason been rejected, would not entitle the applicant to share rateably under this section; and therefore it is clear that one must give the section a common-sense construction, and see what sort of case it really provides for. The object of the section being as above stated, it was not desired to enlarge in any way the rights of decree-holders or place at their disposal the proceeds of property which they could not have themselves attached. It entitled to share in the proceeds only those decree-holders who could have themselves attached and sold the property. It was not meant to enable a decree-holder to indirectly get the benefits of an execution which he could not himself have enforced directly. Where the decree-holders are persons who could have themselves attached and sold the property, then, but only then, an attachment and sale by one is correctly described as enuring for the benefit of all.(3)

The provisions of this section show that when property is sold in execution of a decree it is sold not only for the realization of the money due under that particular decree, but of all other decrees the holders of which have applied for execution. When property is sold in execution of a decree it cannot be sold again at the instance of another decree-holder, who may have attached it before the attachment effected by the decree-holder, under whose decree it is actually sold, and when a judicial sale takes place all previous attachments effected upon the property sold fall to the ground.(4)

(1) Bithal Das *v.* Nand Kishore, 23 A. 106, 110 (1900); Fink *v.* Maharaj Bahadur Singh, 4 C. W. N. 27, 30 (1899).

(2) See Radha Gobind *v.* Shaikh Oozeer, 15 W. R. 219 (1871).

(3) Bithal Das *v.* Nand Kishore, 23 A. 106, 109–111 (1900).

(4) Kartic Nath Roy *v.* Surbanand Shaha, 12 C. 317 (1885).

Where in execution of two decrees certain properties were sold the proceeds of which were sufficient to pay the decree-holders, it was held that on the interposition of a creditor who had not attached, the Court was right in selling a third property, as such creditor would be entitled to share, with the result that it could not be said that by the amount realized from the first sale the decrees under execution were satisfied.(1)

The section relates to procedure only, and was intended to afford an additional facility to decree-holders. It does not interfere with substantive rights or the maintenance of a suit, notwithstanding that a party may not have availed himself of its facilities.(2) On the other hand, failure to participate does not prevent a creditor executing his decree in any other manner.(3)

Permission granted to a judgment-creditor to set off the amount of the purchase money payable for the property sold against the debt due to him under his decree must be taken to be granted subject to the provisions of this section.(4)

The former section was held not to apply to a deposit made by a judgment-debtor under sect. 310A (now O. XXI. r. 89) of the former Code.(5)

An order under this section affects only interests existing at the time. The insolvency of the debtor introduces a new state of things from the date of the insolvency, but as regards sums accrued due prior to the date of the insolvency, the order under this section creates rights which are not affected by the insolvency.(6)

It has been held that sect. 490 (now O. XXXVIII. r. 12) did not empower a decree-holder to share in the distribution of property he has attached; and that though there was no necessity to re-attach, an application for execution was imperative.(7)

Under the last Code it was in some cases held that when a person desired to share in the assets realized by a sale in execution he must apply to the Court in which those assets were for the execution of his decree, and if it were found that property attached by an inferior Court was already or thereafter became subject to an attachment issued from a superior Court, the decree-holder must have applied to transfer his application to the higher Court, if he desired to secure the application of the attached property and its proceeds to the satisfaction of his decree.(8) A contrary view was adopted in the Calcutta High Court, where it was held that this section did not require the transfer of the decree to the Court where the process of realization took place as a condition

(1) Mohunt Megh Lall *v.* Shib Pershad, 7 C. 34 (1881).

(2) Janoky Bullubh Sen *v.* Johiruddin Mahomed, 10 C. 567, 576 (1884).

(3) Syad Nadir Hossein *v.* Thovildarinee, 19 W. R. 255 (1873).

(4) Madden *v.* Chappani, 11 M. 356 (1887), and cases there cited; dist. in Sree Krishna Chandook Chand, 32 M. 334 (1908).

(5) Roshun Lall *v.* Ram Lall Mullick, 30 C. 262 (1903), s. c., 7 C. W. N. 341; Bihari Lall Paul *v.* Gopal Lall Seal, 1 C. W. N. 695 (1897).

(6) Howatson *v.* Durrant, 27 C. 351 (1900); s. c., 4 C. W. N. 610. Insolvency after attachment has no effect, see Viraraghava *v.* Parasumara, 15 M. 372 (1891).

(7) Pattanji Shapurji *v.* Jordan, 12 B. 400 (1888); but see Bhugwan Chunder Kirtiratna *v.* Chandra Mala Gupta, 29 C. 773, 777 (1902).

(8) Muttalagiri Nayak *v.* Muttayyar, 6 M. 357 (1883); Raghubar Dyal *v.* Banke Lal, 22 A. 182, 186 (1900) [Decree of Revenue Court]. Nimbaji Tulsiram *v.* Vadia Venkati, 16 B. 683, 686 (1892); Andanapa *v.* Bhimrao

precedent to an application under sect. 285 (now 63) of the former Code.(1) And this view has been recently adopted in the Madras High Court.(2)

It has been held that a claim or an order under this section did not amount to an attachment,(3) but if a debt was attached no equitable assignment of it was valid against another creditor who subsequently obtained an order under this section.(4) An application does not therefore operate as a substantive attachment, and will lapse, as formerly was the case, when the original attachment terminates.

It is nowhere provided either that an application for distribution cannot be made in the course of execution proceedings taken by the applicant himself, but must be made in the course of execution proceedings initiated by some other decree-holder, or that notice of such an application having been made must of necessity be given to the other decree-holders.(5) After an order for distribution has been made, and before the funds have been actually distributed, it is open to one of the decree-holders to maintain a suit for a declaration that the decree of a next decree-holder is collusive, and that he is not entitled to share in the sale proceeds.(6)

Assets held.—That is available for distribution in execution of a decree. The words of the last Code were assets "*realized by sale or otherwise in execution of a decree.*" Assets meant the proceeds of the sale of the property sold in execution.(7) Moneys paid into Court by sale or otherwise were assets from the moment of their payment into Court.(8) "Realized" meant that property had been converted into or obtained in cash, or some other form available for immediate distribution. There is nothing in the word itself which required that the process should take place as the result of any ulterior proceeding in the course of execution.(9) Assets were realized when the whole of the proceeds were paid into Court.(10) But the word "realized" was however followed by words which showed that the realization must have

Annaji, 19 B. 539, 543 (1894). In Jaynarayan Meghraj *v.* Ismail Karamali, 20 B. 377 (1895); it was held there was a transfer; see Krishna Shankar *v.* Chandra Shankar, 5 B. 198 (1880); Dattatraya *v.* Rahimulla, 15 B. 456 (1893); Himalaya Bank *v.* Hurst, 3 A. 710 (1881) [as to this case and S. C. C., see Bhagvan *v.* Balu, 8 B. 230 (1883); Malhari *v.* Narso, 9 B. 174 (1884); Krishna *v.* Mansaram, 18 B. 61 (1893); Kelu *v.* Vikrishna, 15 M. 345 (1891)].

(1) Har Bhagat Das *v.* Anandaram Marwari, 2 C. W. N. 126 (1897); Clark *v.* Alexander, 21 C. 200 (1893).

(2) Arimuthu *v.* Vyapuripandaram, 35 M. 588 (1911).

(3) Ganga Dass *v.* Kushali, 7 A. 702 (1885); Durga Charan Rai Chowdry *v.* Monmohini Dasi, 15 C. 771 (1888).

(4) Sorabji Edulji *v.* Govind Ramji, 16 B. 91 (1891); but cf. Jetha Bhima *v.* Lady Janbai, 37 B. 138 (1912).

(5) Chunni Lal *v.* Jugal Kishore, 27 A. 132 (1904).

(6) Trailakya Nath Adhya *v.* Pulin Behari Basal, 3 C. L. J. 385 (1904).

(7) Ramanathan Chettiar *v.* Subramania Sastrial, 26 M. 179, 181 (1902).

(8) Vishvanath Maheshvar *v.* Virchand Panachand, 6 B. 16 (1881); Srinivasa Ayyangar *v.* Seetharamayyar, 19 M. 72, 74 (1895), that is when the property became available for distribution: Sew Bux Bogla *v.* Shib Chunder Sen, 13 C. 225 (1886); Veerayya *v.* Annamala Chetty, 31 M. 502 (1908).

(9) Manilal Umedram *v.* Nanabhai Manikal, 28 B. 264, 274 (1903).

(10) Ramanathan Chettiar *v.* Subramania Sastrial, 26 M. 179 (1902), in which it was also held that the words did not apply to the 25 per cent. deposit. Ref. to Hafez Mahomed *v.* Damodar Pramanick, 18 C. 242 at 244

taken place in a particular way, viz. in execution (1) from the property of the judgment-debtor; (2) the proceeds being "assets" even before the sale becomes absolute.(3) Where therefore assets were realized but not in process of execution the section did not apply; as where moneys were paid by a judgment-debtor under arrest (4) or paid into Court (5) voluntarily, though no doubt under pressure of the decrees; or were realized by private sale of properties attached, the assets being realized under the section, not by the attachment but by the sale.(6)

Although this section is wider than sect. 295 of the last Code, yet the effect of sects. 275 and 310A of the last Code (now represented by O. XXI. r. 55 and O. XXI. r. 89) remains unaltered; and therefore sums paid into Court for a particular purpose under O. XXI. r. 55 are not assets under this section; (7) neither are sums paid into Court under O. XXI. r. 89.(8)

The object of the provision should be to expedite and cheapen the execution of decrees against the same person by adjusting the claims of rival decree-holders without the necessity for separate proceedings. If, however, the property is not sufficient to satisfy all the claimants, the wording of the last Code, as judicially interpreted, held out an inducement to the attaching creditors to settle out of Court with the judgment-debtor at the expense of the other decree-holders.(9) The language of the section has been altered and widened by referring to assets held available for distribution rather than to assets "realized in execution." It is necessary of course that assets in order to be "held" must be realized. It is not however necessary now that the realization must have been in execution as that phrase was interpreted under the former Code. It is sufficient that having been realized (and probably that will be held to be when the entire amount due from a purchaser has been paid into Court) they are available for distribution in execution. The creditors

(1891); Arimuthu *v.* Vyapuripandaram, 35 M. 588 (1911); Maharaja of Burdwan *v.* Apurba, 15 C. W. N. 872 (1911); 14 C. L. J. 50.

(1) Manilal Umedram *v.* Nanabhai Manik-lal, 28 B. 264, 274 (1903); Sew Bux Bogla *v.* Shib Chunder Sen, 13 C. 225 (1886); Bishen Chunder *v.* Monmohinee, 8 W. R. 501 (1867). The realization was held to be by execution in Fink *v.* Maharaj Bahadur Singh, 4 C. W. N. 27; 26 C. 272 [equitable execution by appointment of receiver]; Sorabji Edalji *v.* Govind Ramji, 16 B. 91 (1891) [debt attached and paid into hands of Sheriff].

(2) Purshotam Das *v.* Mahanant Suraj-bharthi, 6 B. 588 (1882); Gopaldai *v.* Chunni Lal, 8 A. 67 (1885).

(3) Vishvanath Maheshwar *v.* Virchand Pana Chand, 6 B. 16 (1881).

(4) Purshotam Das *v.* Mahanant Suraj-bharthi, 6 B. 588 (1882).

(5) Gopaldai *v.* Chunni Lall, 8 A. 67 (1885); Sew Bux Bogla *v.* Shib Chunder Sen, 13 C. 225 (1886); Prosonnomoyee Dassee *v.* Sreenath Roy, 21 C. 809 (1894); Vibredha-priya Tirthasami *v.* Yusuf Sahib, 28 M. 380 (1905).

(6) Vibredhapriya *v.* Yusuf Sahib, *supra*, and the section does not apply where the judgment-debtor has paid money out of Court to one of the decree-holders who had taken steps to execute the decree and who then intimated to the Court that his claim had been satisfied, Gowri Dutt *v.* Amarchand C. L. J. 49 (1911).

(7) Sorabji Coovarji *v.* Kala Raghunath, 36 B. 156 (1911).

(8) Harai Saha *v.* Faizlur Rahman, 40 C. 619 (1913).

(9) See Purshotam Das *v.* Mahanant Suraj-bharthi, 6 B. 588, at p. 590 (1882) ["The arresting creditor may avail himself of the arrest to enter into any arrangement he thinks proper with the debtor behind the back, and independently of other creditors who may have applied for execution"].

must apply before (1) the assets have become so available to the Court holding the assets.(2)

"**Court.**"—Section 285 (now 63) of the last Code contained the words "*which shall receive or realize such property.*" (3) A transferee may apply for execution to the Court which passed the decree (even though the latter may have been transferred for execution (4)), and the Court executing the decree was held to have no jurisdiction upon the application of the transferee who had not so applied.(5) A decree was passed by the Subordinate Judge, and in execution of that decree a sale of certain property was held and conducted by the *Nazir* of the District Judge; *held* that in reference to that sale the District Judge had no jurisdiction to pass any order under the provisions of this section.(6) As to transfer for execution, *vide ante*.

Decree for money.—Every decree (7) other than a decree for the enforcement of a mortgage (8) is, to the extent to which money is payable thereunder, a decree for the payment of money, notwithstanding that the amount of money so payable has not yet been ascertained,(9) or that relief of another kind has also been granted; (10) but a dectee directing the realization of a money claim from mortgaged property and declaring the judgment-debtor to be personally liable for any deficiency in a mortgage decree(11) is not a decree for the payment of money, and a decree directing the payment of money by any person does not cease to be a decree for the payment of money in so far as that person is concerned, merely because it directs as against another person, the realization of a money claim from mortgage property.(12) The Madras High Court has more recently held that a decree directing the sale of mortgaged properties in default of payment of money is a decree for money whether there is a direction to pay personally or not, and whether the remedy against the property is exhausted or not.(13) The section refers to *bonâ fide* decree-holders, and the Court

(1) See Tiruchettambala Chetti *v.* Seshayyangar, 4 M. 383 (1881).

(2) See Krishnashankar *v.* Chandra Shankar, 5 B. 198 (1880).

(3) See Bhugwan Chunder Kirtiratna *v.* Chundra Mala Gupta, 29 C. 773 (1902); s. c., 1 C. L. J. 97.

(4) Baij Nath Goenka *v.* Holloway, 1 C. L. J. 317 (1905).

(5) Jameshwar Prasad *v.* Thakur Prasad, 25 A. 443 (1903).

(6) Nobo Kishore Dass *v.* Protap Chunder Banerjee, 1 C. L. R. 534 (1878).

(7) See Hart *v.* Tara Prosonno Mukherjee, 11 C. 718 (1885); Viraraghava Ayyangar *v.* Varada Ayyangar, 5 M. 123 (1882). A judgment under s. 86 of the Insolvent Act is a money decree: *In re* Bhugwandas Hurjivan 8 B. 511 (1884). As to the legal representative of deceased judgment-debtor purchaser of the decree, see Munmohan Das *v.* Vizbai, 13 B. 171 (1888); dist. in Laldhari *v.* Manager, Court of Wards, 14 C. L. J. 639, 644 (1911).

(8) Jagat Narain Rai *v.* Dhundhey Rai, 5 A. 566 (1883), but a mortgagee may waive his lien and proceed under this section: Fukeer Buksh *v.* Chutterdharee Chowdry, 14 W. R. 209 (1870); as also where he obtains a decree without declaration of lien: Radhakant Roy *v.* Murza Sudafat, 21 W. R. 86 (1873).

(9) Viraraghava Ayyangar *v.* Virada Ayyangar, 5 M. 123 (1882) [decree for mesne-profits], but see Mt. Binda Bibee *v.* Lalla Gopeenath, 21 W. R. 66 (1873).

(10) Hart *v.* Tara Prosonno Mukherjee, *supra*, foll. Kommachi Kather *v.* Pakker, 20 M. 107, 110 (1896); dist. in Laldhari *v.* Manager, Court of Wards, 14 C. L. J. 639, 644 (1911).

(11) Fazil Howladar *v.* Krishno Bundhoo Roy, 25 C. 580 (1897); dist. Hart *v.* Tara Prosonno Mukherjee, 11 C. 718 (1885); s. c., 2 C. W. N. 118.

(12) Delhi and London Bank *v.* Uncovenanted Service Bank, 10 A. 35 (1887).

(13) Vardhinadasamy *v.* Somasundram, 28 M. 473 (1904).

should exclude persons who are not so,(1) and the Court is competent to determine the question of *bonâ fides*.(2)

"**The same judgment debtor.**'—If A. holds a decree against two persons X. and Y.; and B. holds a decree against only one of them, X.; in so far as the decrees are both decrees against X. they are decrees against the same judgment-debtor.(3) Where property belonging to A. has been attached under a decree, and other decree-holders than the attaching creditor have applied before realization of assets to participate in the sale proceeds, and amongst them a creditor who has obtained a decree against A. and B., such latter creditor is entitled under this section to share in the proceeds of the sale of A.'s property.(4) The following decrees have been held not to be against the same judgment-debtor: A decree against B. and a decree against B.'s representative; (5) a decree against Y. as representative of a party's deceased husband and a decree against Y. in his personal capacity.(6)

All will share equally in the surplus after deducting the costs of realization; there being no priority except perhaps in the case of Crown debts,(7) as to which also see third sub-clause, or, it has been held,(8) in the case of rent realized by the sale of the house or building for which it was due. It is only the unsatisfied portion of the decree that ought to be taken into account in a question of saleable distribution, there being no reason why any amount should be set apart in favour of a decree-holder in proportion to any sum covered by his decree which has already been realized.(9)

Sale subject to a mortgage.—Clauses (*a*) and (*b*) of the proviso refer only to sales in execution of simple money decrees and declare the incompetence of a mortgagee as such to any share of the surplus proceeds when the property is sold subject to his mortgage; otherwise, if he consents to sell the property free of lien; clause (*c*) refers to sales under mortgage decrees, but in such a case, as appears from that clause, prior incumbrances are not taken into account, the sale proceeds being distributed in discharge of subsequent incumbrances

(1) *In re* Sunder Das, 11 C. 42 (1884); Chaganlal *v.* Fazarali, 13 B. 154 (1888).

(2) Puran Chand *v.* Purendra Narain, 17 C. W. N. 326, 328 (1912); Peary Lal Das *v.* Peary Lal Dawn, 18 C. L. J. 646 (1913).

(3) Gonesh Das Bagria *v.* Shiva Lakshman Bhakat, 30 C. 583 (1903); s. c., 7 C. W. N. 414, overruling Deboki Nundun Sen *v.* Hart, 12 C. 294 (1885) [explained in Nimbaji Tulsiram *v.* Vadia Venkati, 16 B. 683 (1892)]; foll. Gatti Lal *v.* Bir Bahadur Sahai, 27 A. 158 (1904); Chotalal *v.* Nabibhai, 29 B. 528 (1905).

(4) Shumbhoo Nath Paddar *v.* Luckynath Dey, 9 C. 920 (1883), foll. Delhi and London Bank *v.* Uncovenanted Service Bank, 10 A. 35, 38 (1887).

(5) Govind Abaji *v.* Mohoniraj Vinayak, 25 B. 494 (1901); s. c., 3 Bom. L. R. 407 (1901). In this case there was no decree against the father and one against the son, but the case has been distinguished where there was one decree against the father, and another against father and son; Ramanathan Chettiar *v.* Subramania Sastrial, 26 M. 179, 182 (1902), and see Grant *v.* Subramanian, 22 M. 241 (1898); Srinivasa *v.* Kanthimathi 33 M. 465 (1910).

(6) Bhola Nath *v.* Maq-bul-un-nissa, 26 A. 28, 34 (1903); but see Hart *v.* Tara Prosonno Mukherjee, 11 C. 718, 728 (1885).

(7) As to which see Secretary of State *v.* Bombay Landing, etc. Co., 5 B. H. C. R. O., C. J. 23 (1868).

(8) Maniklal Venilal *v.* Lakha, 4 B. 429 (1880).

(9) Sarat Chundra Kundu *v.* Doyal Chund Seal, 3 C. W. N. 368 (1899).

only.(1) The section refers to cases in which property is sold subject to a mortgage, and not to cases where property subject to an undisclosed mortgage is sold in execution.(2) The Court has jurisdiction to inquire into the merits of the alleged mortgage.(3)

Sale under mortgage decree.—See notes to "Sale subject to mortgage." This provision applies where the decree orders the property to be sold, and not to the case where the property sold was not the encumbered property but other property of the judgment-debtor.(4) It was held that the term "*incumbrance*" could not be read as "an incumbrance or incumbrances" so as to apply a principle to the distribution of proceeds which would give priority to a subsequent incumbrance.(5)

"**Amount due.**"—The words of the former section were "*in discharging the interest* (6) *and principal money due on the incumbrance.*"

"**Subsequent incumbrances.**"—The sale proceeds are to be applied in satisfaction of incumbrances according to their priority.(7)

Suit for refund of assets, clause (2).—The scheme of the section is to enable the Judge as a matter of administration (8) to distribute the sale proceeds according to what seems at the time to be the rights of the parties. But this distribution does not import a conclusive adjudication on those rights which may be subsequently readjusted in a suit under this clause. Such a suit is to recover the assets, not to set aside the order for distribution, nor does the order for the reasons stated stand in the way of the suit.(9) The party aggrieved is entitled to bring a regular suit to compel the successful judgment-creditor in execution to refund.(10) The cause of action arises only when the money is paid.(11) And all parties to the distribution should be made parties to the suit.(12) Though an order under this section is not appealable,(13) it

(1) Jugat Narain Rai *v.* Dhundhey Rai, 5 A. 566 (1883); mortgaged property cannot be sold subject to a prior mortgage: Bhagwan Das *v.* Bhawani, 26 A. 14, 17 (1903). See as to Cl. (*b*) Janoky Bullubh Sen *v.* Johiruddin Mahomed, 10 C. 567 (1884), and Cl. (*a*) Kalee Das Ghose *v.* Lall Mohun Ghose, 16 W. R. 306 (1871); Bank of Bengal *v.* Nundo Lall Dass, 12 B. L. R. 509 (1873). See Venkataram *v.* Mangalathammal, 17 M.L.J. 80 (1906).

(2) Joy Chunder Ghose *v.* Ram Narain Poddar, 21 W. R. 43 (1873); Fukeer Buksh *v.* Chutterdharee Chowdhry, 14 W. R. 209 (1870); Sha Nagendas *v.* Halalkore Nathwa, 5 B. 470, 477 (1881).

(3) Purshotam Sidheswar *v.* Dhonda Amrit, 6 B. 582 (1880); Vishnu Dikshit *v.* Narsingrav, 6 B. 584 (1882).

(4) Komachi Kather *v.* Pakker, 20 M. 107, 109, 110 (1896).

(5) Mitthu Lal *v.* Kishan Lal, 12 A. 546 (1890).

(6) In Swarama *v.* Subramaya, 9 M. 57 (1885), it was held that rent could not be regarded as interest.

(7) Shahi Ram *v.* Shib Lal, 7 A. 378 (1885).

(8) Though the order on which such administration is based is a judicial order, Baij Nath Prosad *v.* Ghanshyam Dass, 8 C. W. N. 382, 384 (1904).

(9) Shankar Sarup *v.* Mejo Mal, 23 A. 313; s. c., 5 C. W. N. 649; 3 Bom. L. R. 713 (1901) P. C.; but see Gouri Prosad Kundu *v.* Ram Ratan Sircar, 13 C. 159 (1886). In Hindwar Singh *v.* Bhawani Pershad, 2 C. W. N. 429 (1897), an order under this section was held to bar a suit under the particular circumstances. Such a suit was held to lie under the Code of 1859. Gogaram *v.* Kartick Chunder Singh, 9 W. R. 514 (1886).

(10) Chaganlal *v.* Fazarali, 13 B. 154 (1888).

(11) Hart *v.* Tara Prosonno Mukherjee, 11 C. 718 (1885).

(12) Gouri Prosad Kundu *v.* Ram Ratan Sircar, *supra*, at p. 162; Brojo Kanth Chuckerbutty *v.* Banee Madhub Dischit, 23 W. R. 434 (1875).

(13) See sect. 104; Kashi Ram *v.* Mani Ram, 13 A. 210 (1892); Gogaram *v.* Kartick Chunder Singh, 9 W. R. 514 (1868).

may be open to revision (1) as well as to attack by suit. It has been held that a Small Cause Court cannot try a suit for refund of assets paid under this section; (2) but this has been dissented from.(3)

Sale proceeds.—When surplus sale proceeds are in Court the Judge should pay them out only to the party in whose name they stand, or his agent.(4) It has been held that the Court may allow a decree-holder to take out the purchase money before confirmation of Sale.(5) Where property was sold under one decree and the proceeds were sufficient to satisfy both the decrees of two creditors, the property should not, it was held, be resold but the other decree should have been satisfied out of the assets realized by the first sale.(6) If a mortgagee receives any money out of the surplus sale-proceeds of a share in the property mortgaged to him, sold in execution of a decree on a prior mortgage from some of the mortgagors to whom the share belonged and against whom the decree was obtained, he is bound to apply the money to the satisfaction of his mortgage debt, only in case he receives it by virtue of his security and not otherwise, although the payment might be made to him by the said mortgagors in satisfaction of other debts due to him from them.(7)

RESISTANCE TO EXECUTION.

[s. 330.] **74.** *Where* the Court is satisfied that the *holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been* resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person *on his behalf and* that *such* resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder *or purchaser, order* the judgment-debtor or such other person *to be detained in the civil prison* for a term which may extend to thirty days and *may further* direct that the decree-holder *or purchaser* be put into possession of the property.

Resistance to execution.

Resistance.—See notes to O. XXI. rr. 97–103, *post*, which deal with resistance to delivery of possession either to decree-holder or purchaser.

(1) Tiruchittambala *v.* Seshayyangar, 4 M. 383 (1881); Sew Bux Bogla *v.* Shib Chunder Sen, 13 C. 225 (1886); Viraraghava *v.* Para Sumatra, 15 M. 372 (1891). In Venkataraman *v.* Mahabrigayyan, 9 M. 508 (1886), the Court refused to interfere.

(2) Shahi Ram *v.* Shib Lal, 7 A. 378 (1885).

(3) Harihara *v.* Subramanya, 9 M. 250 (1885).

(4) *In re* Puddabatty Dassee, 12 W. R 352 (1869).

(5) Jogendra Nath Sircar *v.* Gobind Chunder Addi, 12 C. 252 (1885); Vishvanath Maheshvar *v.* Virchand Pana Chand, 6 B. 16 (1881); but see Hafez Mahomed *v.* Damodar Pramanick, 18 C. 242, 245 (1891).

(6) Rati Ram *v.* Chiranji Lal, 3 A. 579 (1881).

(7) Ganga Ram Marwari *v.* Jaibullap Narain Singh, 30 C. 953 (1903).

PART III.

INCIDENTAL PROCEEDINGS.

COMMISSIONS.

75. *Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—*

Power of Court to issue commissions.

(*a*) *to examine any person;*

(*b*) *to make a local investigation;*

(*c*) *to examine or adjust accounts; or*

(*d*) *to make a partition.*

The power of a Court to issue a commission is defined in this section. But the Court cannot delegate its judicial functions under it. And see O. XXVI. r. 9.(1)

76. (*1*) *A* commission *for the examination of any person* may be issued to any Court (not being a High Court) *situate in a province other than the province in which the Court of issue is situate and having* jurisdiction *in the place in which the* person *to be examined* resides. [s. 386.]

Commission to another Court.

(*2*) Every Court receiving a commission for the examination of any person *under sub-section* (*1*) shall examine him *or cause him to be examined* pursuant thereto, *and* the commission, *when it* has been duly executed, shall be returned together with the evidence taken under it to the Court *from* which it *was* issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order. [s. 388.] [s. 389.]

77. *In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.*

Letter of request.

(1) Ram Narain *v.* Odindra Nath, 17 C. W. N. 369 (1911); 15 C. L. J. 17; and Rai Kishori *v.* Kumudini, 15 C. L. J. 138 (1910).

[s. 391.] **78.** The provisions as to the execution and return of commissions *for the examination of witnesses* shall apply to commissions issued by—

Commissions issued by foreign Courts.

(*a*) Courts situate beyond the limits of British India and established *or continued* by the authority of *His* Majesty or of the Governor General in Council, or

(*b*) Courts situate in any part of the British Empire other than British India, or

(*c*) Courts of any foreign country for the time being in alliance with *His* Majesty.

Commissions.—This subject is further dealt with in O. XXVI. and the notes thereto, to which refer. As to forms of letter of request, see First Schedule, Appendix H, No. 8; and as to the same O. XXVI. r. 5, *post*.

PART IV.

SUITS IN PARTICULAR CASES.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS *IN THEIR OFFICIAL CAPACITY.*

79. (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council. [s. 416.]

Suits by or against Government.

(2) *Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power declared by section 111 of the East India Company Act, 1813.*

Suits.—This is sect. 416 of the last Code. Sects. 417–421 are now rr. 2–6 of O. XXVII., the first rule of that Order, dealing with pleadings, being new. Sect. 422 is now r. 27 of O. V. Sect. 423 is r. 7 of O. XXVII. Sects. 424 and 425 are now sects. 80, 81. Sects. 426 and 427 are r. 8 of O. XXVII. Sects. 428 and 429 are now sects. 81 and 82.

The liability of the Secretary of State for India in Council to be sued depends on the statute 21 & 22 Vict. c. 106, for the better government of India, and turns principally upon the construction of sect. 65 of that Statute.(1) Whether a suit will lie at the instance of Government is a matter of substantive law. As regards the Court in which such a suit, assuming it to lie, should be brought, reference should be made in the case of the High Courts to their Letters Patent; in other cases to the various Indian Civil Courts Acts, and to sects. 16–20 of this Code.(2) Whether and when a suit will lie against a public officer is a question

(1) See for a recent decision, in which the earlier cases are cited, Jehangir *v.* Secretary of State, 27 B. 189 (1902), and others cited in O'Kinealy's C. P. C., notes to s. 416.

(2) *Vide ante*, notes to those sections, and in particular as regards suits against Government; see those in which the question has arisen whether the Government may [Biprodas Dey *v.* Secretary of State, 14 C. 262 *n.* (1884); Subbaraya *v.* Government, 1 M. 286 (1862)] or may not be said to carry on business [Rundle *v.* Secretary of State, 1 Hyde, 37 (1862–63); Doya Narain *v.* Secretary of State, 14 C. 256 (1887)]. Several suits have been decided in which the cause of action did not accrue within the local limits, and in which therefore those Courts could have had jurisdiction only if the Government could be held

of substantive law. Judicial officers are protected by Act XVIII. of 1850, but no such general protection is granted to executive officers.(1) None of these matters are relevant to these provisions, which deal with the subject of procedure in a case properly instituted. The statute first cited provides that the Secretary of State for India in Council may be sued as a body corporate, and this section provides that suits shall be so entitled.(2) Where, however, a suit was wrongly brought against a Magistrate, the High Court, on appeal, allowed the name of the Magistrate to be struck out, and that of the Secretary of State for India in Council to be inserted.(3)

Informations.—The power of the Advocate-General to exhibit informations in the nature of actions at law or Bills in Equity was expressly declared by sect. 111 of the East India Company Act, 1813 (53 Geo. 3, c. 155), and kept alive by sect. 2 of the Government of India Act, 1833 (3 & 4 Will. 4, c. 85), and again by sect. 1 of the Government of India Act, 1853 (16 & 17 Vict. c. 95), now merged in the statute of 1858 already mentioned (21 & 22 Vict. c. 106). The Governor General in Council is precluded by sect. 22 of the Indian Councils Act, 1861 (24 & 25 Vict. c. 67), from legislative interference with the provisions of any of the enactments above quoted. The question was considered whether sect. 416 of the last Code appeared to exclude informations exhibited by the *Advocate-General*, and whether it was therefore desirable to add a proviso saving such information. And this has been done.

s. 424.] **80.** No suit shall be instituted against the Secretary of State *for India* in Council, or against a public officer in respect of *any* act purporting to be done by *such public officer* in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, *description* and place of *residence* of the plaintiff and the relief which he claims; and the plaint *shall* contain a statement that such notice has been so delivered or left.

Notice.

"**No suit.**"—The words "no suit" under the last Code were held to mean what they say, that is no suit of any kind, and the section was not confined to a particular class of suit, such as suits founded on tort and claiming damages.

to carry on business in those limits. See Hukm Chand, C. P. C. 321; Ross Johnson *v.* Secretary of State, 2 Hyde, 153 (1864); P. & O. S. N. Co. *v.* Secretary of State, 5 B. H. C. R. App. 1 (1861); Brito *v.* Secretary of State, 6 B. 251 (1881); Hari Bhanji *v.* Secretary of State, 4 M. 344 (1879); see also as to jurisdiction, Hearsay *v.* Secretary of State, 6 A. H. C. R. 47 (1873).

(1) Some cases will be found collected in O'Kinealy's C. P. C., notes to s. 422.

(2) Nobin Chunder *v.* Secretary of State, 1 C. 11, 14 (1876).

(3) Nilkanthapa *v.* Magistrate, 6 B. 670 (1882); Balaram *v.* Magistrate, 6 B. 673 (1882).

And it has been held under the present Code that this section applies to suits of every kind.(1) The object of notice is to give the defendant breathing time, so as to enable him to determine whether reparation ought to be made; and the principle is applicable to any class of suit.(2) The substitution of the words "any act" for "an act" points in the same direction. Notice has, in consequence, been deemed necessary even when the remedy sought was an injunction, and though delay involved in the giving of notice might involve the commission of the wrong complained of before the suit was filed.(3) But the objection for want of notice can only be taken by the Secretary of State, and where no relief is claimed against him it has been held that no notice is necessary.(4)

"**Shall be instituted.**"—That is, commenced. The section says that no suit shall be instituted, not that it shall not be proceeded with or maintained. The language of the section is imperative, and absolutely debars a Court from entertaining a suit instituted without compliance with the provisions of the section. A Court cannot under such circumstances stay proceedings and allow time to the plaintiff to serve the requisite notice, but its only course is to reject the plaint.(5) It has, however, been held that there is nothing in the law to show that in case of any amendment of the plaint, necessitated by the alleged discovery of facts previously unknown to the plaintiff, the Secretary of State should have a further notice of two months, when the relief asked for is not altered by such amendment, and it only embodies certain further material in support of the plaintiff's contention.(6) And where, in an action already instituted against the Secretary of State, a public servant was also afterwards joined as defendant, who, however, was not sued for any act done by him independently of Government, and no separate relief was asked for against him, no notice was held to be required in his case.(7) Further, there is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of it at the trial.(8) Though the Secretary of State is not a necessary party to a suit to set aside a revenue sale, yet the Government has such an

(1) Secretary of State *v.* Gajanan, 35 B. 362 (1911); Sakharam Bagwan *v.* Secretary of State, 14 B. L. R. 353 (1912); Secretary of State *v.* Kalekhan, 37 M. 113 (1914).

(2) Secretary of State *v.* Rajlucki Debi, 25 C. 239, 243, 244 (1897); ref. to Manindra Chandra Nandi *v.* Secretary of State, 5 C. L. J. 148, 167 (1907); *contra*, Shahebzadee Shahunshah Begum *v.* Fergusson, 7 C. 499 (1881), where it appears to have been considered that notice was required only in suits in respect of tortious or quasi-tortious acts. It may, however, be a question whether there was an act done in official capacity in the sense used. See Sardarsingji *v.* Ganpatsingji, 14 B. 395, 402 (1889). And see Rajmal *v.* Hanmant, 20 B. 697 (1895), where it was held that the section did not apply where the suit was one *ex-contractu*. But see Chhaganlal *v.* Collector of Kaira, 35 B. 42 (1910).

(3) Hari *v.* Secretary of State, 27 B. 424 (1903); s. c., 5 B. L. R. 431; see Secretary of State *v.* Rajlucki, 25 C. at p. 244 (1897).

(4) Raghubans Sahai *v.* Phool Kumari, 32 C. 1130 (1905); s. c., 1 C. L. J. 542; Naginlal *v.* The Official Assignee, 14 Bom. L. R. 1148 (1912); 37 B. 243.

(5) Bachchu Singh *v.* Secretary of State, 25 A. 187 (1902).

(6) Ezra *v.* Secretary of State, 7 C. W. N. 249 (1902); s. c., 30 C. 36.

(7) Ib.

(8) Manindra Chandra Nandi *v.* Secretary of State, 5 C. L. J. 148, 168 (1907).

interest in the suit as would justify the Court in adding the Secretary of State as a party,(1) and this section, it has been held, does not prevent that being done.(2)

Public officer.—See as to the definition of this term, sect. 2, *ante*. The Official Trustee ; (3) Official Assignee ; (4) Administrator-General ; (5) a Collector acting as agent of the Court of Wards, and as such illegally seizing property ; (6) and a Talukdari Settlement Officer, when acting as manager under Act XXI. of 1881,(7) or under sect. 79A of Bombay Land Revenue Code (Bom. Act V. of 1879),(8) have been held to be public officers.

"In respect of any act."—The words "in respect of an act purporting to be done by him in his official capacity" were introduced by Act XII. of 1879 into sect. 424 of the last Code under which it was held that the qualifications "in *respect of an act, etc.*," do not relate to the Secretary of State. They did not apply to the case of the Secretary of State in Council.(9) This is now made clear by the introduction of the words "*by such public officer.*" The defendant must not only be a public officer, but the act must be done in his official capacity.(10) If not,(11) then the section does not apply. There must, however, be a distinct act by the public officer which is complained of to entitle him to notice, and so it has been held unnecessary where a Collector was made a party not in respect of any alleged illegal act by him, but on the application of the minor's personal guardians in order to protect the minor's title ; (12) and where a Collector was merely guardian *ad litem*. In such a case the suit is not against him at all, and he defends on behalf of the minor only.(13) To take a case out of this

(1) Bal Mokoond *v.* Jirjudhun Roy, 9 C. 271, 276, 277 (1882); Balkishen Das *v.* Simpson, 2 C. W. N. 513 (1898); s. c., 25 C. 833; foll. in Bhola Nath *v.* Secretary of State for India, 17 C. W. N. 64 (1912); 40 C. 503 (A. C.) (1912).

(2) Bal Mokoond *v.* Jirjudhun Roy, 9 C. 271, *supra*.

(3) Shahebzadee Shahunshah Begum *v.* Fergusson, 7 C. 499 (1881).

(4) Joosub Haji *v.* Kemp, 26 B. 809 (1902); s. c., 4 B. L. R. 929.

(5) Bholaram Chowdhury *v.* Administrator-General, 8 C. W. N. 913 (1904); Antone *v.* Administrator-General, 28 B. 529, 532 (1904).

(6) Collector of Bijnor *v.* Munuvar, 3 A. 20 (1880).

(7) Sardarsingji *v.* Ganpatsingji, 14 B. 395, 402 (1889).

(8) Talukdari Settlement Officer *v.* Bhaijibhai, 14 Bom. L. R. 577 (1912); Chhaganlal *v.* The Collector of Kaira, 35 B. 42 (1910); Secretary of State *v.* Gajanan, 35 B. 362 (1911); 13 Bom. L. R. 273; Cecil Gray *v.* Cantonment Committee of Poona, 34 B. 583 (1910).

(9) Secretary of State *v.* Rajlucki Debi, 25 C. 239, 242 (1897).

(10) See Jogendra Nath *v.* Price, 24 C. 584 (1894) [dist. in Muhammad Saddiq *v.* Panna Lall, 26 A. 220, 222 (1903)]; Secretary of State *v.* Rajlucki Debi, 25 C. 239 (1897); Antone *v.* Administrator-General, 28 B. 529 (1904), and cf. Swamirayacharya *v.* Collector of Dharwar, 15 B. 441 (1890); Bakhtwar Mal *v.* Abdul Lalif, 29 A. 567 (1907), in which the acts were held to have been done in official capacity; Chhaganlal *v.* The Collector of Kaira, *supra*.

(11) Muhammad Saddiq *v.* Panna Lall, 26 A. 220 (1903), and two following notes. A public officer sued in respect of an act done in bad faith is not entitled to notice : Peary *v.* Weston, 16 C. W. N. 145, 214 (1911).

(12) Bhau Balapa *v.* Nana, 13 B. 343, 347 (1888).

(13) Anantharaman *v.* Ramasami, 11 M. 317 (1888) [explaining Narsingrav *v.* Luxumanrav, 1 B. 318 (1876)]; cf. Jadow Mulji *v.* Chhagan Raichand, 5 B. 306 (1881).

section it must be proved that there was something in the conduct of the Secretary of State which prevented the plaintiff from complying with its provisions.(1)

Notice.—The three requisites to be stated are: (*a*) cause of action; (*b*) name and residence; (*c*) relief sought.

The object of the section being merely to inform the defendant substantially of the ground of complaint, the words "stating the cause of action" should not be construed too strictly or narrowly.(2) In considering the sufficiency of a notice on this point, it should not be read with the strictness with which a plaint should be read.(3) A notice is sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed.(4)

The name of the intending plaintiff must be stated. A notice given by a party who dies before suit does not enure, it has been held, for the benefit of his representative, and enable the latter to maintain the suit without giving a fresh notice, as the notice in such place does not give the name of the actual plaintiff.(5) Further, the abode of the intending plaintiff must be stated.(6) The amended section adds description of plaintiff. And this applies to all plaintiffs if there are more than one.

Lastly, the relief claimed should be stated. Generally, and as regards all these matters, it may be said (to adopt the language of Pollock, C.B.),(7) it is, on the question of sufficiency, necessary "to impart a little common sense into notices of this kind," and to ascertain whether the object of the Legislature has been substantially and effectively carried out. If no notice has been given, or it is held to be insufficient, the proper course, it has been held, is not to dismiss the suit, but to reject the plaint, and give an opportunity to serve a fresh notice.(8)

"Plaint shall contain a statement."—The portion of this section relating to the plaint, containing a statement that such notice has been left or delivered in the manner prescribed by it, is separate from the earlier portion, which deals with the delivery of the notice two months before suit. It is only when notice is not given that the suit is liable to be dismissed (or the plaint rejected). The suit, however, may be proceeded with, if notice has been given in the manner prescribed, and subsequently the plaint is amended in order to state that fact.(9)

(1) Sakharam *v.* Secretary of State, 14 Bom. L. R. 353 (1911); Secretary of State *v.* Gajanan, 35 B. 362 (1911); 13 Bom. L. R. 273.

(2) Bholaram Chowdhury *v.* Administrator-General, 8 C. W. N. 913 (1904); Secretary of State *v.* Perumal Pillai, 24 M. 279, 282 (1900); Bachchu Singh *v.* Secretary of State, 25 A. 187, 191 (1902).

(3) Parbutti Churn *v.* Nobin Chunder, 13 C. L. R. 195 (1883).

(4) Jehangir Cursetji *v.* Secretary of State, 27 B. 189; s. c., 5 Bom. L. R. 30; McInerney *v.* Secretary of State for India, 38 C. 797 (1911); plaint cannot be amended as to nature of suit after the notice.

(5) Bachchu Singh *v.* Secretary of State, 25 A. 187; Bhola Nath *v.* Secretary of State for India in Council, 17 C. W. N. 64 (1912); 40 C. 503; notice must give names, etc., of *all* plaintiffs.

(6) Ib., at p. 191; Bholaram Chowdhury *v.* Administrator-General, 8 C. W. N. 913, 916 (1904).

(7) Jones *v.* Nicholls, 13 M. & W. 363, cited in Eales *v.* Municipal Commissioners of Madras, 14 M. 386, 390 (1890).

(8) Bachchu Singh *v.* Secretary of State, *supra*, at pp. 190, 193.

(9) Bholaram Chowdhury *v.* Administrator-General, 8 C. W. N. 913 (1904).

[ss. 425, 428.]

Exemption from *arrest* and personal appearance.

81. In a suit *instituted* against a public officer in respect of *any* act *purporting to be done by him in his official capacity*—

(*a*) *the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,*

(*b*) *where* the Court *is satisfied* that *the defendant* cannot absent himself from his duty without detriment to the public service, *it* shall exempt *him* from appearing in person.

Arrest.—A public officer could not be arrested under sect. 425 of the last Code without the consent of the District Judge. "Where the Court is satisfied;" this expression has been substituted for "*he satisfies the Court*" in sect. 428 of the last Code to remove the misapprehension that the officer is bound personally to satisfy the Court of his inability to attend.

[s. 429.]

Execution of decree.

82. (1) *Where* the decree is against the Secretary of State *for India* in Council or against a public officer in respect of *any* such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

(2) Execution shall not *be* issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of *such* report.

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS.

[s. 430.]

When aliens may sue.

83. (*1*) Alien enemies residing in British India with the permission of the Governor General in Council, and alien friends, may sue in the Courts of British India, as if they were subjects of *His* Majesty.

(*2*) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of *His* Majesty's Secretaries of State or of a Secretary to the

Government of India, shall, for the purpose of *sub-section* (2), be deemed to be an alien enemy residing in a foreign country.

Aliens.—This section deals with the subjects of Foreign States, as the following sections deal with such States or Sovereign Princes and Ruling Chiefs as those terms are understood in sects. 85, 86. As to the position of aliens, see cases cited.(1) Alien friends stand on the same footing as subjects of His Majesty. But permission is a condition precedent in the case of alien enemies.

84. (1) A foreign State may sue in *any* Court of British India: [s. 431.]

When foreign States may sue.

Provided that *such State* has been recognized by *His* Majesty or *by* the Governor General in Council:

Provided, also, that the object of the suit is to enforce *a* private right *vested in* the head *of such* State *or in any officer of such State in his public capacity.*

(2) *Every* Court shall take judicial notice of the fact that a foreign State has *or has* not been recognized by *His* Majesty or by the Governor General in Council.

Foreign State plaintiff.—A Foreign State may sue subject to the fulfilment of the two conditions mentioned in the provisos. As regards the first, if the Foreign State has been recognized, the recognition is conclusive of the right to sue.(2) The State sues by the name by which it has been recognized by His Majesty. In the case of a monarchy, the public rights and interests are represented by the monarch, and the suit is entitled, "The Emperor of —— *v.* A," or "The King of - - - *v.* B," as the case may be. In the case of a republic, the name of the State is used, as "The United States of America *v.* W." (3) Sovereign Princes and Ruling Chiefs, as those terms are understood in the following sections, may sue, and must be sued, in the name of their States, *e.g.* "Maharajah of —— *v.* K." (4)

Nextly, a suit by a Foreign State is limited to the objects stated in the second proviso. It cannot sue for anything else. The infringement of its prerogative right does not constitute a cause of action.(5) The "private right" spoken of does not mean individual rights as opposed to those of the body politic or State, but those private rights of the State which must be enforced in a Court of Justice, as distinguished from its political or territorial rights, which must, from their very nature, be made the subject of arrangement between one State and another. They are rights which may be enforced

(1) Musgrove *v.* Chun Teeong, App. Cas. (1891), 272, authorities cited *arg.*

(2) Emperor of Austria *v.* Day, 2 Giff. 628.

(3) United States of America *v.* Wagner, 2 Ch. App. 582.

(4) S. 87, *post.* See Maharajah of Bhartpore *v.* Kachoru, 19 A. 510 (1897).

(5) Emperor of Austria *v.* Day, *supra.* The rule laid down in s. 84 is only an enactment of that which prevails in England: Hajon Manick *v.* Bur Sing, 11 C. at p. 84 (1884).

by a Foreign State against private individuals, as distinguished from rights which one State in its political capacity, may have as against another State in its political capacity.(1) The second proviso takes the place of clause (*b*) of sect. 431 of the last Code. It was thought that the language of that clause required restriction inasmuch as it appeared to confer on the head of a Foreign State a general power to litigate in respect of the private rights of its subjects. It was considered, however, that the object of such litigation must be the enforcement of a private right vested in the head of the State or in an officer of the State as such, and the language has been modified accordingly. A Foreign State can only obtain relief subject to the rules and pursuant to the practice of the Court in which it sues, and one of the conditions is that, like an individual, it will give discovery.(2)

[s. 432.]

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs.

85. (1) Persons specially appointed by order of *the* Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances *and* applications and *do* acts in any such suit or suits as if he were himself a party *thereto*.

Persons appointed to prosecute or defend.—As regards the meaning of the words "Sovereign Prince" or "Ruling Chief," see notes to next section.

This section was not intended to limit the scope of O. III. r. 2, corresponding with sect. 37 of the last Code, and does not prevent the institution of a suit by an independent Prince in his own name and through a recognized agent other than one appointed under this section.(3) The section applies to suits filed in a Court of Revenue under the provisions of Act XII. of 1881. Where

(1) Hajon Manick *v.* Bur Sing, 11 C. 17 (1884); foll. Gurdyal Singh *v.* Raja of Faridkot, 22 C. at p. 229 (1895), at p. 228, it was doubted whether the suit fell within the scope of the section.

(2) United States of America *v.* Wagner, 2 Ch. App. 590; Republic of Peru *v.* Weguelin, L. R. 20 Eq. 140.

(3) Maharaja of Bhartpore *v.* Kacheru, 19 A. 510 (1897); following Beer Chunder *v.* Ishan Chunder, 10 C. 136 (1883).

the plaint in a suit filed in a Court of Revenue on behalf of a Ruling Chief was signed by a person who, at the time of signing, had not been specially appointed by Government for such purpose under this section, but was so appointed before the period of limitation in respect of such suit had expired, it was held that the plaint was a valid plaint for all purposes.(1) A political agent, if not specially appointed, cannot sue on behalf of a Prince.(2)

Suits against Princes, Chiefs, ambassadors and envoys.

86. (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor General in Council, certified by the signature of *a* Secretary to the Government of India, but not without such consent, be sued in any competent Court. [s. 433.]

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless *it appears to the Government that* the Prince, Chief, ambassador or envoy—

(*a*) has instituted a suit in the Court against the person desiring to sue him, or

(*b*) by himself or another trades within the local limits of the jurisdiction of the Court, or

(*c*) is in possession of immoveable property situate within those limits and is to be sued with reference to such possession or for money charged *thereon*.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) The Governor General in Council may, by notification in the Gazette of India, authorize a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing sub-sections to the Governor General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

(1) Maharajah of Rewah *v.* Swami Saran, 25 A. 635 (1903).

(2) Venkatrav Ghorpade *v.* Madhavrav Ramchandra, 11 B. 53, 55 (1886).

"Sovereign Prince" and "Ruling Chief."—In the Code of 1859, the words were "Sovereign Prince or independent Chief," and these were altered in the Code of 1877 to "Sovereign Prince or Ruling Chief," followed by the words, "whether in subordinate alliance," etc. Sect. 433 of the last Code, which this section replaces, was amended by the addition of certain words in the first paragraph, and the addition of the last two paragraphs by sect. 37, Act VII. of 1888. In these words were intended to be included Native Chiefs of India, feudatories, or tributaries of the British Government. The term "Chief" is not defined, but its ordinary sense is a chieftain, or principal person of a tribe, family, or congregation. But the person must also be a "ruling" chief. It is incorrect, however, to limit the latter term to cases of plenary jurisdiction.(1)

Suits against Foreign States and Sovereign Princes.—The Courts of England have, according to its law, no jurisdiction over a Foreign Sovereign unless he submits to the jurisdiction.(2) Before the Code of 1877, the privilege of Sovereign Princes stood on the same footing as the privilege of Foreign Sovereigns in England. What this section does is to create a personal privilege for Sovereign Princes, Ruling Chiefs, and their ambassadors and envoys. It is a modified form of the absolute privilege enjoyed by independent Sovereigns and their ambassadors in the Courts of England in accordance with principles of international law. The difference is that, while in England the privilege is unconditional, dependent only on the will of the Sovereign or his representative, in India it is dependent upon the consent of the Governor General in Council, where it can be given only under specified conditions. This modified or conditional privilege is, however, based upon substantially the same principle as the absolute privilege — the dignity and independence of the ruler, which would be endangered by allowing any person to sue him at pleasure, and the political inconveniences and complications which would be the result. But as the absolute privilege may be waived by the sovereign, *à fortiori* the modified privilege of the section may be.(3) Where consent has been given, but none of the conditions enumerated in the second clause exist, the suit is not maintainable.(4) The Rajah of Tipperah was held to be subject to the Courts of British India in respect of lands held within it; otherwise not, except in the cases mentioned in this section.(5) But it has been more recently and correctly held that the section, while it provides that consent shall not be given unless (*inter alia*) the Prince (C.) is in possession of immoveable property within the jurisdiction, it does not permit

(1) Kambhai Ajubai *v.* Himatsangji, 8 B. 415 (1884), in which it was held that the Desai of Patadi, a talukdar of the fifth class in Kathiawar, was a Ruling Chief; so also is the Jamadar of Shihr and Mokalla in Arabia: Chandu Lal *v.* Awad Sultan, 21 B. at p. 355 (1896).

(2) Mighell *v.* Sultan of Johore (1894), 1 Q. B. 149; foll. Maharajah Radha Kishore *v.* Chakravarti, 2 C. L. J. 163 (1905).

(3) Chandu Lal *v.* Awad Sultan, 21 B. at pp. 371, 372 (1896); absence of consent is not a defect in jurisdiction, but an irregularity in procedure: ib., pp. 366, 367.

(4) Maharajah of Jaipur *v.* Lalji Sahai, 29 A. 379 (1907).

(5) Maharajah Beer Chunder *v.* Ishan Chunder, 3 C. L. R. 417 (1878).

suits to be brought in respect of such property without consent, unless the plaintiff claims to hold (under the fifth clause) as tenant from such Prince.(1) In some cases, where consent to a suit is required, it is obvious that such consent must be obtained at the outset, as in sect. 2 of Act XIII. of 1868, which provided that suits brought against the King of Oudh could not be "commenced or prosecuted" without consent.(2) It has been held also under this section that a consent given after the commencement of a suit against a Ruling Chief—a consent not to the suit being instituted, but to its being proceeded with—is not a sufficient consent. If the consent has not been obtained before the commencement of the suit, the Court should dismiss the suit, or allow the plaintiff to withdraw it with liberty to bring a fresh suit under O. XXIII. r. 1. Where an insufficient consent has been obtained by the plaintiff, the defendant may, by his conduct, waive the defect, so that, notwithstanding the absence of a valid consent under the section, the suit can be heard and determined on its merits.(3) A suit for maintenance which seeks to have the maintenance made a charge on immoveable property is not a suit for immoveable property within the meaning of clause (*c*), nor is it a suit for "benefits to arise out of the land" within the meaning of the definition of the words "immoveable property" contained in Act I. of 1868, sect. 2, clause 5. A claim for maintenance is not a charge upon immoveable property.(4) Where consent to a suit for declaration of title to land had been obtained and the plaint had afterwards been amended by adding a prayer for recovery of possession, it was held on revision that the plaintiff, having obtained a fresh sanction for a suit for recovery of possession, should apply for leave to withdraw the plaint with liberty to bring a fresh suit.(5)

The object of these provisions is of a political character, and therefore the exercise of delegated authority is subject to control, and a consent once given or refused, even under a delegated authority, does not exhaust the power conferred. For the Notification under this clause which came into force after April 1st, 1912, see the Calcutta Gazette, April 3rd, 1912, Part IA., pp. 203–205.

87. A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State: [s. 434.]

Style of Princes and Chiefs as parties to suits.

Provided that in giving the consent referred to in the foregoing section the Governor General in Council or *the* Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

(1) Maharajah Radha Kishore *v.* Chakravarti, 2 C. L. J. 163 (1905), in which it was held that the plaintiff was not claiming as tenant but adversely.

(2) Chandu Lal *v.* Awad Sultan, 21 B. (1896), at p. 363; see Begum Bibee *v.* King of Oudh, 11 W. R. 146 (1869).

(3) Chandu Lal *v.* Awad Sultan, 21 B. 351 (1896).

(4) Beer Chunder *v.* Raj Coomar Nobodeep, 9 C. 535 (1883); cf. Mahalakhmamma *v.* Venkarataratnamma, 6 M. 83, at p. 87 (1883).

(5) Maharajah of Cooch-Behar *v.* Maharajah Manindra Chandra, 17 C. W. N. 1243 (1913).

INTERPLEADER.

[s. 470.] **88.** *Where* two or more persons claim adversely to one another the same *debt, sum of money* or *other* property, *moveable or immoveable*, from another person, *who claims no* interest therein *other than for charges or costs* and who is ready to *pay or deliver* it to the right*ful claimant*, such *other person* may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to *the person to* whom the payment or *delivery shall* be made, and of obtaining indemnity for himself:

Where interpleader-suit may be instituted.

Provided that *where* any suit is pending in which the rights of all parties can properly be decided, *no such* suit of interpleader shall be instituted.

Interpleader.—See O. XXXV. and notes thereto, *post*.

PART V.

SPECIAL PROCEEDINGS.

ARBITRATION.

89. (*1*) *Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.*

Arbitration.

(*2*) *The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.*

Arbitration.—The provisions of the former Code have as a temporary measure been removed to Schedule II., *post*, which see, as also Preface. It has been held that one effect of the saving clause at the beginning of this rule is to make the Second Schedule inapplicable to references outside a suit and to leave them to be governed by O. XXIII. r. 3.(1)

SPECIAL CASE.

90. *Where any persons* agree in writing *to* state a case for the opinion of the Court, *then the Court shall try and determine the same in the manner prescribed.* [s. 527.]

Power to state case for opinion of Court.

Special case.—See O. XXXVI. and notes thereto, *post*.

SUITS RELATING TO PUBLIC MATTERS.

91. (*1*) *In the case of a public nuisance the Advocate General, or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit, though no special damage has been caused, for*

Public nuisances.

(1) Harakhbai *v.* Jamnabai, 15 Bom. L. R. 340 (1912); 37 B. 639 (1912).

a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) *Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.*

Public nuisances.—A private individual cannot sue in respect of a public nuisance unless he shows that he has suffered special damage thereby. The present section, however, which is new, enables actions for public nuisances to be brought with the consent of the Advocate General irrespective of special damage suffered by the parties suing.

[s. 539.] **92.** (1) In the case of any alleged breach of any express or constructive trust created for public purposes *of a* charitable or religious *nature*, or *where* the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, *whether contentious or not*, in the *principal Civil* Court *of original jurisdiction or in any other Court empowered in that behalf by the Local Government* within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

Public charities.

(*a*) *removing any trustee;*

(*b*) appointing *a* new trustee;

(*c*) vesting any property in trustee;

(*d*) *directing accounts and inquiries*;

(*e*) declaring *what* proportion *of the trust-property or of the interest therein shall be allocated to any particular object of the trust;*

(*f*) authorizing the whole or any part of *the trust*-property to be let, sold, mortgaged or exchanged;

(*g*) settling a scheme; or

(*h*) granting such further or other relief as the nature of the case may require.

(2) *Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.*

[s. 539, last para.] **93.** The powers conferred by sections *91 and 92* on the Advocate General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by

Exercise of powers of Advocate General outside Presidency-towns.

the Collector or by such officer as the Local Government may appoint in this behalf.

Origin of sections.—As to the equitable jurisdiction over charities which existed prior to the Code of 1877, in which this section first appeared, see *post*, p. 358. It is only necessary to add, that apart from this general jurisdiction, special provision was made for religious endowments by Act XX. of 1863. Under sect. 14 of that Act any person interested might sue, with leave in case of misfeasance, breach of trust, or neglect of duty by a trustee, and the Court might direct specific performance, removal of the trustee, and give a decree for damages. That Act was, however, merely enabling or permissive, and did not take away rights which persons had prior to the Act to bring suits in the ordinary Courts.(1) A person, however, electing to proceed under that Act, can be given only such special relief as that special statute says it may give. If he wishes for any relief beyond that, he should, it has been held,(2) proceed under this section.

This section is in part borrowed from Romilly's Act (52 Geo. III. c. 101), and the decisions on that Statute. The Madras High Court has therefore held that the section should be interpreted in the light of the decisions on that Statute.(3) In other cases, however, it has been considered that the differences between the Act and the Statute are such that the decisions on the latter Statute are not in point upon a question of the construction of this section.(4) As regards the objects with which the section was enacted, *vide post*, p. 361. The words "*or religious*" were first inserted in the Code of 1882, *vide post*.

Scope of the sections.—It has been held under the last Code both that sect. 539 of that Code was mandatory—in other words, that suits of the character mentioned in the section could only be brought in accordance with its provisions and not otherwise; (5) as also that it did not take away pre-existing rights or remedies (6)—and that, like sect. 14 of the Religious Endowments

(1) See generally as to this Act, Ganapathi Iyer's Hindu and Mahomedan Religious Endowments, where the cases will be found collected. As to the procedure before the Code of 1877, in cases not coming under Act XX. of 1863, see Kali Churn *v.* Golabi, 2 C. L. R. 128 (1878); Rup Narain *v.* Junko Bye, 3 C. L. R. 112, 115 (1878); Punch Cowrie *v.* Chunnoo Lali, 2 C. L. R. 121 (1878).

(2) Gyanananda Assam *v.* Kristo Chandra, 8 C. W. N. 404 (1901); and see Venkataranga Charlu *v.* Krishnama Charlu, 37 M. 184 (1914); 24 M. L. J. 697 (1912) (choice of reliefs).

(3) Rangasami *v.* Varadappa, 17 M. 462 (1891); *contra*, Subbayya *v.* Krishna, 14 M. 186, 190, *per* Best, J., 218, *per* Weir, J.; Ramados *v.* Hanumantha Rao, 36 M. 364 (1911).

(4) See case last cited; Sayad Husseinmian *v.* Collector of Kaira, 21 B. 48, 52 (1895); Sajedur Raja *v.* Gour Mohun, 24 C. 418, 424 (1897) [and see ib., p. 421, as to object of the Statute]; Budh Singh *v.* Niradbaran Roy, 2 C. L. J. 431, 439 (1905).

(5) Tricumdass Mulji *v.* Khemji Vullabhdas, 16 B. 626, 628 (1892); Lutifunnissa *v.* Nazirum Bibi, 11 C. 33, 36 (1884). And see Subbayya *v.* Krishna, 14 M. 186, at pp. 221, 222 (1890), cited in Sayyad Husseinmian *v.* Collector of Kaira, 21 B. 48, 50 (1895); and Sajedur Raja *v.* Baidyanath Deb, 20 C. 397, 408, 409 (1892).

(6) See Nellaiyappa Pillai *v.* Thangama Nachiyar, 21 M. 406 (1897); Subbayya *v.* Krishna, 14 M. 186 (1890), at p. 197, and cases in next note.

Act (XX. of 1863), it was merely permissive and enabling.(1) In the latter view, if the suit was one which came within the scope of the section, then, provided that such a suit was, independently of the section, maintainable under the substantive law, either an individual or all persons jointly interested, or some on behalf of the rest under O. I. r. 8, might sue, or, if they so chose, two or more persons might sue without joining the others interested, with sanction, under the provisions of this section. In these cases and as regards parties, the section was only enabling in this sense, that two persons might sue where it would have been necessary that all should sue or that some should obtain leave to sue on behalf of the rest under sect. 30 (now O. I. r. 8).(2) If an individual could sue before, it was held that he could do so after the enactment of the section.(3) If all persons interested joined, they were, it was held, always competent to maintain a suit for the removal of a trustee,(4) and when all parties interested joined in suing or sanction was obtained under sect. 30 (now O. I. r. 8), the jurisdiction of the ordinary Courts as to the removal of trustees still existed.(5) As regards certain persons, it was enabling in the sense that it conferred a new right of suit on persons who had previously none, namely the Collector or such other officer as the Government may appoint, as in Allahabad, the Legal Remembrancer. In the Presidency towns it was always competent to the Advocate-General to initiate proceedings in matters of public trust, but in the Mofussil there was previously no public official who could take action.(6)

Then leaving the question as to who might sue and dealing with the nature of the relief which might have been given, the equitable jurisdiction of the Supreme Court over charities, and of the High Court its successor, the Supreme Court was complete, and no amendment of the law in this respect was required; (7) but the extent and nature of the jurisdiction of the Mofussil Courts was doubtful. In their character as Courts of Equity they gave relief in matters of public trust. Thus, the removal of a trustee from the management of charitable trusts on the ground of malversation was a remedy always available in these Courts,(8) and it is not correct to say that the former section created in this respect a new and special jurisdiction.(9) But there were

(1) Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 789 (1906); 10 C. W. N. 789, in which the scope of the section will be found fully discussed, and the earlier cases are cited; Sathappayar *v.* Periasami, 14 M. 1, 15 (1890); Thackersey *v.* Hurbhum, 8 B. 432, 451, 452 (1883); Subbayya *v.* Krishna, 14 M. 186 (1890), at pp. 200, 203, 206, *per* Muttusami Ayyar, J.; at p. 209, *per* Best, J., who stated the section to be merely an exception to the rule that either all interested should sue, or leave should be obtained under s. 30: Sajedur Raja *v.* Gour Mohun, 24 C. 418, 425 (1897).

(2) Subbayya *v.* Krishna, *supra*, at p. 209; Sajedur Raja *v.* Gour Mohun, *supra*, at p. 425; Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 789 (1906).

(3) Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 789 (1906).

(4) Sajedur Raja *v.* Gour Mohun, *supra*.

(5) Subbayya *v.* Krishna, *supra*, at p. 209.

(6) Rangasami *v.* Varadappa, 17 M. at pp. 465, 466 (1891).

(7) Subbayya *v.* Krishna, 14 M. at p. 200 (1890); Rangasami *v.* Varadappa, 17 M. at p. 467 (1893). [As to jurisdiction of Supreme Courts, see Attorney-General *v.* Brodie, 4 M. I. A. 190 (1846); Wadens of Nossa Senora *v.* Hartmann, Perry's Oriental Cases, 338; Doe d. Howard *v.* Pestonji, ib., 535; Advocate-General *v.* Damothar, ib., 526.]

(8) Ib., 199, 466.

(9) Sajedur Raja *v.* Gour Mohun, 24 C. at p. 425 (1897).

other matters in which their jurisdiction was doubtful. It was generally necessary that breach of trust should be alleged,(1) whereas under this section jurisdiction may be exercised whenever the direction of the Court is necessary for the administration of the trust, notwithstanding that there may have been no breach of trust.(2) So, again, it was doubtful whether the Mofussil Courts could award under the law some of the reliefs mentioned in the section, such as a scheme,(3) and whether worshippers were entitled to ask for the appointment of new managers when there was a mere case of vacancy.(4) Other reliefs, however, in matters of public charities were commonly granted. So numerous cases established the right of a founder of an endowment, or his heirs, to sue to set aside alienations by the trustee, to recover the trust property for the trust, to enforce the due performance and to rectify abuses of the trust, to remove the old and to appoint a new trustee.(5) In one of such cases also, the Court directed the framing of a scheme.(6)

Similarly it has been held, though the question was not free of conflict, that Hindu or Mahomedan worshippers in a temple or mosque might, apart from suits to enforce some purely individual right, such as that of free access for worship,(7) sue to rectify mal-administration of the trust by restraining a breach of trust, restoring possession to the trust, seeking an account, removing old and appointing new trustees. Every Mahomedan, it has been said,(8)

(1) See Kalee Churn *v.* Golabi, 2 C. L. R. 128, 131 (1878).

(2) Raghubar Dial *v.* Kesho Ramanuj, 11 A. 18, 22 (1888).

(3) Subbayya *v.* Krishna, 14 M. at p. 199 (1890).

(4) Ib., 199-201.

(5) See Iyer, *op. cit.* cclxviii. *et seq.*; Prosunno Moyee *v.* Koonjo Beharee, 1864, W. R., C. R. 157; Biddia Soondaree *v.* Doorganund Chatterjee, 22 W. R. 97 (1874); Ram Narain *v.* Ramoon Paurey, 23 W. R. 76 (1874); Brojomohun Doss *v.* Hurrololl, 5 C. 700 (1880); Sathappayyar *v.* Periasami, 14 M. 1, 7, 14, 15 (1890); Sheoratan Kunwari *v.* Ram Pargash, 18 A. 227; cf. Mohesh Chunder *v.* Koylash Chunder, 11 W. R. 443 (1869). See also Giyana *v.* Kandasami, 10 M. 375, 502, 506 (1887); Gajapati *v.* Bhagavan Dass, 15 M. 44 (1891); Ganapati Ayyan *v.* Savithri, 21 M. 10, 11, 15 (1897), as to Hindu trusts; and Bhurruck Chunder *v.* Golam Shuruff, 10 W. R. 458 (1868); Hedait-oon-Nissa *v.* Syud Afzul, 2 N. W. P. 420 (1870); Fatma Bibi *v.* Advocate-General, 6 B. 42, 53, 54 (1881); Lakshmandas Parashram *v.* Ganpatrav Krishna, 8 B. 365 (1884) [Hindu endowing property for celebrating urus in honour of a Mahomedan saint]; Kazi Hassan *v.* Sagun Balkrishna, 24 B. 170, 176, 180 (1899); cf. Syud Ashcerooddeen *v.* Sree Doolo Moyee, 25 W. R. 557 (1876); but see Phate Saheb *v.* Damodar Promji, 3 B. 84 (1879), as regards Mahomedan trusts.

(6) Ganapati Ayyan *v.* Savithri, 21 M. 10, at p. 15 (1897).

(7) See Anandrav *v.* Shankar, 7 B. 323 (1883); Venkatachalapati *v.* Subbarayadu, 13 M. 293 (1890); Kalidas Jivram *v.* Gor Parjaram, 15 B. 309 (1891); Vengamuthu *v.* Pandaveswara, 6 M. 151 (1883); Subbarayadu *v.* Asanali Sheriff, 23 M. 100 *n.* (1898). In such cases the interest, though it may be a right enjoyed in common with others, is not a joint right vested in the whole body of worshippers, and not vested in the individual: Baija Lal *v.* Bulak Lal, 24 C. 385, 390 (1897). Where the right is an individual one, the party may sue alone, and is not obliged to proceed under this section or s. 30, or Act XX. of 1863. Suits brought not to establish a public right but to remedy a particular infringement of an individual right, are not within the section: Budree Das Mukim *v.* Chooni Lal Johurry, 23 C. 789 (1906).

(8) Ameer Ali's Mahomedan Law, cited in Kazi Hassan *v.* Sagun Balkrishna, 24 B. at pp. 175, 176 (1899); Dasondhary *v.* Muhammad, 33 A. 660 (1911).

who derives any benefit from an admitted *wagf* is entitled to sue,(1) and there is no question of there being any difference in the Hindu (2) and Mahomedan law; (3) in this respect the cases holding that a Hindu has or has not the right in question follow cases decided with reference to Mahomedan law, and *vice versâ*.(4)

The question then arose whether this section in the last Code affected or did away with rights of suit which existed prior to and independently of it. That it did not, must, apart from judicial precedent, appear upon a consideration of the two following circumstances: Firstly, the Code was one which dealt with procedure. Presumably, therefore, it did not affect or take away existing substantive rights unless it said so.(5) Secondly, the section did not say so. To support the contrary contention, it would have to be read as if the words "*but no other person or persons*" were inserted between the words "*Advocate-General*" and "*may institute.*" The Legislature might have prohibited all suits other than those brought under the provisions of this section, but it did not do so.(5) Passing to the case law, which it must be admitted was in a state of considerable confusion, we find that it was held that the right of a founder, or his heir, was not affected by this section, and a suit by them for enforcement of the trusts was one which could be brought independently of this section, under which they are not obliged to sue; (6) though of course they could, if they chose, institute their suit under this section,(7) provided that it was of a character cognizable thereunder.(8) So also it was held that a general manager of a temple was

(1) Saiyid Ali *v.* Sajjad Husain, 35 A. 98 (1912).

(2) See Radhabai *v.* Chimnaji, 3 B. 27 (1878); Shri Ganesh *v.* Keshavrav, 15 B. 625, 636 (1890); Thackersey *v.* Hurbhum, 8 B. 432, 450 (1884) [account; appointment of new trustees; scheme]. And see Srinivasa *v.* Raghava, 23 M. 28, 32 (1897); Nam Narain *v.* Ramoon Paurey, 23 W. R. 76 (1874); Ponnambala *v.* Varaguna, 7 M. H. C. R. 117 1872); Subbayya *v.* Krishna, 14 M. 186, 197, 199, 220, 221 (1890). *Contra*, see Jan Ali *v.* Ram Nath, 8 C. 32 (1881); Raghubar Dial *v.* Kesho Ramanuj, 11 A. 18, 26 (1888) [but see Sheoratan *v.* Ram Pargash, 18 A. 227 (1896)]; Sajedur Raja *v.* Baidyanath, 20 C. (1892).

(3) Abdul Rahman *v.* Yar Muhammad, 3 A. 636 (1881); Zafaryab *v.* Bakhtawar, 5 A. 497 (1883); Jawahra *v.* Akbar Husain, 7 A. 178 (1884); Mohiuddin *v.* Sayiduddin, 20 C. 810 (1893). See Syud Ashcerooddeen *v.* Sreemutty Drobo Moyee, 25 W. R. 557 (1876); Kazi Hassan *v.* Sagun Balkrishna, 24 B. 170, 176 (1899). *Contra*, see Phate Saheb *v.* Damodar Premji, 3 B. 84, 88 (1879); Wajid Ali *v.* Dianut-ul-lah, 8 A. 31 (1885); Lutifunnissa *v.* Nazirun, 11 C. 33 (1884).

(4) See Iyer, *op. cit.* cclxxv. *et seq.*

(5) Rai Budree Das Mukim *v.* Chuni Lal Johurry, 10 C. W. N. 581 (1905); foll. in Ram Das *v.* Badri Narain, 29 A. 27 (1906), in which case the section was held not to apply, as the suit was brought by the whole body of persons who were authorized to administer the trust. See Kannsilla *v.* Ishri, 32 A. 499 (1910); but see Bisheshwar *v.* Jasoda, 17 C. W. N. 622 (1913).

(6) Sathappayyar *v.* Periasami, 14 M. 1, 15 (1890); Sheoratan Kunwari *v.* Ram Pargash, 18 A. 227, 232 (1869). See also Giyana *v.* Kandasami, 10 M. 375, 506 (1887).

(7) See Chintaman *v.* Dhondo, 15 B. 612 (1888); Sheoratan Kunwari *v.* Ram Pargash, *supra*; Narayana *v.* Kumarasami, 23 M. 537 (1899).

(8) See Lakshmandas *v.* Ganpatrav, 8 B. 365, 367 (1884); Kazi Hassan *v.* Sagun Balkrishna, 24 B. 170, 181 (1899); Sri Dhundiraj *v.* Ganesh Dev, 18 B. 721 (1893).

entitled to bring a suit with reference to the special endowment in charge of the special managers, the Court stating that it did not think that such a right was intended to be affected by this section, for if it were, the rights which existed prior to it would be seriously restricted, and it was difficult to believe that the Code intended to restrict special rights of the character in question.(1) On the same principle, such suits as were permitted to worshippers before the enactment of this section have been held not to be restricted by it.(2) This section under the last Code was, in short, enacted to confer on suitors, in cases falling within its scope, an additional remedy to any which they may have enjoyed before. It was as regards such persons cumulative and not restrictive. It further applied to persons who before its enactment had no right to take proceedings for the purposes mentioned in the section.(3) It was as regards the latter mandatory, for it was only under this section that such persons can sue at all. But as regards others it was enabling and permissive. The question then in every case not instituted under this section was: Did the substantive law give a right of suit? If it did, the ordinary procedure applied. If, however, under the substantive law it did not give a right of suit, as to a Collector or to a worshipper (if such be held to be the case), or the Court has not jurisdiction to grant a particular form of relief and so forth, then the suit must necessarily fail as not having been brought in conformity with the terms of an enactment under which, *ex hypothesi*, it could alone succeed.

But whether the section was generally mandatory or not, it is obvious that no question of this nature could arise unless the particular suit came within its purview. To ascertain this it was necessary to examine the terms of the section itself.

The second clause now makes it clear that the section is mandatory. A suit claiming any of the reliefs specified must be brought under and in conformity with its provisions, or not at all. Any right of suit which existed independently of its provisions has now been expressly taken away where the suit and relief are of the character mentioned in the section. Thus it has been recently held that where a trust is a trust created for a public purpose of a religious or charitable nature (as for instance a *waqf* under Mahomedan Law) no suit can be brought for the removal of a duly appointed trustee except under this section.(4)

Conditions of applicability of section.—The suit contemplated (*a*) is

(1) Nellaiyappa *v.* Thangama, 21 M. 406 (1897).

(2) Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 789 (1906). The decisions, however, are conflicting. See cases cited, *ante*, and in Iyer, *op. cit.* ccxci.

(3) Nellaiyappa Pillai *v.* Thangama Nachiyar, 21 M. 406 (1897); Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 789 (1906).

(4) Saiyid Ali *v.* Sajjad Husain, 35 A. 98 (1912). It has been held that cl. 2, "save as provided," gives a choice of remedies, but that a suit brought for removing a trustee with the sanction of a Collector is not bad because the leave of the Court has not been obtained: Venkataraya Charlu *v.* Krishnama Charlu, 24 M. L. J. 697 (1912).

a representative one, (*b*) by the persons mentioned, (*c*) against trustees, (*d*) in respect of the trusts mentioned, (*e*) in cases where either there has been a breach of trust or, if none, where the directions of the Court are necessary,(*f*) or relief of the kind mentioned in the section. If the suit is one to which the section does not apply, then the only question is whether a right of suit exists independently of it. If a right of suit exists, and this is a question of substantive law, then the ordinary procedure prescribed for suits by the Code applies.

1. **Representative suit.**—In the first place it is to be observed that the section relates only to charities in which the public are interested. The suit may be instituted by certain public officers, namely the Advocate-General, the Collector, or by such other officer as the Government may appoint, such as, according to the N.W.P. and Oudh Rules, the Legal Remembrancer. It is obvious that such plaintiffs can and do sue only as representing the public, and if instead of these public officers two or more persons having an interest in the trust sue with their consent, they so sue under a warrant to represent the public as the objects of the trust.(1) The dispute must be, it has been said, (and will necessarily be if the terms of the section are followed), of such a public nature that the intervention of the Advocate-General or other public officer is necessary to decide if, and by whom, a suit should be brought to establish public rights.(2) It follows from this, that where a person or persons sue, not to establish the general rights of the public of which they are members, but to remedy a particular infringement of their own individual right, though they may possess that right in common with others, a suit will lie independently of the section. The suit contemplated is a representative one, and of necessity, therefore, other persons than those permitted to sue will be affected by it. Under it two or more persons may sue for the benefit of themselves and the rest of the public interested. An objection therefore that a plaintiff was suing to enforce rights common to himself and the class to which he belonged, and that this section did not apply, was, of course, overruled. When sanction is obtained under this section, no leave is required under sect. 30 (now O. I. r. 8). In fact, the section is enabling in this sense that it dispenses with leave under that rule, when but for this section it might be necessary.(3)

In certain cases connected with public trusts there is no question but that a right of suit exists, and has always existed, independently of this section. Where there is a particular injury to an individual, or number of individuals, which is not suffered by other members of the class or public interested in the trust; where these individuals, interested apart from others, sue to establish their own right which has been infringed, and to remedy only the particular grievance of which they complain, then a suit may lie under the general law, either by the particular person whose right

(1) Lakshmandas *v.* Jugul Kishore, 22 B. 216, 220 (1896).

(2) Maniian Bibee *v.* Khadem Hossein, 32 C. 273 (1904).

(3) MacMochi *v.* Lee Chin, 9 C. W. N. 594 (1905).

has been infringed, or where there are numerous parties having the same interest, by one or more on behalf of the others similarly interested under the provisions of O. I. r. 8. So if there be a trust intended for a class of the public, such as Hindus or Mahomedans, or for a portion of such class, such as a sect, each member of that class or sect is entitled, as of a personal or individual right,(1) to free access to the temple or mosque for the purposes of worship,(2) and to present the usual offerings if any to the Deity and to perform other usual acts of worship.(3) If a trustee, manager, or any other person interferes with such a right, the individual whose right has been so infringed may institute an ordinary suit in the ordinary Civil Courts for a declaration of his right, injunction, and damages. It may be that several persons are similarly situated and interested. But the interest of a worshipper, though it may be a right enjoyed in common with others, is not a joint right vested in the whole body of worshippers and not vested in the individual.(4) The latter's interest is generally an individual one. When this is so he is entitled to sue alone to assert that individual right, and is not obliged to proceed either under this section or O. 1. r. 8, or Act XX. of 1863.(5) If the infringement of the right and the relief claimed are the same, several plaintiffs may join in suing under O. I. r. 1 ; (6) or if the conditions of r. 8 of that Order are fulfilled, he or some may sue thereunder on behalf of himself and others similarly interested.(7) Should, however, the right in any case be a joint and not a separate right, then either all jointly interested must sue,(8) or one or more must sue under r. 8 on behalf of the rest.(9) There is no doubt about the procedure applicable in the case of infringement of a purely

(1) Jawahra *v.* Akbar Husain, 7 A. 178 (1884); Anandrav *v.* Shankar, 7 B. 323 (1882); Ram Chandra *v.* Ali Muhammad, 35 A. 197 (1913).

(2) Ib.; Venkatachalapati *v.* Sabbarayadu, 13 M. 293 (1889); Kalidas Jivram *v.* Gor Parjaram, 15 B. 309 (1890).

(3) Vengamuthu *v.* Pandareswasa, 6 M. 151 (1882).

(4) Baija Lal *v.* Bulak Lal, 24 C. 385, 390 (1897).

(5) Jawahra *v.* Akbar Husain, 7 A. 178 (1884); Baija Lal *v.* Bulak Lal, *supra*; Subbarayadu *v.* Asanali, 23 M. 100 *n.* (1899). In Latifunnissa *v.* Nazirun, 11 C. 33, 37 (1884), the suit was held to fall within s. 539, and as regards the applicability of s. 30, it seems to have been thought that the cause of action was not a several one as also apparently in Jan Ali *v.* Ram Nath, 8 C. 32 (1881). If, however, a right is a several individual one and the suit is brought to assert that right, it is not correct to say that a plaintiff must sue either under s. 30, s. 539, or s. 14, Act XX. of 1863.

(6) Kalidas Jivram *v.* Gor Parjaram, 15 B. 309, 319 (1890).

(7) See Dhunput Singh *v.* Paresh Nath, 21 C. 180 (1893) [where five persons sued on behalf of the Jain Situmbary Society, or sect]; Fernandez *v.* Rodrigues, 21 B. 784 (1897) [where churchwardens sued on behalf of themselves and all other parishioners against the vicar]; Ganapati Ayyan *v.* Savithri Ammal, 21 M. 10 (1897) [where two Brahmans sued on behalf of the Brahman community]; Monmotho Nath Das *v.* Harish Chandra Das, 33 C. 905 (1906) [where certain persons sued on behalf of the Tatchan community of Chatra]. See other cases in notes to sect. 30, *ante*.

(8) Jawahra *v.* Akbar Husain, 7 A. 178 (1884); Baija Lal *v.* Bulak Lal, 24 C. 385 (1897).

(9) Ib.

private right. It may be that the infringement of the individual right is caused by a breach of trust, as where in the case of an institution for public worship the right, to such worship is obstructed or denied to a person interested in the religious trust. But the right infringed in such cases is an individual right. For instance, though others may have similar and common rights, these may not have been infringed, in which case the individual is interested apart from all others of his class, and the relief to which he is entitled is particular relief designed to meet the necessities of his individual case. Instances such as these do not come within the purview of this section at all.(1) Ordinarily, the nature of the suit and the specific relief claimed exclude any difficulty; but this might arise if the relief sought was not merely the remedying of a particular grievance by damages or injunction, but general administration of the trust. Such relief would not ordinarily be necessary; but should that be the case, it would be necessary to determine whether a suit based on an individual and separate cause of action might claim such relief independently of the provisions of this section, that is, whether a general administration could be obtained in aid of the individual right alleged. Probably such a case could hardly occur, as in most cases where such relief was sought it would be found that the case was one where a public right had been infringed, but if it did it would seem on principle that such a suit would not come within the section. Other instances of the enforcement of personal and individual rights will be found in the class of cases to which reference will be made, where the suit is brought to enforce the personal claim of the plaintiff to be a trustee or to be co-trustee, or to vindicate the right of management in the case of obstruction offered to one vested with and actually exercising the right of management at the date of suit. Where, however, a party is not interested otherwise than in connection with others for whom as well as for him the trust is intended; where the suit is brought in the interest of the public, no special injury distinct from that suffered by the general public having been suffered by the plaintiff; and where the same relief is sought under the same circumstances as those mentioned in this section;—in such cases only is it that the question arose whether the section was or was not mandatory, that is, whether suits of the character mentioned in the section could only be brought with leave in accordance with its provisions and not otherwise, a matter which has already been dealt with.

2. Persons who may sue.—These are either particular public officials, viz., the Advocate-General, the Collector, or such other person (as in the N.W.P. the Legal Remembrancer) as are appointed by Government to exercise the powers conferred by this section.

(*a*) **Advocate-General or other public officer.**—The Advocate-General in the Presidency-towns corresponds with the Attorney-General

(1) Ramados *v.* Hanumantha Rao, 36 M. 364 (1911), this section does not apply to a suit regarding the hereditary trusteeship of a private family.

in England.(1) So far as the trusts are concerned he only represents the public,(2) and is bound by all acts and omissions of the manager which are not in themselves fraudulent.(3) The *de jure* managers and trustees of a public charity losing their right by limitation to oust the *de facto* trustee does not confer on the latter immunity from suit on the part of the Advocate-General.(4) He may, in the Presidency-towns, maintain a suit in his own name, or some relators may in such towns, with his sanction, sue.(5) And since the Code of 1877, this section has expressly enacted that the Advocate-General may sue.(6) A Bill filed by one Advocate-General does not abate by the fact that the latter leaves the country.(7) Though the Advocate-General may sue, it is not necessary that he should be made a party either as a plaintiff (8) or as a defendant, although if he be made a party defendant and appears by counsel he will be entitled to costs.(9) He is at liberty to intervene at any stage of the litigation (10) and is entitled to be heard.(11) There was, however, no public officer in the Mofussil entitled to bring suits which the Advocate-General could, and can now, institute in the Presidency-towns.(12) But where the Advocate-General was made a party in a suit brought at the instance of a person, and instituted in the Mofussil, and the Advocate-General employed counsel, he was held entitled to get the costs of such counsel and other expenses of the suit.(13) Where a suit by the Advocate-General at the instance of relators was dismissed, and the Advocate-General did not appeal, the relators who were not parties to the suit were held incompetent to appeal on their own account.(14)

(*b*) **Other persons may sue.**—Two or more persons interested in the trust may, with the consent in writing of the Advocate-General, Collector, or

(1) Advocate-General of Bombay *v.* Adamji, 30 B. 474 (1905). As to the office of Advocate-General, see Articles in 7 Madras Law Journal, pp. 61, 91, and Iyer's Hindu Endowments, ccxcv.

(2) Advocate-General *v.* Bai Punjabai, 18 B. 551, 561 (1894).

(3) Ib. [former suit by trustees; subsequent suit by Advocate-General barred].

(4) Lakshmandas *v.* Jugul Kishore, 22 B. 216 (1896).

(5) See Attorney-General *v.* Brodie, 4 M. I. A. 190 (1846); see also Dhuncooverbhai *v.* Advocate-General, 1 Bom. L. R. 743 (1899); Srinivasa *v.* Raghava, 23 M. 28, 30 (1897).

(6) Shri Ganesh *v.* Keshavrav, 15 B. 625, 636 (1890); Hori Dasi *v.* Secretary of State, 5 C. 228 (1897).

(7) Strettel *v.* Palmer, 2 Mor. Dig. 104 (1816).

(8) Lakshmandas *v.* Ganpatrav, 8 B. 365, 367 (1884).

(9) Hori Dasi *v.* Secretary of State, 5 C. 228 (1879).

(10) Advocate-General *v.* Muhammad Huseni, 4 B. H. C., O. C. J. 203, 206 *n.* (1867); as to the bringing in of new relators and dismissal of the old, see ib., and as to death of relator, Strettel *v.* Palmer (1816), 2 Mor. Dig. 104.

(11) Attorney-General *v.* Brodie, 4 M. I. A. 190, 200 (1846).

(12) Rangasami Naickan *v.* Varadappa Naickan, 17 M. 462, 465 (1895); Brojomohun Dass *v.* Hurro Lall, 5 C. 700 (1880); Shri Ganesh *v.* Keshavrav, 15 B. 625, 636 (1890). It has been said (Iyer, *op. cit.* ccxcvi.) that it is doubtful whether this statement is correct so far as regards the charitable institutions which were governed by Regs. XIX. of 1810, and VII. of 1817, and that the Collector must be regarded as such official.

(13) Hori Dasi *v.* Secretary of State, 5 C. 228 (1879).

(14) Jan Mahomed *v.* Syed Nurudin, 9 Bom. L. R. 996 (1907); 32 B. 155.

other officer, sue. When the suit is brought by such relators the suit is in their name, and not in that of the Advocate-General.(1) Where the suit was filed by only one plaintiff with consent, and the plaint was afterwards amended by the addition of a second plaintiff, the suit was held defective even though the Advocate-General had given his consent to such amendment.(2)

(*c*) **If interested.**—The words "*an interest*" were substituted for the words "a direct interest" by sect. 44, Act VII. of 1888, prior to which it had been held that a worshipper at a mosque had not a direct interest; (3) nor had managers of a temple.(4) The first decision was, however, rightly dissented from, it being pointed out that it was difficult to imagine whose interest in a mosque is direct if the interest of worshippers is not.(5) The effect of the amendment has been to widen the class of persons who are entitled to maintain an action under this section,(6) and it is now clear that persons having a right to worship are interested.(7) But the mere possibility of an interest, or the mere possibility of succession, does not give a right to sue as the interest must be an existing one and not a mere contingency.(8) Thus the representative of the founder or the beneficiaries under the trust may be said to have an interest in the trust so as to entitle them to call for its administration; but a person cannot, it has been held, be said to have an interest in a trust merely because he is the possible successor of the present holder of the office.(9) Officiating priests, as also persons who act as *pandas* or guides and priests of the pilgrims, have an interest;(10) and persons *ex officio* concerned in the performance of worship and entitled to maintenance from the temple funds.(11)

(*d*) **With sanction.**—The section requires that sanction for the institu-

(1) Panchcowrie Mull *v.* Chumroo Lall, 3 C. 563, 571 (1878); Thackersey *v.* Hurbhum, 8 B. 432, 452 (1884); Srinivasa *v.* Raghava, 23 M. 28, 30 (1897). As to the Advocate-General suing with relators for purposes of costs only, see Strettel *v.* Palmer, 2 Mor. Dig. 104 (1816).

(2) Darves Sidik *v.* Jainudin, 30 B. 603 (1906).

(3) Jan Ali *v.* Ram Nath, 8 C. 32 (1881).

(4) Narasimha *v.* Ayyan, 12 M. 157 (1888) [but see Subbayya *v.* Krishna, 14 M. 189 (1890)]. *Contra*, Manohar *v.* Lakhmiram, 12 B. 247 (1887), where the manager was held to have a direct interest; s. c., in Privy Council, 4 C. W. N. 23 (1899).

(5) Jawahra *v.* Akbar Husain, 7 A. 178, 184 (1884).

(6) Shailajananda *v.* Umeshanunda, 2 C. L. J. 460, 470 (1905).

(7) Sajedur Raja *v.* Gour Mohun, 24 C. 418, 427 (1897) [two of the plaintiffs had a larger interest, for one had been performing the duties of a mohunt and another the poojatri]; Chintaman *v.* Dhondo, 15 B. 612 622, 623 (1888); Manohar *v.* Lakhmiram, 12 B. 247 (1887) [priests taking part in worship]; s. c., 24 B. 50; Jugul Kishore *v.* Lakshmandas, 23 B. 659 (1889) [pujari and five other worshippers]; Chintaman *v.* Dhondo, 15 B. 612 (1888) [plaintiffs worshippers and descendants of original founder]; Radhabai *v.* Chimnaji Bin Jali, 3 B. 27 (1878).

(8) Mohiuddin *v.* Sayiduddin, 20 C. 810, 816 (1893); Budh Singh *v.* Niradbaran Roy, 2 C. L. J. 431, 441 (1905).

(9) Budh Singh *v.* Niradbaran Roy, *supra*; and see as to descendants of founder, Jaggamoni *v.* Nilmoni, 9 C. 75 (1882).

(10) Shailajananda *v.* Umeshanunda, 2 C. L. J. 460 (1905).

(11) Ram Churn Tenary *v.* Protap Chandra Dutt, 2 C. L. J. 448 (1886).

tion of the suit should be obtained from the Advocate-General, or the Collector or other officer appointed by the Local Government (such as in Allahabad the Legal Remembrancer), (1) as the case may be. An Assistant Collector discharging the duties of the Collector during his illness cannot grant sanction under this section.(2) The object of such sanction is to guard charitable trusts from abuse, and for that purpose to prevent such proceedings from being instituted for no other reason than because it is known that the costs will be payable out of the charity funds.(3) Where, however, a person has capacity to sue, the motives that actuated him do not affect his capacity and will not by themselves defeat a suit for which sanction has been obtained.(4) The Advocate-General, Collector, or other officer is required to exercise his judgment before giving consent.(5) Where the language of permission indicated that as regards the interest of the plaintiffs the Collector did not exercise his judgment, it was held to be a mere irregularity within sect. 578 (now 99), *post*.(6) But it has also been held, that the consent in writing must be a specific permission given to two or more persons by name; and that a permission given to one applicant by name "and another" is not a sufficient compliance with the terms of the section.(7) The suit brought under this section must correspond with the sanction, as no reliefs can be awarded which are not contained in the section.(8) It has been held by the Allahabad High Court that the obtaining of sanction is a pre-requisite for the institution of the suit, and that the section cannot be read as meaning merely that the Courts cannot proceed with the suit already instituted until that consent has been obtained, and that therefore if no valid consent is given before the institution of the suit, the mistake cannot be subsequently rectified, unless by means of withdrawal, with permission to institute a fresh suit.(9) The Advocate-General may give consent to the institution of a suit, but not for the amendment of a defective suit.(10) And the Court's action after the institution of the suit in making a defendant a plaintiff has been held not subject to the consent of the Advocate-General.(11) Nor is consent necessary for the amendment of the plaint by mentioning particulars of the breach of trust.(12)

(1) N.W.P. & Oudh Rules, 1893, p. 114.

(2) Somchand *v.* Chhaganlal, 35 B. 243 (1911).

(3) Sajedur Raja *v.* Gour Mohun, 24 C. 418, 421, 425 (1897).

(4) Manohar *v.* Lakhmiram, 12 B. 247, 259 (1887).

(5) Sajedur Raja *v.* Gour Mohun, 24 C. 418, 428 (1897). It has been held that under the former Code a person having a special right (such as one next entitled to be trustee) was entitled to file a suit under s. 539 without sanction: Cunniah Chetty *v.* Ramanuja Charlar, 24 M. L. J. 48 (1912).

(6) Ib.

(7) Gopal Dei *v.* Kanno Dei, 26 A. 162 (1903).

(8) Sayad Hussein *v.* Collector of Kaira, 21 B. 257 (1895); Srinivasa *v.* Venkata, 11 M. 148 (1877).

(9) Gopal Dei *v.* Kanno Dei, 26 A. 162 (1903); the Madras High Court, however, in Ramayangar *v.* Krishnayyangar, 10 M. 186 (1887), appear to have held the other way. See Iyer's Hindu Endowments, cexc.

(10) Darves Sidik *v.* Jainudin, 30 B. 603 (1906).

(11) Ram Churn Tewary *v.* Protap Chandra Dutt, 2 C. L. J. 448 (1886).

(12) Dhanjibhoy Raghoo *v.* Meherally Moraj, 9 Bom. L. R. 901 (1906). But see Abdul Rehman *v.* Cassim Ebrahim, 36 B. 168 (1911), where sanction a condition precedent to amendment.

3. Against whom suit may be brought.—The opening words of the section imply the existence of a trustee who is alleged to have been guilty of the breach of trust referred to.(1) The plaint must allege that the defendant is a trustee, and if that is denied by him it must be established by the evidence. Where the plaintiff's case was that the defendant was a trustee of the *Mandir* in dispute, the *Mandir* being public charitable property, and that the defendant should be removed from his possession for breach of trust and the Court's direction given as to administration of the trust, it was held that the suit was within these sections.(2) It has doubtless been held that where there is a claim for administration of the trust which falls within the section, a claim to eject an alienee may be joined with it.(3) But the latter claim does not come within the scope of the section, is open to the charge of misjoinder, and this decision has been dissented from.(4) It is on this principle, namely, that the section is directed against trustees, that it has been held that as against strangers it does not apply; (5) such as alienees from the trustee (6) or trespassers.(7) There is no doubt but that claims by trustees against persons who are strangers to the trust, and who set up a title hostile thereto, such as alienees and mere trespassers holding adversely thereto, are not within the section.(8)

But a person who recognises the trust and has assumed, though it may be without authority, the right to administer, and, in fact administers it by virtue of his alleged title as trustee, stands on a different footing. A trustee may be such *de jure* or *de facto*. A person who, without title, chooses to take upon himself the character of trustee, becomes a trustee *de son tort*. He is liable to account for what he has done and received while so acting, and cannot be heard to say for his own benefit that he had no right to act as trustee.(9) Though a trustee *de son tort* and a trustee of a constructive trust have been used as synonymous,(10) the two are not the same thing. While

(1) Subbayya *v.* Krishna, 14 M. 186, 190 (1890).

(2) Girdharlal *v.* Naranlal, 14 Bom. L. R. 1135 (1912).

(3) Sajedur Raja *v.* Gour Mohun, 24 C. 418 (1897).

(4) Budh Singh *v.* Niradbaran Roy, 2 C. L. J. 431, 439 (1905); Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 799 (1906).

(5) Kazi Hassan *v.* Sagun Balkrishna, 24 B. 170 (1899); Budree Das Mukim *v.* Chooni Lal Johurry, *supra*.

(6) Lakshmandas *v.* Ganpatrav, 8 B. 365 (1884); Sheoratan Kunwari *v.* Ram Pargash, 18 A. 227, 232 (1896); Huseni Begam *v.* Collector of Moradabad, 20 A. 46, 49 (1897); Kazi Hassan *v.* Sagun Balkrishna, 24 B. 170, 181 (1899); s. c., 1 Bom. L. R. 649; Budh Singh *v.* Niradbaran Roy, 2 C. L. J. 431 (1905); Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 799 (1906).

(7) Vishvanath Govind *v.* Rambhat, 15 B. 148 (1890); Augustine *v.* Medlycott, 15 M. 241, 246 (1892); Srinivasa Ayyangar *v.* Srinivasa Swami, 16 M. 31, 32, 33 (1892); Shri Dhundiraj *v.* Ganesh, 18 B. 721, 733 (1893); Muhammad *v.* Kallu, 21 A. 187, 188 (1899); Budree Das Mukim *v.* Chooni Lal Johurry, *supra*.

(8) But where the alienee denies that the property is a public trust for religious purposes he is a necessary party to the suit, though no relief can be given against him by ejectment: Collector of Poona *v.* Bai Chanchabai, 35 Pc470 (1911).

(9) Godefroi's Trusts, 2nd ed. 30; Ghelabhai *v.* Uderam, 36 B. 29, 34 (1911); Malhar *v.* Narsinha, 14 Bom. L. R. 1135 (1912).

(10) Jugal Kishore *v.* Lakshmandas, 23 B. at p. 664.

there cannot be both an express and constructive trust in respect of the same subject-matter, a person may be trustee *de son tort* either of an express or constructive trust. There may be, for instance, an express trust admitted by both plaintiff and defendant. Both may claim to be trustees, though only one under the circumstances can, in fact, have title. If, in fact, the defendant be found to have no title, then he is a trustee *de son tort* of the express trust. Again, a trustee *de son tort* of an express trust may become such of a constructive trust. A suit under this section lies against a trustee of an express or constructive trust, and whether such trustee be *de jure* or *de son tort*.(1) It does not, however, follow that because the defendant is a trustee a suit brought against him is necessarily within the section. Its other conditions have to be fulfilled. So where a plaintiff sues a trustee, alleging that he is a co-trustee but has been excluded from a share in, and in the profits of, the management, he does not sue on account of any such breach of trust as is contemplated by this section, nor can he be said to require the direction of the Court for the administration of the trust, and such a suit therefore does not come within the section; (2) nor a case of contest as to who are the lawful trustees, both claiming to be such; (3) nor a suit by a person (who has something more than a mere interest in the trust as worshipper or object of the charity) to enforce a vested right to see that certain religious and charitable endowments are managed by a person entitled to manage them, as being the members of a particular religious institution or brotherhood; (4) nor a suit for the vindication of the right of management which was vested in and actually being exercised by the plaintiffs and those they represent at the date of the obstruction complained of, notwithstanding that those who caused the obstruction had been nominated as trustees.(5) In all such cases it will be found that they proceed upon the ground that, though there may have been a trust and trustee, there was no breach of trust or necessity for administration, or the relief sought was not that mentioned in the section, or the right sought to be enforced was of a personal and individual character. Where, on the other hand, administration of the trust is necessary, and relief is sought which is within the scope of the section, a suit will lie against a person alleged to be in the position of a trustee *de son tort*. So parties who did not themselves claim to be trustees, but alleged that the trusteeship was vacant, might, it was held,(6) sue under this section persons wrongfully claiming to be and acting as trustees for an order appointing new trustees. And where a suit otherwise fell within the terms of this section, a former trustee and a representative of a former trustee were allowed to be added with a view to relief being granted against them.(7)

(1) Budree Das Mukim *v.* Choom Lal Johurry, 33 C. 799 (1906).

(2) Miya Vali *v.* Sayed Bara, 23 B. 496, 499 (1896). See Athavulla *v.* Gouse, 11 M. 283 (1886).

(3) Vishvanath Govind *v.* Rambhat, 15 B. 148, 152 (1890); Manijan Bibee *v.* Khadem Hossein, 32 C. 273 (1904).

(4) Giyana Sambandha *v.* Kandasami Tambiran, 10 M. 375, 506 (1886).

(5) Navroji Manekji *v.* Dastur Kharsedji, 28 B. 20, 54 (1903); s. c., 5 Bom. L. R. 745.

(6) Netai Rama *v.* Venkatacharulu, 26 M. 450 (1902).

(7) Sayad Husseinmian *v.* Collector of Kaira, 21 B. 48 (1895).

4. The trust must be a public one.—The section presupposes the existence of a public trust and a suit for the administration, either partially or completely, of that trust.(1) It enables the persons mentioned therein to sue trustees to enforce the better administration of the trust.(2) Where, however, *it is said that the section presupposes a trust*, this does not mean that the defendant must admit the trust before the section can apply, but that the suit must proceed upon the allegation of the existence of a trust which may or may not be admitted by the defendant.(3)

Private trusts concern only individuals or families for private convenience or support. By public trusts may be understood such as are constituted for the benefit either of the public at large, or of some considerable portion of it answering a particular description. In private trusts the beneficial interest is vested absolutely in one or more individuals, who are, or within a certain time may be, definitely ascertained, and to whom therefore collectively, unless under some legal disability, it is, or within the allowed time will be, competent to control, modify, or determine the trust. A public or charitable trust, on the other hand, has for its objects the members of an uncertain and fluctuating body, and the trust itself is of a permanent character.(4) A trust is none the less a trust for a public purpose if its main object is the support of *fakirs* of a particular sect.(5) The trust may be charitable, such as for the relief of the poor, or the advancement of learning, religion, or objects of general public utility, or religious, though all religious uses are charitable uses. Though, therefore, the section, as originally enacted in the Code of 1877, did not contain the words "or religious," there is little doubt but that the Legislature intended the section to embrace both charitable and religious purposes.(6) It was, however, held that the corresponding section in the Code of 1877 did not apply to religious endowments,(7) and therefore in the Code of 1882 the section was altered to

(1) Jamal-ud-din *v.* Mujtaba Husain, 25 A. 631 (1903).

(2) Srinivasa Ayyangar *v.* Srinivasa Swami, 16 M. 31, 32 (1892).

(3) Budh Singh *v.* Niradbaran Roy, 2 C. L. J. 431 (1905); Shailajananda Dut *v.* Umeshananda Dut, 2 C. L. J. 460 (1905).

(4) Lewin on Trusts, 18; and see generally as to this section, P. R. Ganapathi Iyer's Laws relating to Hindu and Mahommedan Religious Endowments. See the following cases as to whether trusts are public: Jugal Kishore *v.* Lakshmandas, 23 B. 659 (1899); Manohar *v.* Lakhmiram, 12 B. 247 (1887) [Trust for Hindu idol and temple]; Dakhin Din *v.* Rahimunnissa, 16 A. 412 (1894); Girijanund *v.* Sailajanund, 23 C. 645 (1896); Bhugobutty Prosonno *v.* Gooroo Prosonno, 25 C. 112 (1897); Jagadindra Nath *v.* Hemanta Kumari, 32 C. 129 (1905). As to English Equity governing the relief in respect of Hindu charitable trusts, see Sayad Hussein-mian *v.* Collector of Kaira, 21 B. at p. 52 (1895); Bikani Mia *v.* Shuk Lal, 20 C. 116, F. B. (1892); Mahomed Ahsanulla *v.* Amar Chand, 17 C. 498 (1889); Mahomed Israil *v.* Sasti Churn, 19 C. 412 (1892). See as to *devasthan* of idol: Radhabai *v.* Chimnaji, 3 B. 27 (1878), and *Savasthan;* Shri Ganesh *v.* Kesharav, 15 B. 625, 635 (1890); Chintamon *v.* Dhondo, 15 B. 612 (1888); and private trust: Satnappayyar *v.* Periasami, 14 M. 1, 7 (1890).

(5) Mahant Puran Atal *v.* Darshan Das, 34 A. 48 (1912).

(6) See Thanga Karappa *v.* Arumaga, 5 M. 383, 384 (1882).

(7) Ib.; Girjana *v.* Kandasami, 10 M. 375, 506 (1886); Thackersey *v.* Hurbhum, 8 B. 432, 450, 451 (1883).

expressly include religious trusts, in consequence of these rulings and doubts which had been entertained. The contention that, while there exists the special enactment, XX. of 1863, for the proper appropriation of endowments of lands relating to temples, the words "religious purposes" should be considered as referring only to cases where the endowments do not relate to temples, has been overruled.(1)

The public trust may also be either express or constructive. The first are those which are raised and created by act of the parties, and are declared by them either in word or writing. A constructive trust (to which this section also, though not the English Statute, applies) (2) is one arising, not by the act of the party, but by operation of law, where a trustee gains some personal advantage by availing himself, and through the medium of his situation as trustee.(3) It is imposed on such a person to prevent him from holding for his own benefit an advantage gained by reason of the fiduciary relation subsisting between him and others, and for whose benefit only it is his duty to act.(4) So, if a lease were the subject-matter of a public trust, a constructive trust would arise if a trustee renewed the lease in his own name. He would, in such case, be deemed to be a trustee for those interested in the original term. And this would be equally so if the trustee was trustee of right or trustee *de son tort*. And were there a breach of such constructive trust, by making away with the renewed lease or not applying its benefits to the purposes of the trust, there would be such a breach of trust as is referred to in this section.(5) It has been recently held that where it is proved that certain property has been held for many generations for such purposes as the support of *fakirs*, and there is no evidence that the property was ever held for any other purpose, the Court ought to presume the existence of a charitable or religious trust within the meaning of these sections.(6)

Where it was objected that the section was limited in its action to suits relating to property, and that its operation could not be extended to spiritual offices, it was held to be applicable where it is sought to remove the trustee from a religious office, if, as the holder of such office, he is called upon to exercise business functions either as trustee or as manager of temple funds and properties, and thus necessarily possesses civil rights and consequent liabilities.(7)

5. There must be a breach of trust or necessity for directions.—Nextly, assuming that there is a trust and trustee, it must be ascertained whether

(1) Narasimba *v.* Ayyan, 12 M. 157, 158, 159 (1888).

(2) See Subbayya *v.* Krishna, 14 M. 186, 202, 215 (1890); Jugal Kishore *v.* Lakshmandas, 23 B. 659 (1899); s. c., 1 Bom. L. R. 118; Manohar Ganesh *v.* Lakhmiram Govindram, 12 B. 247, 265 (1887); affd. 24 B. 50 (1899).

(3) Lewin on Trusts, 196, 11th ed.; Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 789, at p. 806 (1906).

(4) Id.; Godefroi Trusts, 2nd ed. 193.

(5) As to such, *vide post;* Budree Das Mukim *v.* Chooni Lal Johurry, *supra.*

(6) Mahant Puran Atal *v.* Darshan Das, 34 A. 468 (1912).

(7) Shailajananda *v.* Umeshananda, 2 C. L. J. 460 (1905).

there is a breach of trust. If not, then the direction of the Court must be required for the administration of the trust. A breach of trust is not necessary. It is sufficient if there be a public trust, and the direction of the Court is considered necessary for its administration.(1) If there be neither a breach of trust (2) nor necessity for such directions,(3) then the section does not apply. As to evidence of breach of trust and the grounds which will justify removal for breach of trust, see cases below.(4)

6. The suit must be for relief of the kind mentioned.—Lastly though some or even all of the other elements stated in the section are found to exist, a suit will not be within it unless the relief sought therein is that which is expressly or impliedly mentioned in the section.(5) No difficulty arises as regards the relief expressly mentioned in clauses (*a*) to (*g*). Contention has ever taken place as to what may be held to be included in the words "such further or other relief as the nature of the case may require."

The general clause ought to be read with the five preceding specified clauses; and the nature of the relief which may be properly granted under it is of the same character as the reliefs which may be granted under the preceding clauses. The five specified clauses are not merely illustrative, but furnish an indication of the nature of the relief which may be granted in a suit under this section.(6) This clause must be read with what has preceded as referring to further relief to which the party may be entitled, which arises out of the existence of the trust in respect of which the suit has been brought.(7) On this ground it has been held that a suit which has been instituted simply and solely for the purpose of having a declaration that certain property is trust-property, and which was in no way a suit for the administration of the trust, or the removal of the trustees, or for any of the purposes referred to, was not within the section.(8) It may, however, be that in a suit for such purposes a declaration may be incidental and ancillary thereto.(9) Within the words

(1) Raghubar Dial *v.* Kesho Ramanuj, 11 A. 18, 22 (1888); so in Neti Rama *v.* Venkatacharulu, 26 M. 450 (1902), though there was no breach of trust the case was held to be one where the direction of the Court was required.

(2) See *e.g.*, Girjana Sambandha *v.* Kandasami Tambiran, 10 M. 375, 506 (1886); Miya Vali *v.* Sayad Bava, 22 B. 496, 499 (1896); Naoroji Manekji *v.* Dastur Kharsedji, 28 B. 20, 54 (1903), where the cause of action was held not to be an alleged breach of trust.

(3) See *e.g.*, Miya Vali *v.* Sayad Bava, *supra*. On the other hand, in Neti Rama *v.* Venkatacharulu, *supra*, the case was held to be within these words.

(4) Shailajananda *v.* Umeshananda, 2 C. L. J. 460 (1905); Chintaman *v.* Dhondo, 15 B. 612 (1888); Damodar *v.* Bhat Bhoge Lal, 22 B. 493 (1896); Annaji Raghunath *v.* Narayan, 21 B. 556 (1894); Anantanarayana *v.* Kuttalam, 22 M. 481 (1899); Girdharlal *v.* Naranlal, 14 Bom. L. R. 1135 (1912).

(5) See Jan Ali *v.* Ram Nath, 8 C. 32, 34, 35 (1881); Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 789 (1906).

(6) Budh Singh *v.* Niradbaran Roy, 2 C. L. J. 431, 438 (1905); Budree Das Mukim *v.* Chooni Lal Johurry, *supra*; Sir Dinsha Manekji Petit *v.* Sir Jametsi, 33 B. 509 (1908).

(7) Jamal-uddin *v.* Mujtaba Husain, 25 A. 631 (1903).

(8) Ib.

(9) See Kazi Hassan *v.* Sagun Balkrishna, 24 B. 170, 181, *per* Ranade, J., who said only that a suit by a beneficiary for a declaration against strangers was not barred by this section.

"further or other relief" is, it has been held, a decree for an account.(1) This is now expressly mentioned in clause (*d*). Before a scheme can be settled for the management of a temple and its funds, an account of the trust property must be taken. Until the trust funds are ascertained it is impossible to settle a scheme.(2) The Calcutta High Court has in one case held that a suit for the removal of a trustee, and for the recovery of trust-property from the hands of a third party to whom it has been improperly alienated by the trustee, falls within the section.(3) But this decision has been dissented from in the same Court,(4) in which it was held that persons claiming a title purely adverse to a trust are not proper parties to a suit for the execution of the trust. The Allahabad High Court has also held that the alienees are not proper parties, that a prayer for recovery of possession is not entertainable under this section, and that a suit for such purpose could be instituted only by the trustee.(5)

The High Courts at Calcutta,(6) Bombay,(7) and Allahabad (8) have held that in a suit under this section the Court may remove a trustee hostilely for breach of trust, and that the section applies both to contentious and non-contentious cases. Such relief was held to be involved in clause (*b*) of the former section, or to be included in "further or other relief." The Madras High Court, however, held, though at one time there was a difference of opinion on the point, that a suit to remove a trustee did not lie under this section.(9) A prayer for removal might, however, be inserted where the right of suit existed independently of, and the suit was not brought under, this section.(10) The amended section

(1) Tricumdass Mulji *v.* Khemji Vullabhdas, 16 B. 626, 629 (1892); Chotalal Lakhmiram *v.* Manohar Ganesh, 24 B. 50 (1899); s. c., in High Court, 12 B. 247, 267 (1887). See also Sayad Husseinmian *v.* Collector of Kaira, 21 B. 48, 51 (1895).

(2) Chotalal Lakhmiram *v.* Manohar Ganesh, 4 C. W. N. 23 (1899).

(3) Sajedur Raja *v.* Gour Mohun, 24 C. 418, 423 (1897): foll. by Stanley, C.J., in Ghazaffar Husain *v.* Yawar Husain, 28 A. 112 (1905).

(4) Budh Singh *v.* Niradbaran Roy, 2 C. L. J. 431 (1905); Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 789 (1906); *per* Burkitt, J., in Ghazaffar Husain *v.* Yawar Husain, 28 A. 112 (1905).

(5) Huseni Begam *v.* Collector of Moradabad, 20 A. 46, 49, 50 (1897).

(6) Sajedur Raja *v.* Gour Mohun, 24 C. 418 (1897); Mohiuddin *v.* Sayiduddin, 20 C. 810 (1893); and see Bishen Chand *v.* Syed Nadir, 15 I. A. 1, 10 (1887).

(7) Tricumdass Mulji *v.* Khemji Vullabhdas, 16 B. 626, 629 (1892); Chintaman Bajaji *v.* Dhondo Ganesh, 15 B. 612, 617 (1888); Advocate-General *v.* Moulvi Abdul, 18 B. 401 (1894); Annaji Raghunath *v.* Narayan Sitaram, 21 B. 556 (1896); Damodar Bhatji *v.* Bhat Bhogilal, 22 B. 493 (1896); Damodarbhat *v.* Bhogilal, 24 B. 45 (1899); Sayad Husseinmian *v.* Collector of Kaira, 21 B. 48 (1895) [a suit to remove trustees must therefore be brought in the District and not Subordinate Judge's Court]; Girdharlal *v.* Naranlal, 14 Bom. L. R. 1135 (1912).

(8) Huseni Begam *v.* Collector of Moradabad, 20 A. 46 (1897); Girdhari Lal *v.* Ram Lal, 21 A. 200 (1899).

(9) Rangasami Naickan *v.* Varadappa Naickan, 17 M. 462 (1891); Subbayya *v.* Krishna, 14 M. 186 (1890), *per* Muttusami Ayyar, J.; Narasimha *v.* Ayyan Chetti, 12 M. 157 (1888); *contra, per* Best and Weir, JJ., in Subbayya *v.* Krishna, *supra*.

(10) Tiruvengadah *v.* Srinivasa, 22 M. 361 (1899).

makes it now clear that it applies both to non-contentious and contentious suits, and clause (*a*) expressly mentions the removal of a trustee.

As clauses (b) and (c) allow of the appointment of new trustees and the vesting of the property in new trustees, it follows that the Court can take possession from the old trustee who has been removed and give it to the new trustee. Whether the Court can grant relief by taking possession of trust-property from the hands of a third party, to whom it has been improperly alienated,(1) has already been discussed. If there is a trustee and the suit is merely to recover property from strangers and not for the execution of the trust, it does not come within the section. If, again, there is a trustee, but the suit be for his removal, then, till he is removed, the trust-estate is vested in him, and he alone can sue strangers for possession. When the new trustee is appointed he can sue.(2) It has also been held that where there is a trustee, worshippers cannot sue strangers for possession,(3) though they are entitled, irrespective of this section or O. I. r. 8 to maintain an action against any person improperly interfering with their rights to worship.(4) If, however, a suit merely for possession as against strangers is not within the scope of the section, this question does not properly arise under it. It amounts simply to this, who has title under the ordinary law to sue for possession; and need not be further discussed. Within the terms "further relief" are the appointment of a receiver,(5) and the grant of an injunction, both forms of relief being of a merely ancillary character, and a decree for the cancellation of unauthorized leases (6) The Court, in sanctioning a scheme, may provide for the appointment of additional or new trustees, though such appointment may not be in conformity with the original constitution of the trust, or with the rules in force in respect to it, and a scheme framed is liable to variation for good cause shown.(7) Where a suit is maintainable under this section and the plaint seeks relief specified in that section, sect. 42 of the Specific Relief Act does not apply.(8)

"**A suit.**"—The procedure under Romilly's Act (52 Geo. III. c. 101) was by petition and summary order, whereas a regular suit is prescribed by this section.(9) There is, however, no ground for suggesting that a suit under

(1) See Sajedur Raja *v.* Gour Mohun, 24 C. (1897), at p. 423, and cases in note (2), p. 373.

(2) Budh Singh *v.* Niradbaran Roy, 2 C. L. J. 431, 436, 438 (1905).

(3) Kamaraju *v.* Asanali, 23 M. 99 (1899); Subbarayadu *v.* Asanali, 23 M. 100 *n.* (1899); Huseni Begam *v.* Collector of Moradabad, 20 A. 46, 50 (1897); Raghubar Dial *v.* Kesho Ramanuj, 11 A. 18 (1888). See, however, Kazi Hassan *v.* Sagun Balkrishna, 24 B. 170, 175, 176, 181 (1899).

(4) Subbarayadu *v.* Asanali, 23 M. 100 *n.* (1899).

(5) Gyanananda Asram *v.* Kristo Chandra, 8 C. W. N. 404, 407 (1901).

(6) Ram Churn Tewary *v.* Protap Chandra Dutt, 2 C. L. J. 448 (1886).

(7) Prayag Doss *v.* Tirumala, 28 M. 319 (1905). A scheme was framed by the P. C. in Prayaga *v.* Tirumala, 9 Bom. L. R. 588 (1907); s. c., 34 I. A. 78.

(8) Netai Rama *v.* Venkatacharulu, 26 M. 450 (1902).

(9) See Subbayya *v.* Krishna, 14 M. 186, 188 (1890).

this section has the character of a summary proceeding. It possesses all the characteristics of a suit under sect. 9 of the Code.(1) Where a suit which is not within the section is instituted in a District Court, it has been held that the Court should not dismiss the suit, but should deal with it under sect 57, clause (*a*) (now O. VII. r. 10), and return the plaint to be presented to the proper Court.(2) So, also, where a Subordinate Judge held that this section was a bar to the suit, no consent having been obtained, it was held that he should not have proceeded to dispose of the case, but should have returned the plaint to be presented to the Court having jurisdiction to try the suit.(3)

"Any other Court."—With reference to the words "any other Court empowered on that behalf," it has been held that the notification empowering the Court should not be directed to a particular judge and should not purport to deal with a particular litigation which on the date of the notification was pending before another Court.(4)

Execution.—So far as a decree under this section orders particular acts to be performed by the defendants in the management of the trust, it may be enforced by their imprisonment or by the attachment of their property, or both.(5) And in order to obtain the removal of trustees who have infringed the scheme, the latter may be amended so as to include a provision for removal, and it is not necessary to file a separate suit.(6) In the under-mentioned case (7) application was refused, as the requirements of sects. 235 (*j*) and 260 of the former Code had been ignored. Where an order was held not to invest a suit with a representative character, a person not on the record and not a member of the community of the plaintiffs, but claiming certain rights under the decree, was held to have no right to apply to compel the observance of the scheme directed by the decree.(8) The directions in a scheme framed may be enforced in execution on application by persons interested.(9)

Settling a scheme.—Settling a scheme under this section is largely a matter of discretion, and the scheme will not be interfered with in appeal unless the discretion has been improperly exercised or the Court has failed to give due consideration to matters which it was bound to consider.(10)

Costs.—The costs of the Advocate-General as between attorney and

(1) Shailajananda *v.* Umeshananda, 2 C.L. J. 460, 469 (1905); Rangasami *v.* Varadappa, 17 M. at p. 468 (1893).

(2) Muhammad Abdullah *v.* Kallu, 21 A. 187 (1899).

(3) Jamal-ud-din *v.* Mujtaba, 25 A. 631, 633 (1903).

(4) Abdul Karim *v.* Abdus Sobhan, 39 C. 146 (1911); 16 C. W. N. 44.

(5) Damodarbhat *v.* Bhogilal, 24 B. 45 (1899); followed Prayag Doss *v.* Tirumala, 28 M. 319 (1905).

(6) Ib.

(7) Sha Karamchand *v.* Ghelabhai, 19 B. 34 (1893).

(8) Ragava *v.* Rajaratnam, 14 M. 57 (1890).

(9) Prayag Doss *v.* Tirumala, 28 M. 319 (1905).

(10) Kirpa Shankar *v.* Manohar Tamleckor, 24 M. L. J. 199 (1912).

client come, as a rule, out of the trust-fund.(1) The Court may also make a similar order in the case of trustee-defendants if there have been no improper conduct on their part. But the Court has refused to disturb the decision of the Taxing Master that certain items ought not to come out of trust-funds.(2)

"**Save as provided.**"—That is, the section is now mandatory. See note, *ante*, "Scope of the Sections." (3)

(1) See order in Parmanandas *v.* Venayek, 7 B. 19 (1878).

(2) Advocate-General *v.* Moulvi Abdul, 20 B. 301 (1895).

(3) Natesa Pandara *v.* Ramalingam, 24 M. L. J. 658 (1912); Venkataraya Charlu *v.* Krishnama Charlu, 24 M. L. J. 697 (1912).

PART VI.

SUPPLEMENTAL PROCEEDINGS.

94. *In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—*

Supplemental proceedings.

(*a*) *issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;*

(*b*) *direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;*

(*c*) *grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;*

(*d*) *appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;*

(*e*) *make such other interlocutory orders as may appear to the Court to be just and convenient.*

Supplemental proceedings.—This section is new. It is intended to generally define the powers of the Court in this respect, specific provision being made either by present or future rules. In this connection may be noted in the first paragraph "if it is so prescribed" in contrast with the phrase "in the manner prescribed," which occurs in other sections, *e.g.*, sect. 90, *ante*. As regards security [clauses (*a*) and (*b*)], the former Code dealt with security for costs. This section deals also with security for personal

appearance and production of property. As regards clauses (*c*), (*d*), (*e*), see O. XXXIX. rr. 1–5, O. XL., and O. XXXIX. rr. 6–10 respectively, and notes thereto.

Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

95. (1) *Where*, in any suit in which an arrest or attachment has been effected *or a temporary injunction granted* under the last preceding section,—

(*a*) it appears to the Court that such arrest, attachment *or injunction* was applied for on insufficient grounds, *or*

(*b*) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the *same*,

the defendant may apply to the Court, and the Court may, *upon such* application, award against the plaintiff *by* its *order* such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him:

Provided that *a* Court shall not award, under this section, *an* amount *exceeding the limits of its pecuniary jurisdiction*.

(2) An *order determining any such application* shall bar any suit for compensation in respect of such arrest, attachment *or injunction*.

Compensation.—This section amalgamates sects. 491 and 497 of the last Code. Prior to this enactment in the Code, a suit for damages would have lain for the wrongful suing out of mesne process. And such a suit will lie now. But it must be shown that there was malice and want of reasonable and probable cause.(1) In the case of an application under this section it must be shown that the arrest or attachment was applied for on insufficient grounds,(2) or, if the suit fails, that there was no probable ground for instituting it. Compensation may be awarded for excessive attachment, notwithstanding that the plaintiff may be successful.(3) A defendant, however, is not bound to apply for redress under this section, and by omitting to do so, or by applying and failing to obtain an award,

(1) Goutière *v.* Robert, 2 A. H. C. R. 353 (1870); Chowdharee Sherraj *v.* Dwarka Doss, 4 A. H. C. R. 42 (1872); Dhurmo Narain *v.* Sreemutty Dossee, 18 W. R. 440 (1872); and, of course, where there has been an offence it is not necessary first to prosecute: Choitunno *v.* Zumeerooddee, 18 W. R. 27 (1872). As to the liability of a creditor who attaches goods not belonging to his debtor, see Kissori Mohun Roy *v.* Harsukh Das, 17 C. 436 (1889).

(2) See Syed Ali *v.* Adib, 15 B. 160, at p. 163 (1890).

(3) Mahomed Rezaooddeen *v.* Hossein Buksh, W. R. Misc. 24.

he does not lose his right to bring a regular suit; (1) though if he applies for compensation, any award which may be passed will bar a suit.(2) Compensation can only be granted by the Court which disposes of the suit,(3) and on the recorded application of the defendant, and not of its own motion.(4) A Provincial Small Cause Court has jurisdiction to award damages under this section to a defendant whose property has been attached on insufficient grounds.(5) If a defendant is arrested, he may apply under this section although he has not been summoned.(6) In a summary suit, if a defendant has been arrested before judgment and claims compensation for such arrest under this section, he is entitled on that ground to apply for leave to defend the suit, and, if a *primâ facie* case is made out, leave to defend should be given. Under the Code, a cross-claim made by a defendant against a plaintiff cannot, in ordinary cases, be set up as a defence, except when it arises out of the very transaction sued upon and is in the nature of a set-off, but the special cross-claim provided for by this section, viz. a claim for compensation for arrest on insufficient grounds, may under that section be taken into account in any suit, and the amount awarded as compensation be awarded in the decree, and thus *pro tanto* be a defence to the plaintiff's claim in the suit.(7)

It was held that there was no appeal from an order awarding compensation under this section.(8) But see now sect. 104, clause (*f*). Under sect. 491 of the last Code, the Court has to award "*in its decree.*" Now the section runs "*in its order.*" The order may, however, under sect. 36, be executed as if it were a decree. As regards the amendment in clause 2, see the next paragraph.

Compensation.—The corresponding section of the Code of 1859 concluded with the words "an *award of compensation* under this section shall bar," etc.; therefore an unsuccessful application by a defendant did not debar him from instituting a suit.(9) And the same must have been held under the last Code, as it could not be said that where there has been a denial of compensation there has been an "*award.*" It, however, an application had been made and granted, then a separate suit for compensation was barred. The present words "order determining," etc., are ambiguous, as by themselves they may refer either to the grant or refusal of an application. A person is not bound to apply under this section. There may be cases where the maximum amount of Rs. 1000 is an insufficient compensation. Persons may sue who do not wish

(1) Goutière *v.* Charriol, 1 A. H. C. R. 91 (1869); Daniel *v.* Mohun Bibee, 1 Agra, 104.

(2) Goburdhun Majhee *v.* Banee Chunder, 21 W. R. 375 (1874).

(3) Huro Soondaree *v.* Bungshee Mohun, 3 W. R. Misc. 28 (1865).

(4) Ram Narain *v.* Kurun, S. D. N. W. 136 (1863).

(5) Ibrati *v.* Sangaram, 26 M. 504 (1902).

(6) Syed Ali *v.* Adib, 15 B. 160 (1890).

(7) Roulet *v.* Fetterle, 18 B. 717 (1894).

(8) Narasinga Bhakshi *v.* Govinda Bhakshi, 24 M. 62 (1900); Lok Nath *v.* Amir Singh, 28 A. 81 (1905); Huro Soondaree *v.* Baboo Bungshee, 8 W. R. 332 (1867).

(9) Nanda Kumar Shaha *v.* Gour Sankar, 50 B. L. R. app. 4 (1870); s. c., 13 W. R. 305.

to take advantage of the remedy given by this section.(1) The provisions of this section show that where a claim is dismissed an injunction cannot subsist pending an appeal, or until the period for lodging an appeal has elapsed; for if such were the case the Court would not have had authority given it to grant compensation.(2)

(1) Wilson *v.* Kanhya Sahoo, 11 W. R. 143 (1869); as to the remedy by suit, see Joy Kalee Dassee *v.* Chand Malla, 9 W. R. 133, 135 (1868); Nanda Kumar Shaha *v.* Gour Sankar, 5 B. L. R. app. 4, 6 (1870).

(2) Shaikh Moheeooddeen *v.* Shaikh Ahmed Hossein, 14 W. R. 384 (1870). See Ram Chand *v.* Pitam Mal, 10 A. 506, 572 (1888); Yamin-ud-doulah *v.* Ahmed Ali Khan, 21 C. 561, 563 (1894).

PART VII.

APPEALS.

APPEALS FROM ORIGINAL DECREES.

96. (*1*) *Save where* otherwise expressly provided *in the* [s. 540.]

Appeals from original decrees.

body of this Code or by any other law for the time being in force, an appeal shall lie from *every* decree *passed by any* Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of *such* Court.

(*2*) An appeal may lie from an original decree passed *ex parte*.

(*3*) *No appeal shall lie from a decree passed by the Court with the consent of parties.*

Appeal.—An appeal is a stage in and part of the proceedings in a suit.(1) There must be a suit, for if there is none there can be no decree, and therefore no appeal.(2) It is the removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of the former Court,(3) and the lodging of an appeal is thus equivalent to an allegation that the decree is wrong and that the reasons which led to it are as stated in the judgment insufficient.(4) It is a hearing before another tribunal, being in this distinguished from a review, which is the reconsideration of the same subject by the same Judge.(5) The function of an Appellate Court is to determine what decree the Court below ought to have made. It may affirm, reverse, or vary the decree under appeal.(6) The rule upon which the Privy

(1) *Re* Duli Chand, 9 B. L. R. 190, 196 (1872).

(2) Peary *v.* Baroda, 19 C. 485 (1892) [a proceeding under sect. 84 of the Bengal Tenancy Act; and see also as to applications under sect. 93, Hussain *v.* Mutookdhari, 14 C. 312 (1887), and proceedings under sect. 91 of the same Act, Dya Gazi *v.* Ram Lal, 2 C. W. N. 351, 352 (1897)].

(3) Chappan *v.* Moidin Kutti, 22 M. 68, 80 (1898).

(4) Mt. Pan Koer *v.* Bhugwunt Koer, 6 N. W. P. H. C. R. 19, 21 (1873).

(5) Moheswar Sing *v.* Bengal Government, 7 Moo. I. A. 283, 305 (1859), though *ex-necessitate* there may be cases in which a review might take place before another and different Judge.

(6) Kristo Kinkur *v.* Baroda Caunt, 14 M. I. A. 465, 490 (1872).

Council has universally acted is to affirm the judgment, unless their Lordships see that the judgment is clearly wrong.(1) It is a rule of practice that a Court of Appeal should not upset the judgment of the first Court on a question of fact, depending on the appreciation of evidence, unless the former Court is quite confident that the judgment is wrong. But, after all, it is a rule of practice, meant for the guidance of Appellate Courts having jurisdiction to deal with questions of fact, and they are the sole judges of the question whether a judgment appealed against on facts is wrong.(2) An Appellate Court, in regular appeal, is bound to take notice of a positive invalidity of a document created by a Statute, even though no objection may have been raised to its admission in the Court below. The Appellate Court is thus bound in regular appeal to entertain an objection that a document is invalid for want of registration, even though no objection may have been raised to its admissibility in the Court below. "The bulwark against fraud," says West, J., "intended to be constituted by registration is of great public importance. We think we could not, consistently with the law, allow it (the unregistered document) to count as a part of the materials on which we have to dispose of this case, supposing that the registration was, indeed, indispensable to its validity." (3) An appellant will not be allowed to raise in the Court of Appeal a point which he did not raise in the Court below, even though there is some evidence in support of it, if the nature of that evidence is such that, by any possibility, the respondent might have been able to rebut, if that point had been raised originally.(4) If a party desires or intends to make misconduct of a Judge a ground of appeal to the High Court, he ought always to draw the Judge's attention to that matter either by presenting a petition or otherwise, so that a proper record may be at once made of the facts which he desires to establish in appeal.(5) A pending appeal, without annulling the judgment appealed against, leaves it subsisting as a valid adjudication governing the rights of the parties, but the further litigation and all matters connected therewith are transferred to and placed under the control of the Appellate Court. During the pendency of an appeal, the power of the inferior Court in any way to deal with the litigation is completely in abeyance, except to carry out the decree which, of course, it is the duty of the Court to do, as the Code in terms provides that the execution of the decree is not stayed by the mere fact that an appeal has been preferred against it.(6) It is not only competent to a Court of Appeal, but it may be its duty under certain circumstances to take notice of events which have happened since the order challenged in appeal was made. The Court has inherent power to recall an

(1) Khoorshidjee *v.* Mehowanjee, 1 M. I. A. 431, 442 (1837).

(2) Pandurang *v.* Anant, 5 Bom. L. R. 957, 969 (1903); Yemuna Bai *v.* Balshet, 5 Bom. L. R. 585, 586 (1902).

(3) Básáwá *v.* Kalkápa, 2 B. 489, 491 (1877); see also Ramapa *v.* Umanna, 7 B. 123, 124 (1882); Imdad *v.* Tasadduk, 6 A. 335, 339 (1884); Safdar Ali *v.* Lachman, 2 A. 554, 559 (1879).

(4) *Ex-parte* Firth, 19 Ch. D. 419, 429 (1881).

(5) Ram Koomar *v.* Sonatun, 3 C. L. R. 23, 24 (1878); see also Zamindar of Tuni *v.* Bennayya, 22 M. 155 (1898).

(6) Ramanadhan *v.* Narayanan, 27 M. 602, 604, 605, 607 (1904).

order improperly or fraudulently obtained. Where wrong has been done by order of Court, which has been set aside on appeal, the Court executing the decree without express authority is competent to put the parties in the position which they occupied before that order.(1) A decree of the Appellate Court merely affirming the decree of the first Court does not give the decree-holder fresh time for performing a condition imposed by the original decree.(2) It has been held that the effect of a party preferring an appeal was to re-open the decree so as to render it competent to the parties to agree that the case should be remanded for the trial of fresh issues even on points not raised in the ground of appeal.(3)

"**Save where.**"—As to the Court Fees Act,(4) sects. 5, 12, see cases cited. See sect. 19, Succession Certificate Act (5) (VII. of 1889); sects. 47, 48, Guardian and Wards Act (6) (VIII. of 1890); Chota Nagpore Landlord and Tenant Act (7) (I. of 1879); Lower Burmah Courts Act (8); Bengal Tenancy Act.(9) N.W.P. Revenue Act (10) (XII. of 1881); Madras Act (II. of 1897) in the case of suits (11) under Madras Reg. VI. of 1881; N.W.P. Land Revenue Act (12) (XIX. of 1873); Small Cause Courts (13) (Act VII. of 1868,

(1) Udit Chobey *v.* Rashika Prasad, 6 C. L. J. 662 (1907).

(2) Ramasamy Kone *v.* Sundra Kone, 17 M. L. J. 495 (1907).

(3) Natesa Gramani *v.* Venkatrama, 17 M. L. J. 318 (1907).

(4) Balkaran *v.* Gobind Nath, 12 A. 129, 156 (1890); Moti *v.* Kaunsilla, 16 A. 308 (1894); Lurkhur *v.* Ram Bhajun, 23 A. W. N. 214; Vithal Krishna *v.* Bal Krishna, 10 B. 610 (1886); Sardar Singji *v.* Ganpat Singji, 14 B. 395 (1889); Dada *v.* Nagesh, 23 B. 486, 489, 490 (1898); Ajoodhya Pershad *v.* Gunga Pershad, 6 C. 249 (1880); Raj Kristo *v.* Bama Soondaree, 23 W. R. 296 (1875); Gunga Monee *v.* Gopal, 19 W. R. 214 (1873); Kanaran *v.* Komappan, 14 M. 169 (1890); Bai Anope *v.* Mulchand, 9 B. 355 (1885); Annamalai *v.* Cloete, 4 M. 204, 208 (1881).

(5) Bhagwani *v.* Manni Lal, 13 A. 214 (1891); Barkatannissa *v.* Tajibunissa, 1 C. W. N. x. (1895); Rama Reddi *v.* Rapi Reddi, 19 M. 199 (1895); Alta Soondari *v.* Sreenath, 20 C. 641 (1893); Nannhumal *v.* Gulabo, 26 A. 173 (1903); Radha Rani *v.* Brindhun, 2 C. W. N. 59, 60 (1897); s. c., 25 C. 320; Ariya Pellai *v.* Thangammal, 20 M. 442 (1896); Bai Devkori *v.* Lalchand, 19 B. 790 (1894); dist. in Bai Nand Kore *v.* Sha Maganlal, 36 B. 272 (1911). As to sufficiency of security on application for certificate of administration, see Lucas *v.* Lucas, 20 C. 245 (1891).

(6) Pran Bandhu Singh *v.* Brahmamoyee Dasya, 1 C. W. N. 693 (1897); Mohima Chandra Biswas *v.* Tarini Sanker Ghose, 19 C. 487 (1892); Pakhwanti Dai *v.* Indra Narain Sing, 23 C. 201 (1895); *In re* Bai Harkha, 20 B. 667 (1895).

(7) Priag Nath Sah *v.* Mura Munda, 24 C. 249 (1896), and as to second appeal, Khedu Mahto *v.* Budhan Mahto, 27 C. 508 (1900); sect. 44, Act V. of 1903, B. C. (Chota Nagpur Tenancy Act), Iswar Lal Singh *v.* Jagoo Sahu, 33 C. 378, 380 (1905).

(8) XVII. of 1875 repealed by Act XI. of 1889, and the latter by Act VI. of 1900; Golam Rahman *v.* Fatima Bibi, 13 C. 232, 235 (1886); *In re* Mulla Adjim, 14 C. 351 (1887).

(9) Gogan Chand *v.* Casperz, 4 C. W. N. 44 (1897); Goghan Mollah *v.* Rameswar, 18 C. 271, 281 (1891); Lala Kirut Narain *v.* Palukdhari, 17 C. 326 (1889); Kishori *v.* Saroda-moni, 1 C. W. N. 30 (1890); Subh Narain *v.* Goroke Prasad, 3 C. W. N. 344 (1897).

(10) Deo Churn *v.* Beni Pathak, 21 A. 247, 249 (1899); Beni Prasad Kuari *v.* Batulan Bibi, 23 A. 283 (1901); Chotu *v.* Jitan, 3 A. 63, 66 (1880); Krishna Ram *v.* Hingu Lal, 4 A. 237 (1882).

(11) Sadasiva Pellai *v.* Kalappa Mudahar,

(12) Imtiaz Bano *v.* Latafat-un-nissa, 11 A. 328 (1889).

(13) Srinivasa Charlu *v.* Balaji Ram, 21 M. 232 (1896); Behram Kai Khusru *v.* Ardesher Kavasjee, 27 B. 563 (1903; Sassoon *v.*

B. C.); (1) Madras Rent Recovery Act; (2) and with regard to an appeal from an order refusing to amend clerical error in form of probate,(3) see cases cited. See Registration Act, sects. 72, 76. The objection that "no appeal lies" is usually taken as a preliminary objection by the pleader for the respondent. But the Court will none the less consider it on learning from the appellant what the facts are.(4)

"An appeal shall lie." A right of appeal is not a natural and inherent right attaching to litigation. It can only be given by Statute.(5) A party can only appeal when so allowed by Statute: and it is only the Court to which jurisdiction is given to entertain an appeal in a particular matter which can determine it.(6) And where there is inherent incompetency in a Court, it has been held that objection can be taken at any time, and that consent cannot confer jurisdiction.(7) though as regards objections taken in appeal to want of jurisdiction of Courts of first instance, see now the provisions of sect. 21, *ante*.

The section does not confer a right of appeal from all adjudications which are decrees within the meaning of sect. 2, but in those cases only where the right is not taken away by the Code or any other law.(8) In order to sustain an appeal it must be shown (*a*) that the party has the right to appeal, and (*b*) that the Court to which he desires to prefer the appeal has the right to entertain it. A distinction must be drawn between provisions which confer rights on parties and those which confer jurisdiction on Courts. This section does *not deal with the jurisdiction of Courts, but with the rights of appeal given to parties.(9)*

"From every decree."—An appeal lies from the decree. Where there is no decree there is no appeal. As to what is a decree, see notes to sects. 2 and

Hurry Das Bhukut, 24 C. 455 (1896); Soonderlal v. Goor Prasad, 23 B. 414 (1898). The character of a suit, and therefore the right of appeal, is not altered by the mode in which a Judge invested with both ordinary and Small Cause Court Jurisdiction tries a suit: Shankarbhai *v.* Somabhai, 25 B. 417 (1900); foll. in Indra Chandra Mukerjee *v.* Srish Chandra Banerjee, 40 C. 551 (1913).

(1) Mir Waziruddin *v.* Lala Dorki Nandan, 6 C. L. J. 472 (1907).

(2) Dontaraju *v.* Nekkalapudi, 17 M. L. J. 129 (1907).

(3) Girindra *v.* Rajeshwari, 27 C. 5 (1899).

(4) Behary Lal Pundit *v.* Kedarnath Mullick, 18 C. 469, 472 (1891).

(5) Nathubai *v.* Manordas, 36 B. 360 (1911); 14 Bom. L. R. 325, 331; Rangoon Botatoung Co., Ltd. *v.* Collector, Rangoon, 39 I. A. 197 (1912); The Special Officer, Salsette Building Sites *v.* Dasabhai, 17 C. W. N. 421 (1913); Prayag Narain *v.* Sukhdeo, 17 C. L. J. 605 (1911) (and not by mutual consent); Ram Soshi *v.* Gray, 18 C. L. J. 123 (1913).

(6) Percy v. Percy, 18 A. 375, 378 (1896): Meenakshi Naidoo v. Subramaniya Sastri, 11 I. A. 160, 165; s. c., 11 M. 26, 34 (1887); Narayan Ballal v. Secretary of State, 20 B. 803, 805 (1895); Tota Ram *v.* Ishar Das, 9 A. 446 (1887); Parasuram *v.* Seshier, 27 M. 504, 508 (1903). *In re* Court of Wards Estate, Raja Pertab Sing, 7 W. R. 222 (1867). As to appeals under the Land Revenue Act, XIX. of 1873, see Niaz Begum *v.* Abdul Karim, 14 A. 500 (1882); Shibban Lal *v.* Tiloki Chand, 2 A. 619 (1880); and under Land Acquisition Act, I. of 1894, Balaram *v.* Shyam Sunder, 23 C. 526, 529, 530 (1896); Shcorattan *v.* Mohri, 21 A. 354 (1899).

(7) See notes to sect. 9, *ante*.

(8) Balkaran *v.* Gobind Nath, 12 A. 129, 155 (1890). An adjudication between defendants in Interpleader is a decree: Maharaj Singh *v.* Chittar Mal, 30 A. 22 (1907).

(9) Golam *v.* Rahman, 13 C. 232, 235 (1886).

47, *ante*. In the first part of the section the word "decrees" and *in the con* cluding portion of the first paragraph the word "decision" is used. But this difference of language does not involve any distinction. The appeal must be strictly from the decree, that is, the appellant must object to the decree before he can be allowed to enter upon his detailed objections to the judgment.(1) The object of an appeal is to correct the decree. An appeal lies from the decree, not from the judgment. There is, therefore, no appeal to a party in whose favour a decree is passed simply because there may be some expressions in the judgment which led to the decree which may be considered prejudicial.(2) An appeal will not lie from separate determinations of isolated issues of law or fact before taking evidence on the remaining issues.(3) If findings have been recorded upon some issues against a party and he desires to have formal effect given to them by the decree so as to allow of his filing objections thereto or of appealing therefrom, he must take steps to have the decree properly brought into conformity with the judgment, so that there may be matter on the face of it to show that something has been decided against him. In other words, he must obtain insertion in the decree itself (which alone contains the final determination of the cause and not the judgment) of such portions of the Court's findings as he considers himself injuriously affected by, so as to place himself in the position which the statute recognizes as giving him a right to impeach the decree. If he fails to follow this course, the decree, though in general terms, will stand good, as finally deciding the issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself actually rested. More than these the decree cannot cover, and the findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiff's right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision.(4) When more questions than one arise in a suit, according to the circumstances of the case depending upon the nature of the questions and of the decision arrived at, it may be either necessary to decide them all, or sufficient to decide only some of them, for the disposal of the suit. In cases of the second class, the Court may either decide only the questions that are found necessary to decide, or it may decide all the questions raised. In the latter class of cases, again, the Court

(1) Mt. Pan Kooer *v.* Bhugwant Kooer, 6 N. W. P. H. C. R. 19, 21 (1873).

(2) Krishnasami Ayyangar *v.* Raja Gopala Ayyangar, 18 M. 73, 87 (1893); Shama Soondaree *v.* Digumburee, 13 W. R. (1870); Mt. Pan Kooer *v.* Bhugwant Kooer, 6 N. W. P. 19 (1893); Annusuyaba *v.* Sakharam, 7 B. 464, 466 (1883). See also Vithilinga *v.* Vithilinga, 15 M. 111, 120 (1891); Ghela Icharam *v.* Sankal Chand, 18 B. 597, 602 (1893); Muttu Kumarappa *v.* Arumuga, 7 M. 145, 149 (1883). In Run Bahadoor *v.* Lucho Koer, 12 I. A. 23; s. c., 11 C. 301 (1884), the appeal was not against the decree, but a finding in the judgment. The decree was not based on it, but was made in spite of it. And see as to *res judicata*, Nanda *v.* Bidhu, 13 C. 17 (1886); Thakur Magun *v.* Thakur Mahadoo, 18 C. 647 (1891); Peary *v.* Ambica, 24 C. 900, 905 (1897); Shib Charan *v.* Raghunath, 17 A. 174, 184 (1895).

(3) *In re* petition Court of Wards Estate, Raja Putab Sing, 7 W. R. 222 (1861).

(4) Jamaitunnissa *v.* Lutfun-nissa, 7 A. 610 (1885); see also Niamut Khan *v.* Phadu Buldia, 6 C. 319, 323, 324 (1880); Koylash *v.* Ram Lal, 6 C. 206, 208 (1880).

may either embody the result of its decision upon every question in the decree in the form of a declaration or otherwise, or it may not do so. Cases of this last-mentioned description, again, sub-divide into two classes, in one of which the decree is supported by the decision upon each of the questions determined, and in the other it is in spite of the decision upon some of those questions, as, for instance, where a suit fails upon the question of limitation, but the question of title is found for the plaintiff.(1) The mere fact that a Court has gone on to determine a question which it could not determine so as to bind the parties does not give a right of appeal against a decision on such a question.(2)

The former section allowed an appeal from any part of the decree which may also be of a provisional or preliminary character, such as a decree in a partnership or partition suit.(3) Though an appeal was allowed against a portion of a decision, yet there should, it was held, be a decision relating to the disposal of the entire suit.(4) The words "or from any part" have been now omitted.

"**Courts authorized to hear appeals.**"—See the various Civil Courts Acts, and in Act XII. of 1887, sects. 20, 21; sect. 55, Indian Divorce Act (IV. of 1869).(5) As to Admiralty jurisdiction, see note.(6)

The subject-matter of an appeal should be valued (7) for the purpose of jurisdiction, according to the law in force at the date of the appeal and not of the suit which led to it.(8) Where a plaintiff definitely fixes a certain sum as the amount of his claim, this must be considered as the value of the original suit and the appeal will lie accordingly; but where he fixes a certain sum as the amount of his claim only approximately or tentatively, and prays that the amount of his claim may be ascertained in the course of the suit, then the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the forum of appeal.(9)

***Ex-parte* decree (clause 2).**—The clause allowing appeals from *ex-parte* decrees was added by sect. 45, Act VII. of 1888, previous to which Act it was doubted whether an appeal was given in such cases.(10)

In Jonardan *v.* Ramdhone,(11) the Calcutta High Court said that "when a decree is passed *ex parte* against a defendant, a remedy by appeal is now always open to him by sect. 540 of the Code as amended by Act VII. of

(1) Peary Mohun *v.* Ambica Churn, 24 C. 900, 904, 905 (1897).

(2) Dya Gazi *v.* Ram Lal, 2 C. W. N. 351, 352 (1897).

(3) Krishnasami Ayyangar *v.* Raja Gopala Ayyangar, 18 M. 73, 87 (1893).

(4) Raja of Venkatagiri *v.* Mahomed Rahemutulla, 3 M. 13, 14 (1881).

(5) And Percy *v.* Percy, 18 A. 375, 378, 379 (1896); overruling Morgan *v.* Morgan, 4 A. 306 (1882).

(6) In the matter of the Ship "Champion," 17 C. 66, 81, 82, 83 (1889).

(7) See notes to sect. 9, sub-voc. "Pecuniary Jurisdiction."

(8) Muttammal *v.* Chinnana, 4 M. 220 (1881).

(9) Gulab Khan *v.* Abdul Wahab, 31 C. 365, 369; s. c., 8 C. W. N. 233 (1904); foll. Ijjatulla Bhuiyan *v.* Chandra Mohan Banerji, 11 C. W. N. 1133 (1907); s. c., 6 C. L. J. 225; Ramjit Misser *v.* Ramador, 17 C. W. N. 116, 119 (1912).

(10) See Lal Singh *v.* Kunjan, 4 A. 387 (1882); Ajudhia *v.* Balmukund, 8 A. 354 (1886); Karuppan *v.* Ayyathorai, 9 M. 445 (1886).

(11) 23 C. 738, 743 (1896).

1888. But such a remedy can be efficacious only in those cases, and their number must be small, in which the *ex parte* decree is either wrong in law on the face of the proceeding or is based upon evidence so weak that even though unrebutted it is insufficient to sustain the decree. In the great majority of cases in which a defendant having a good defence has had an *ex parte* decree passed against him, the disadvantage he labours under is that he has not been able to substantiate his defence by evidence before the Court. Upon the record, as it stands, the *ex parte* decree may be unassailable, but if the defendant has an opportunity (which he was prevented from having owing to some sufficient cause) of placing on the record evidence which he could have adduced to substantiate his defence, no such decree should have been passed. The remedy in such a case cannot be by way of appeal, which must ordinarily proceed upon the record as it stands. The proper remedy must be the one provided by sect. 108 of the Code." In Sadhu Krishna Ayyar *v.* Kuppan,(1) however, Sir Arnold White, C.J., said that these observations were merely *obiter*, and he added " they seem to me to involve the reading into the Code of a great deal which the Legislature might have said but did not say. I think it must be taken that the Legislature by accident or design has given a right of appeal apart from the merits, against an order on the ground that the defendant was not in default in failing to appear and against an *ex parte* decree, also apart from the merits upon the same grounds. There is a power to remand a case when the Appellate Court reverses an order refusing to set aside an *ex parte* decree, and it seems to me anomalous to hold that there is no such power when the Appellate Court allows an appeal against a decree upon the ground that there ought not to have been an *ex parte* decree against the defendant." (2) In this case it was held by the Full Bench that when a suit is decided *ex parte* an Appellate Court, to which the appeal from the decree is preferred under sect. 540 of the former Code, had jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the suit *ex parte* and remand the suit for re-hearing.(3)

Appeal as to costs.—See notes to sect. 35, which deals with the general power to award costs.

Consent decree (clause 3).—No appeal lies from such a decree. A consent decree cannot be set aside by appeal or by motion.(4) For setting aside such a decree there are two available modes of procedure : (*a*) by a suit ; (*b*) by an application for a review of the judgment sought to be set aside. But the more proper mode is by an application for review.(5)

Who may appeal.—In the first place, whatever may be a party's rights

(1) 30 M. 54, 59, F. B. (1906).

(2) 30 M. 54, 59.

(3) Foll. Perumbara Nayar *v.* Subrahmanian Pattar, 23 M. 445, and Habib Baksh *v.* Baldeo Prasad, 23 A. 167, 168 (1901), and dissenting from Jonardan Dobey *v.* Ramdhone Singh, 23 C. 738 (1896) ; Parvatishankar *v.* Bai Naval, 17 B. 733 (1892) ; Caussanel *v.* Soares, 23 M. 260 (1899) ; Sadha Krishna *v.* Kuppar Ayyangar, 30 M. 54.

(4) Fatmabai *v.* Sonbai, 36 B. 77 (1911).

(5) Aushootosh *v.* Tara Prasanna, 10 C. 612, 615 (1884). See also Nistarini *v.* Nando Lal, 26 C. 891, 907 ; s. c., 3 C. W. N. 670 (1899) ; Biraj Mohini *v.* Chintamoni, 5 C. W. N. 877, 878 (1901) ; Bhutnath *v.* Ram Lal, 6 C. W. N. 82, 85.

under the general law, he may forego them and debar himself, or be estopped from asserting them. If, therefore, an appellant agrees not to appeal, he cannot do so.(1) A party, it has been held, may also otherwise be barred from appealing. Thus, where a decree was obtained against A and others, and A not appealing, the decree was set aside and the case remanded on the appeal of the co-defendants but re-affirmed by the first Court, it was held that A could not appeal from the last decree.(2) In the under-mentioned case,(3) however, a suit having been decided by the first Court after an intervenor had been made a party, it was remanded for trial on the appeal of the intervenor whose name was ordered to be expunged from the record. The suit was decided again in favour of the plaintiff, but the decision was reversed on appeal. It was held that the fact of the defendant having in the first instance allowed the intervenor alone to appeal, did not debar him, after the case was reopened by remand, from appealing in his own person.

Chapter XLI. of the last Code treated of appeals from original decrees, and Chapter XLII. in the same Code of appeals from appellate decrees. It is provided that an appeal shall be from such decrees generally. It is not expressly said by whom an appeal may be preferred, but it may reasonably be assumed that any party to the suit in which a decree is passed may, if dissatisfied with it, appeal from it. O. XLI. r. 33 refers to the judgment in appeal from original decrees, and enacts that it may be for confirming, varying, or reversing the decree against which the appeal is made, and applies under sect. 108 to judgments in appeal from appellate decrees. Hence, also, it is inferrible that the parties who are allowed to appeal are those who desire that a decree should be varied or reversed.(4)

But a *pro forma* defendant against whom no judgment has been given has no right to appeal, even if another party has been found to be the owner of the land, inasmuch as such finding carries with it no legal consequence as against him.(5) So in the under-mentioned case (6) it was held that the tenant had no reason to object to a decree, which was altogether in his favour, and it was not competent to him to present an appeal from the finding on an issue. Even in the case of findings inserted in the decree itself it is not necessary to appeal

(1) Moonshee Ameer Ali *v.* Maharanee Inderjit Koer, 14 M. I. A. 203 (1871); Anant Das *v.* Ashburner, 1 A. 267 (1876); Protab Chunder Dass *v.* Arathoon, 8 C. 455 (1882); s. c., 10 C. L. R. 443; Bahir Das Chakvararti *v.* Nobin Chunder Pal, 29 C. 306 (1901); s. c., 6 C. W. N. 121; Uttam Chandra Kirthy *v.* Khetra Nath Chattopadhya, 29 C. 577 (1901); in Rajmohan Gossain *v.* Gourmohun Gossain, 8 Moo. I. A. 91 (1859), a decree of an Appellate Court obtained after compromise was held to be fraudulent and was set aside. If a person carries on an appeal contrary to his agreement a suit for damages will lie: Jati Ram *v.* Dass Ram, 3 C. L. R. 574 (1879). See also Ragobir Dyal *v.* East India Company, Fulton, 146 (1843).

(2) Nand Kishori Singh *v.* Balmokund, 1 Shome 12 (1877).

(3) Bucha Singh *v.* Mirza Mashook Ali Beg, 15 W. R. 572 (1871).

(4) Jumna Singh *v.* Kumar-un-nissa, 3 A. 152, 156, 157 (1880).

(5) Ram Dass Lushkar *v.* Hurechar Mookerjee, 23 W. R. 86 (1874).

(6) Muttu Kamarappa *v.* Arumuga, 7 M. 145, 149 (1883); as to objection to finding in Appellate Court, see Rajai *v.* Appaji, Bom. P. J. 1888, p. 220, cited in Bibi Ladli Begum *v.* Bibi Raji Begum, 13 B. 652 (1888).

if the findings be on issues which are not necessary for the decision of the suit in which they are raised.(1)

Assuming there is otherwise no bar, the question as to who may appeal is determinable by the common-sense consideration that there can be no appeal when there is nothing to appeal about. A person, therefore, who is no party (2) to the suit in which a decision is given can, as the decree does not affect him, have no ground to appeal therefrom. The person appealing must also have been a party when the decree was passed. Thus a person was once made a party to a suit, but the decree was set aside, the suit as against him dismissed, and the case remanded for trial. From this last decision he appealed, but the Court ordered the appeal to be struck off as made by a person no longer a party to the suit.(3) A party, however, to the suit when the decree is passed, or when they have been brought on the record, his representative (4) or assignee (5), may appeal regarding their own rights invaded by the decree.(6)

Ordinarily only the party against whom a decree is passed, that is the person ordinarily injuriously affected by the decree, can appeal. For the same reason a person against whom a suit has been dismissed usually cannot appeal against the decree, as he is not affected otherwise than beneficially by it. But in some cases a suit may be dismissed as against a defendant and yet the latter may have a right of appeal. It is not because a suit is formally dismissed that no appeal lies, but because such dismissal is ordinarily not merely no grievance but an actual benefit to the defendant. There is nothing to complain of. If, however, a party is aggrieved (7) by a decree then, notwithstanding that the suit is dismissed against him, he may appeal.

(1) Ghela Ichharam *v.* Sankalchand Jetha, 18 B. 597 (1893).

(2) See Caemmerer *v.* Birch, 1 Mad. H. C. R. 8 (1862); where, however, an objection was taken to a next friend being heard on the ground that he was no party to the suit, it was held that the Court would not entertain the objection at the instance of the party through whose fault the error occurred, viz., that the next friend only and not the minor had been made respondent to the decree appealed from: Bhobotarini *v.* Sree Ram Paul, 9 C. 629 (1883). An exception also exists in the case of an auction-purchaser who, as well as a decree-holder and judgment-debtor, may appeal from an order setting aside an execution sale, though he may not have been a party to the suit: Hiralal Ghose *v.* Chundra Kanto Ghose, 26 C. 539 (1899). The case to the contrary reported at p. 541 was uncontested and is of no authority.

(3) Gokool Pershad Deschite *v.* Brojo Monee Debia, 24 W. R. 259 (1875).

(4) See Jugoo Lal *v.* Lalla Bhikun Lal, 5 W. R. 133 (1866).

(5) See Gajadhar Prasad *v.* Ganesh Tewari, 7 B. L. R. 149 (1871). In Moheshwar *v.* Kushabas, 2 B. 248 (1877), which was decided under the Code of 1859, the transfer was before the second appeal, which was preferred by the transferor. He died before the appeal was heard, and the transferee applied but was not allowed to carry it on. This case is now provided for by O. XXII. r. 10. See Ahmedbhoy *v.* Vallecbhoy, 8 B. 323, 330 (1884); Rajarain *v.* Jibai, 9 B. 151, 156 (1884). The case of Jaduputtee *v.* Chunder Kant Bhattacharjee, 9 W. R. 309 (1868), was a rule. The purchaser was not added, but substituted for the plaintiff, apparently without the latter's concurrence.

(6) Sm. Khermukree *v.* Nilumbur Mandal, 2 W. R. 227, at p. 231 (1865).

(7) Musst. Pan Kooer *v.* Bhugwunt Kooer, 6 N. W. P. 19 (1873). "It must be held that in appeal, as well as in review, the appellant must be aggrieved by the decree," *per* Jardine, J.; and see also *per* Pearson, J., and Stuart, C.J., at pp. 23, 25; Lachman Singh *v.* Mohan, 2 A. 497, 499, 501, *per* Stuart, C.J. "I am now quite ready to accept the principle that an appellant must be aggrieved by the

The general question whether successful defendants in a suit can appeal from the decree in their favour has been raised in several cases, though under different circumstances. In the first of the last-mentioned cases, which was one in which the defendants had no contention *inter se*, but on the contrary a common interest against the plaintiff who was the respondent in the appeal, it was held that as the appellants had no ground of complaint, and as the appeal was against a decree wholly in their own favour, the legal meaning of which was that the plaintiff's suit altogether failed, there was no appeal.(1) In the under-mentioned case (2) the plaintiff's suit had been dismissed. The defendant appellants did not desire that the decree dismissing the suit should be varied or reversed. The attempted appeal, which was disallowed, was by one defendant against another, the matter in issue being the authenticity and validity of a deed of conditional sale purporting to have been executed by one defendant as vendor in favour of the other as vendee. So again a party cannot appeal to protect a possession which he has disclaimed to hold except on behalf of another party whom he is not authorized to represent and who has not appealed.(3) In such case he is not interested either on his or on such other party's behalf.(4) Inasmuch as an appeal lies from the decree and not from the judgment; (5) therefore a party cannot appeal from a decree which is altogether in his favour simply because there may be findings or expressions in the judgment which may be prejudicial to him.(6) In a suit for rent in which the only real issue was whether one X. was or was not liable for rent, and in which Y. the alleged purchaser of the tenure was held to have been wrongly made a party on the application of the tenant, it was held that Y. had no right to appeal against a decree given against X. praying for a declaration of her (Y.'s) liability for rent as purchaser from the tenant.(7) On the other hand, an appeal has been held to lie by defendants against whom specifically no decree was made, but whose defence

decree," *per* Spankie, J., at p. 504; and see pp. 507, 508, *per* Oldfield, J. This case dissents from Saroop Chunder Pal *v.* Dombal, 1 W. R. 72 (1864), which does not appear to be correctly decided.

(1) Musst. Pan Kooer *v.* Bhugwunt Kooer, 6 N. W. P. 19 (1873). See on this case Jumna Sing *v.* Kamar-un-nisa, 3 A. at pp. 154, 155 (1880).

(2) Jumna Singh *v.* Kamar-un-nisa, 3 A. 152 (1880).

(3) Sheshayyar *v.* Pappuvaradayangar, 6 M. 185 (1882).

(4) See also Doorga Mohaputtur *v.* Radha Mohun Mytee, 15 W. R. 586 (1871). Where a Hindu widow sued jointly with her sons her suit was dismissed, she did not appeal, and it was held that her sons who had no interest in the result of the suit were not competent to prefer a second appeal.

(5) Shama Soondaree Debia *v.* Digumbaree Debia, 13 W. R. 1 (1870); Musst. Pan Kooer *v.* Bhugwant Kooer, 6 N. W. P. 19 (1873); Ram Dass Lushkar *v.* Hurechar Mookherjee, 23 W. R. 86 (1874); Muttu Kumarappa *v.* Arumuga, 7 M. 145, 149 (1883). *Vide ante* "Decrees."

(6) *Vide ante* "Decrees."

(7) Musst. Oognee Chowdhrain *v.* Shaikh Keramutoollah, 17 W. R. 219 (1872); dist. in Krishna Chandra Goldar *v.* Mohesh Chandra Saha, S. A. Cal. H.C. 2310 of 1902, in which the plaintiffs had themselves added, the auction-purchaser alleging that he was a mere benamdar for the former tenants, and in which the Lower Appellate Court wrongly set aside an order which the appellant had obtained under sect. 108 of the former Code.

to the suit was necessarily disposed of by the decree.(1) In order to see what the decree really means, the Court may look not only into the judgment but into the pleadings. If the decree, although apparently, and so far as it goes, favourable to the defendants, is yet imperfect and not self-explanatory, and when read by the light of the record really unfavourable and may prove injurious to them, then the defendants, being aggrieved by it and having every interest to appeal, may do so.(2) In short, any person who being party to proceedings is injuriously affected by a decree passed therein is entitled to appeal.(3) And if this be shown, it is immaterial that the suit may have been dismissed as against him.

Ordinarily a case is decided upon issues between the plaintiffs on the one side and the defendants on the other. Thus a defendant, whether interested or *pro forma* only, cannot appeal against a co-defendant (4) unless the Court has dealt with the case at the hearing as raising not only a question between the plaintiff and defendants but also as between the defendants, in which case one of the defendants can appeal against the decree as between himself and the other defendant.(5) When the decree of the Lower Court proceeds on a ground common to all defendants the Appellate Court may, on appeal by one of the defendants against the whole decree, reverse the decree in so far as it affects the other defendants though they have not joined in the appeal.(6)

Appeal from final decree where no appeal from preliminary decree.

97. *Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.*

(1) Jamna Das *v.* Udey Ram, 21 A. 117 (1898); and see also Ram Golam *v.* Sheo Tahal, 1 A. 266 (1876), in which an appeal was held to lie on the ground that the respondent's suit should have been dismissed absolutely, and not in such a manner by negativing the defence, that the respondents were at liberty to come into Court again.

(2) Luchman Singh *v.* Mohan, 2 A. 497, 500, 501 (1879).

(3) See Mirhamdeo *v.* Nazerun, 6 C. 19 (1880), which was a case under sect. 28 of Act XI. of 1858 (Guardian and Wards), which provides that all orders shall be open to appeal under the rules in force for appeals in miscellaneous cases (*i.e.* appeals from orders under sect. 588 of the former Code). Similar language was used in that section and in ss. 540 and 584 of that Code.

(4) Gudadhur Bannerjee *v.* Musst. Mun Mohinee Dossia, 7 W. R. 366 (1867); Ramessur Ghose *v.* Azeem Joardar, 17 W. R. 373 (1872); Jumna Singh *v.* Kamar-un-nissa, 3 A. 125 (1880); Kashee Chunder Ray *v.* Sm. Doorga, 11 W. R. 410 (1869); but if he is allowed to do so he is estopped from asking that the decision may be set aside for want of jurisdiction, *ib.* A person cannot, however, appeal so as to affect another's rights under the decree unless he makes that other person a respondent: Ram Mohun Dey *v.* Kangalee Gopee, 20 W. R. 149 (1873): as to cross appeal, see Sched. I., O. XLI. r. 21; Goonomonee Dossia *v.* Parbutty Dassia, 10 W. R. 326 (1868).

(5) Soiru Padmanath *v.* Narayanrao, 18 B. 520 (1893).

(6) Dhutta Coor *v.* Paidigan Tam, 30 M. 470.

Preliminary decrees.—A decree according to the definition in sect. 2 may be either preliminary or final. And an appeal lies against a preliminary decree. It was, however, a matter of debate under the former Code whether in an appeal against the final decree, it was open to the appellant to question the correctness of the preliminary decree when no appeal had been preferred against it within the time allowed.(1) The Legislature has now determined the question in the negative by this section. The object of this section is to prevent preliminary questions being raised in the form of an appeal after the case has been decided on its merits.(2) But an aggrieved party can only appeal if a decree is extant in a formal shape.(3) Although there may be a preliminary finding, yet unless a formal decree is drawn up, there is no possibility of the appeal here contemplated.(4) There is no provision enabling an Appellate Court to dismiss an appeal against a preliminary decree on the ground that a final decree has been passed while that appeal was pending.(5).

Where in a suit for accounts the first Court recorded findings on preliminary issues and ordered accounts to be taken on their basis, but drew up no preliminary decree, and a Commissioner took the accounts, and on his report the suit was dismissed; it was held that under this section plaintiff was not barred from appealing and now objecting to the preliminary findings; it was held also that no party or pleader is bound to move the Court to draw a decree, and omission to do so cannot affect the right of appeal.(6).

[s. 575.] **98.** (*1*) *Where an* appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

Decision where appeal heard by two or more Judges.

(*2*) *Where* there *is* no such majority which concurs in a judgment varying or reversing the decree appealed *from*, such decree shall be *con*firmed:

Provided that *where* the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in

(1) Khadem Hossein *v.* Emdad Hossein, 5 C. W. N. 617 (1901), and cases there cited.

(2) Govind *v.* Vithal, 36 B. 536 (1912); 14 Bom. L. R. 560.

(3) Bai Divali *v.* Vishnav Manordas, 11 Bom. L. R. 1326 (1909); 34 B. 182; Sidhanath *v.* Ganesh, 14 Bom. L. R. 916 (1912); 37 B. 60.

(4) Sakharam *v.* Sadashiv, 15 Bom. L. R. 382 (1913); Krishnaji *v.* Maruti, 12 Bom. L. R. 762 (1910).

(5) Kuppusamy *v.* Ragmah Bai, 24 M. L. J. 190 (1912); following Ramaien *v.* Veerapuddian, 22 M. L. J. 217 (1911); dissenting from Mackenzie *v.* Narasingh, 36 C. 762 (1909). See also Khirodamoyi Dasi *v.* Adhar Chandra, 18 C. L. J. 321 (1913); Nistarini Debi *v.* Rai Mohun, 18 C. L. J. 214 (1913).

(6) Kaluram Pirchand *v.* Gangaram Sakharam, 38 B. 331 (1913); and see also Sakharam Vishram Purvo *v.* Sadashiv Balshet Lodha, 37 B. 480 (1913); following Bai Divali *v.* Vishnav Manordas, 34 B. 182 (1909); and distinguishing Govind Ramchandra *v.* Vithal, 36 B. 536 (1912); and see Ram Nath *v.* Basanta Narain, 18 C. L. J. 209 (1913).

opinion on a point of law, *they may state the point of law upon which they differ, and* the appeal *shall then be heard upon that point only by* one or more of the other Judges, and *such point* shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

Procedure on difference of opinion.—The result of this provision is as follows :—Where the Judges differ, but not on any question of law, there can be no reference and the decree is affirmed.(1) But there is an appeal under the Letters Patent (*vide post*). If the difference is on a point of law, then the Judges may or may not (2) refer the point of law. In the case of reference the judgment on the point referred is according to the majority of the Judges who first heard the appeal and the third Judge ; and in the second case (that is, where there is no reference under this section) there is an appeal under the Letters Patent. The effect of this section is to supersede the provision in the Letters Patent that in the case of disagreement the judgment of the senior Judge shall prevail,(3) a provision which is still in force as regards Letters Patent appeals,(4) but it does not take away the right of appeal. Therefore when the judgment of a Lower Court has been confirmed under this section by reason of one of the Judges of the Appellate Court agreeing upon the facts with the Court below, an appeal will lie against such judgment under the Letters Patent, notwithstanding the terms of this section.(5) When the Judges of a Division Bench have concurred in a final decree, the fact that they differed on one point is no ground for an appeal under the Letters Patent.(6) It was also held that where the Judge to whom an appeal was referred, concurred with one of the differing Judges as to the decree to be passed, but did not agree with him as to the reasons therefor, there was no further appeal to the High Court under clause (15) of the Letters Patent.(7) See now as to amendment next paragraph but one. Sect. 647 of the Code of 1877 was held to extend sect. 575 of that Code (which on the face

(1) Jehangir *v.* Secretary of State, 6 Bom. L. R. 135, 206 (1903).

(2) See Suraj Prosad *v.* Golab Chand, 27 C. 724, 762 (1900) ; 28 C. 517 (1900).

(3) Sri Gridhariji *v.* Purushotum Gossami, 10 C. 814, 816 (1884) ; Appaji Bhivrav *v.* Shivlal Khubchand, 3 B. 204 (1879) ; Narayanasami Reddi *v.* Osuru Reddi, 25 M. 548, 551 (1901) [dist. Husaini Begam *v.* Collector of Muzaffurnagar, 11 A. 176, 178 (1889), where it was held that the Code did not apply on the ground that there had been no hearing of the appeal, the Judges having differed on the point whether the appeal was time-barred].

(4) Lachman Singh *v.* Ram Lagan Singh, 26 A. 10 (1903).

(5) Sri Gridhariji *v.* Purushotum Gossami, *supra*, F.B. ; Mohendro Chandra Ganguli *v.* Ashutosh Ganguli, 20 C. 762 (1893) ; Lala Suraj Prosad *v.* Golab Chand, 28 C. 517 (1901) ; Deo Chand *v.* Hira Chand, 13 B. 449, 454, 458 (1889) ; Keshav Pandurang *v.* Venayak, 18 B. 355, 362 (1893) ; Narayanasami Reddi *v.* Osuru Reddi, 25 M. 548 (1901) ; Raghunath Prasad *v.* Jurawan Rai, 8 A. 105 (1886) ; Jadu *v.* Hari Kar, 17 C. L. J. 206 (1913).

(6) *In re* Hurban Sahay, 10 C. 108 (1883).

(7) Jehangir *v.* Secretary of State, 6 Bom. L. R. 230 (1904).

of it applied to appeals only) to applications to the High Court in its extraordinary jurisdiction.(1)

"**Of the majority.**"—The word "majority" obviously refers to appeals heard by more than two Judges,(2) and further the section does not say that any one or all of the differing Judges should be members of the Court when the appeal is decided. The decision has to be according to the opinions of the majority of all the Judges who have heard the appeal, including those who first heard it, that is, the opinions of the two differing Judges recorded when they agreed to refer have to be taken into account in determining the majority.(3)

"**They may state the point of law.**"—Under the last Code the words were "*the appeal* may be referred." The wording of the proviso has been altered; it now deals only with the decision on the point of law referred.(4) It was held that the law did not require the Judges to announce the agreement to refer in open Court. As soon as the Judges agreed to refer and informed the Chief Justice, the order of reference took effect though it might be drawn up afterwards.(5) It was held that where a Bench of two Judges hearing an appeal differed in opinion but delivered judgment of the Court without any reservation, they were not competent to refer the appeal.(6)

"**Shall then be heard.**"—It was held under the last Code (in accordance with the practice of the Calcutta and Bombay High Courts) that the third Judge to whom reference was made could sit and hear the appeal alone.(7) This is so now, the section stating that the appeal may be heard by one or more of the Judges. It was held under the last Code that when there was a reference under sect. 575 the whole appeal was open for argument and not only the point of law on which the Judges had differed in opinion.(8) This, however, is not so now, the section expressly stating that the appeal shall be heard upon the point of law referred only.

[s. 578.] **99.** No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of *any misjoinder of parties or causes of action or of* any error, defect or irregularity *in any proceedings in the suit*, not affecting the merits of the case or the jurisdiction of the Court.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

(1) Apaji Bhivrav *v.* Shiv Lal, 3 B. 204 (1879); In the matter of petition of Balaji Ranchaddas, 5 B. 680 (1881).

(2) Jehangir *v.* Secretary of State, 6 Bom. L. R. 131, 207 (1903).

(3) Ib. at p. 211.

(4) Mahammad Mehdi *v.* Sheoshankar, 14 C. L. J. 552, 566 (1911).

(5) Jehangir *v.* Secretary of State, 6 Bom. L. R. 135, 206 (1903).

(6) Lal Singh *v.* Ghana Sham, 9 A. 625, 643 (1887); distinguished in Jehangir *v.* Secretary of State, 6 Bom. L. R. 131 at p. 206 (1903).

(7) Jehangir *v.* Secretary of State, 6 Bom. L. R. 131, 207 (1903); diss. from Rohilkhand Bank *v.* Row, 6 A. 468 (1884); and see *per* Weir, J., in Subbayya *v.* Krishna, 14 M. 186 at p. 191.

(8) Seshadri *v.* Natavaja, 21 M. 179, 214 (1897).

Cure of technicality.—This section contains one of the most salutary rules of law which the Code provides. Its obvious aim is to prevent technicalities from overcoming the ends of justice and from operating as means of circuity of litigation which the old method of English Common Law Courts so much encouraged.(1) The principle which it enacts has also been recognized in other statutes, such as the Evidence Act,(2) Stamp Act,(3) and Valuation Act.(4) The section excepts two cases, viz., want of jurisdiction (5) of the Court to try the case and the affectation of the merits by irregularities committed in the exercise of an existent jurisdiction. The result is that in any other case than these, errors and irregularities form no ground for appeal, and an appeal alleging such error and irregularity only will be dismissed. The entertaining of a matter which lies out of the jurisdiction is quite a different thing from proceeding in a faulty or improper way in a matter which lies wholly within it.(6) An objection to jurisdiction, the validity of which is patent on the face of the proceedings, can be taken at any stage,(7) the section being unavailable to cure the defect, and the merits in all cases must be looked to.

Whether an error or irregularity does in any particular case affect the jurisdiction must be determined with reference to the facts of that particular case. The following decisions are only referred to as illustrations of the application of the general principle which the section embodies.

See as regards summoning witnesses: (8) irregular remand; (9) granting

(1) Sant Kumar *v.* Deosaran, 8 A. 365, 375 (1886).

(2) Act I. of 1872, sect. 169; De Souza *v.* Pestonji, 8 B. 408, 410 (1884); Surjya Moni *v.* Kali Kanta, 28 C. 37, 52 (1901); Katchikalyana *v.* Kachivijaya, 12 M. I. A. 495, 504 (1869); Womesh *v.* Chunder, 7 C. 293, 296 (1881) [second appeal]; Palakhdari *v.* Manners, 23 C. 179, 185 (1895).

(3) Sect. 34 (c); Ramasami *v.* Ramasami, 5 M. 220 (1882); Devachand *v.* Harachand, 13 B. 449, 458 (1889); Shiddappa *v.* Irava, 18 B. 737 (1893); Maulappa *v.* Baswantrao, 14 M. I. A. 24, 39 (1871).

(4) Sect. 11, Act VII. of 1889; Hamidunnissa *v.* Gopal, 24 C. 661, 665 (1897).

(5) The words "not affecting the jurisdiction" mean "not affecting the competency of the Court to try;" Matra Mundal *v.* Hari Mullick, 17 C. [illegible], 159 (1889), institution of suit in Court of higher grade, and see Nidhilal *v.* Mazahar, 7 A. 230, 234, 243 (1884); see as to the meaning of the term in this section, Mohesh *v.* Jamiruddin, 28 C. 324, 329, 331, 332 (1900), and notes to sect. 9, *ante*; see Amar *v.* Guru Prosunno, 29 C. 493 (1900); Venkatrav Raji *v.* Madhavrav, 11 B. 53 (1886); Chedalall *v.* Badullah, 11 A. 35, 39 (1888) [the scope of this section cannot be so extensive as to bring within the scope of adjudication matters not subject to it]; Augustine *v.* Medlycott, 15 M. 241, 246 (1892); Goura Chundra *v.* Vikrama Deo, 23 M. 367, 370 (1899); Krishnasami *v.* Kankashhai, 14 M. 183, 185 (1890); Rameshur *v.* Sheodin, 12 A. 510 (1889); Nusseerooddeen *v.* Lall Mahomed, 23 W. R. 234 (1870); Savitri *v.* Ramji, 14 B. 232 (1889).

(6) Combe *v.* Edward, 3 P. D. 103, 128.

(7) Nidhi Lall *v.* Mazahar, 7 A. 230, 243 (1884); Shri Sidheswar *v.* Shri Harihar, 12 B. 155, 157 (1887); see, however, also index, *sub voc.* "Jurisdiction."

(8) Bhagwat *v.* Debi Din, 16 A. 218 (1899).

(9) Debendra Nath Bhattacharjee *v.* Prasanna Kumar Chakravarti, 5 C. L. J. 328 (1907); Ram Gopal *v.* Raghu Nath, 2 C. L. J. 496 (1904); Trailakhya Ghose *v.* Kali Prosanna Mohini, 11 C. W. N. 380, 386 (1907) Debendro *v.* Prosonno, 5 C. L. J. 328, 333 (1907); Subba Sastri *v.* Balachandra, 18 M. 421 (1894); Mallikarjuna *v.* Pathareni, 19 M. 479 (1896); Nabin Chandra Tripati *v.* Prankrishna De, 41 C. 108 (1913) (an order of removal improperly made is an irregularity within meaning of this section).

an application under sect. 244 instead of sect. 623 of the last Code; (1) refusal *to grant adjournment; (2) hearing* an appeal as an appeal from an order and *not as an appeal from a decree*; (3) defective procedure in obtaining repre*sentation of minor; (4) omission* to verify inventory in application for *attachment*; (5) application to bring legal representative of deceased judgment-debtor on record; (6) surplusage in judgment; (7) omission of application under sect. 234 of last Code in proceeding under sect. 248 of that Code; (8) evidence recorded by one Judge and weighed by another; (9) consent of Collector to suit under sect. 539 of last Code defective in language; (10) defective signature to (11) or verification in (12) or filing (13) of plaint; reference to arbitration not in writing; (14) absence of the word "absolute" in an application for an order absolute for sale; (15) error in frame or valuation of suit; (16) recording evidence in language not that of the Court; (17) proceeding on a Sunday or other holiday; (18) refusal to issue commission; (19) an improper exercise of discretion under sect. 42 of the Specific Relief Act; (20) suit wrongly framed; (21) improper representation of Chief by political agent; (22)

(1) Nilratan *v.* Ram Rutton, 5 C. W. N. 627, 629 (1901).

(2) Surjyamoni *v.* Kalikanta, 28 C. 37, 52 (1900); s. c., 5 C. W. N. 195, 206.

(3) Pramatha *v.* Khetra, 29 C. 651, 654 (1902).

(4) Walian *v.* Banke Behari, 30 C. 1021, 1031 (1903); Munnu Lal *v.* Ghulam Abbas, P. C., 32 A. 287, 295 (1910); Hari Saran *v.* Bhubaneswaree, 15 I. A. 195, 200 (1888); Suresh *v.* Jagut, 14 C. 204 (1886) [dist. in Ganga Prosad *v.* Umbica, 14 C. 754 (1887)]; Hardi Narain Sahu *v.* Rud Perkash, 10 C. 626, 634 (1883); Bhaba Pershad *v.* Secretary of State, 14 C. 159, 163 (1886); Permeshar Das *v.* Bela, 9 A. 508 (1887); Bansi *v.* Ramji, 20 A. 370, 374 (1898).

(5) Nasir-un-nissa *v.* Ghafur-ud-din, 28 A. 244 (1905).

(6) Sivaminatha *v.* Vaidya Natha, 28 M. 466, 472 (1905).

(7) Ram Chunder *v.* Ram Jeebun, 14 W. R. 141, 142 (1870).

(8) Sham Lal *v.* Madhu Sudan, 22 C. 558, 562 (1895) [dist. in Amar *v.* Guru Prosunno, 27 C. 493 (1900)].

(9) Naranbhai *v.* Naroshankar, 4 Bo. H. C. R. A. C. J. 98, 100, 101 (1867). This suit was under the Code of 1859, which contained no such rule as that enacted by sect. 191 of the last Code: Jadu Rai *v.* Kanizak, 8 A. 576, 605 (1886).

(10) Sajedin *v.* Gour Mohun, 24 C. 418, 428 (1897).

(11) Basdeo *v.* Smidt, 22 A. 55, 60, 64 (1899); Rakhal Chandra Tenary *v.* Secretary of State, 10 C. W. N. 841 (1906).

(12) Rajit Ram *v.* Katesar, 18 A. 396, 400 (1896); Mohim *v.* Bungsi, 17 C. 580 (1889); Ram Komal *v.* Bank of Bengal, 5 C. W. N. 91, 98 (1900); Rakhal *v.* Secretary of State, 10 C. W. N. 841, 842, 843 (1906).

(13) Rakhal *v.* Secretary of State, *supra*.

(14) Shama Sein *v.* Abdul Latif, 4 C. W. N. 92, 83 (1899).

(15) Manchorji *v.* Thakor Das, 5 B. L. R. 389, 392 (1903).

(16) Param *v.* Achel, 4 A. 289 (1882); Kalidas *v.* Parjaram, 15 B. 309, 315; Rameswar *v.* Raj Kishore, 13 W. R. 325 (1870).

(17) Ratan Lall *v.* Farshi Bibi, 34 C. 396, 398, 11 C. W. N. 826; 34 C. 396, 398 (1907).

(18) Sheoram *v.* Thakur Prasad, 29 A. 562; s. c., A. W. N. 168 (1907), and on appeal, 30 A. 136 (1908); Unant Ram *v.* Protab, 16 W. R. 230 (1871).

(19) Akikumissa *v.* Rup Lal, 25 C. 807, 816 (1898); see also Bhagwan *v.* Debi Din, 16 A. 218, 220 (1894); S'ama Sundram *v.* Abdul Latif, 27 C. 61 (1899).

(20) Sarat Kumar *v.* Deo Saran, 8 A. 365, 375 (1886); see also Muhamad Mashuk *v.* Khuda Buksh, 9 A. 622, 624 (1887).

(21) Nubeen *v.* Stephenson, 15 W. R. 534, 535 (1871); see also Shivram *v.* Bhagirthi Bai, 6 B. H. C. R., A. C. J. 20 (1869).

(22) Venkatrao Raje *v.* Madhabrao, 11 B. 53, 56 (1886).

omission in application for attachment of immoveable property to verify inventory of property sought to be attached ; (1) the cases cited.

The section now expressly deals with the question of misjoinder, as to which there has been previously a diversity of judicial opinion ; (2) the Courts being thus given a larger discretion in dealing with irregularities in proceedings. And the word misjoinder in this section includes non-joinder.(3) This section regulates the procedure of the Appellate Court, and is therefore applicable to all appeals heard after this Act came into force, even though instituted before that date.(4) It has been held that where a lower Appellate Court refuses to refer the matter in dispute to the arbitrator named in the application, the High Court can set aside that order and the defect will not be cured by this section.(5)

APPEALS FROM APPELLATE DECREES.

100. (1) *Save where* otherwise *expressly* provided *in the body of* this Code or by any other law *for the time being in force,* an appeal shall lie to the High Court from *every* decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :– [s. 584.]

Second appeal.

(*a*) the decision being contrary to law or *to* some usage having the force of law ;

(*b*) the decision having failed to determine some material issue of law or usage having the force of law ;

(*c*) a substantial error or defect in the procedure *provided* by this Code or *by* any other law *for the time being in force,* which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed *ex parte.*

101. No second appeal shall lie except on the grounds mentioned in section *100.* [s. 585.]

Second appeal on no other grounds.

(1) Nasir-un-nissa *v.* Ghafur-ud-din, 28 A. 244 (1905).

(2) See Sarala Sundari *v.* Sarada Prasad, 2 C. L. J. 602, 608 (1904) ; Namasivayya *v.* Kadir Ammal, 17 168, 175, 176 (1893) ; Muthappa Chetty *v.* Muthu Paloni, 27 M. 80, 84 (1903) ; Goneshi Lal *v.* Khairath, 16 A. 279 (1894) ; Namasivayya *v.* Kadir, 17 M. 168 (1893) ; Mohima *v.* Atul, 24 C. 540 (1897) ; Ram Kanaye *v.* Prosunno, 13 W. R. 176 (1870) ; Upendra *v.* Tara Prasanno, 30 C. 794 (1903) ; Shunker *v.* Lala Shco Churn, 2 A. H. C. R. 443 (1870) ; Kalian Singh *v.* Gur Dayal, 4 A. 163 (1881) ; Behari Lal *v.* Kodu Ram, 15 A. 380 (1893) ; Varajlal *v.* Ramdat, 26 B. 259 (1901) ; Param *v.* Achal, 4 A. 289 (1882) ; Rup Narain *v.* Gopal Devi, 36 I. A. 103, 113 (1909) ; 13 C. W. N. 920.

(3) Yakanath *v.* Manakkat, 33 M. 436 (1909).

(4) Tej Mal *v.* Papayamma, 22 M. L. J. 225 (1911) ; Aiyava Mooppan *v.* Vellaya Nadan, 34 M. 55 (1910).

(5) Dutta *v.* Khedu, 33 A. 645 (1911).

"**Save where otherwise expressly provided.**"—The right of appeal is a substantive right of a very valuable nature, and the presumption is against the taking away of a substantive right of such a nature by mere implication, and where the Legislature wants to take it away it will do so expressly. The introduction of the word "expressly" gives effect to this view.(1) Cf. sect. 19 (3) and sect. 26 (3) Succession Certificate Act (2) (VII. of 1889); sect. 109 A. Cl. (3) Bengal Tenancy Act (VIII. of 1885) (3) sect. 153 Bengal Tenancy Act. As to suits for arrears of rent under Act X. of 1859, see note; (4) and as to appeal against the decision of the Court to which a reference was made under sect. 15 of the Land Acquisition Act (5) (X. of 1870), the decision of a District Court passed on appeal from the decision of a forest settlement officer,(6) the decision of the Political Agent of the Southern Maratha Country passed in regular appeal,(7) the decision of a District Court on appeal from an order of a Talukdari Settlement officer under sect. 16, 21 of Guzrat Talukdar's Act (Bombay Act VI. of 1888),(8) Chota Nagpur Tenancy Act (VI. of 1908, B. C.), sects. 87 and 264, sub-sect. (1), cl. (2),(9) see cases cited. As to special appeals against decrees on awards, see second schedule.

"**Shall lie.**"—As to who may appeal, see notes to sect. 96, *ante*. An appellant who was the respondent in the lower Court and did not appear in that Court is not debarred by reason of his non-appearance in that Court from preferring an appeal to the High Court.(10) In second appeals, the appellant has a right to question every order of the subordinate Courts leading up to the decree objected to, if it was made without the sanction of law.(11) No second appeal, it was held, lay from the last order passed on an application for review of a former order.(12) The question whether an appellant in second appeal can raise an objection to the legality of a remand order when he had not preferred any appeal against it,(13) is now dealt with by the second clause of sect. 105, *post*. Before the passing of Act VII. of 1905 a second appeal from the appellate decision of the District Judge of Sambalpur lay to the Court of the Judicial Commissioners of the Central Provinces, but now such an appeal lies to the

(1) Kamaraju *v.* Secretary of State, 11 M. 309, 312 (F.B.) (1888).

(2) Subba Rao *v.* Palamandi, 17 M. 167 (1893); Rama Reddi *v.* Rapi Reddi, 19 M. 199 (1895); Monmohini *v.* Khetter, 1 C. 127 (1875); s. c., 24 W. R. 362; In the matter of petition of Nanuk *v.* Nittya, 6 C. 40 (1880); and see Atta Sundari *v.* Srinath, 20 C. 641 (1893), as to orders for security against person obtaining a certificate.

(3) Ram Bishen *v.* Rajaram, 33 C. 832, 837 (1906); Rameswar *v.* Bhubaneshwar, 33 C. 837 (1906); s. c., 4 C. L. J. 138.

(4) Sadar Naik *v.* Serai Naik, 28 C. 532 (1901).

(5) Atri Bai *v.* Arno Poarna, 9 C. 838 (1883); s. c., 12 C. L. R. 409.

(6) Kamaraju *v.* Secretary of State, 11 M. 309, 312, 314 (1888).

(7) Nilowa *v.* Fakirappa, 6 Bom. H. C. R. 75 (1869). A decision of a District Court under the Land Acquisition Act is not a decree. It is an award and not appealable: Nathubai *v.* Manordas, 36 B. 360 (1911); 14 Bom. L. R. 325.

(8) Jamsang *v.* Goyabhai 16 B. 408, 412.

(9) Raghubur *v.* Sri Pratap, 39 C. 241 (1911); 16 C. W. N. 244.

(10) Kali *v.* Dhuman Joy, 3 C. 228 (1877); Ajudhia Prasad *v.* Balmukund, 8 A. 354 (1886).

(11) Runglall *v.* Takhun, 2 C. 114 (1876).

(12) Modhoomutty Debia *v.* Dhunput Singh, 13 W. R. 167, 168 (1870).

(13) Mohesh *v.* Jamiruddin, 28 C. 324, 328 (1900). See cases cited in sect. 105, *post*.

Calcutta High Court.(1) A special appeal on the grounds given in sect. 100 lies to the High Court from the decision of the Civil Judge at Vinchur.(2) When the lower Appellate Court passes separate decrees in appeals relating to the same matter between the same parties, against the same person, separate second appeals must be filed, though the decision in one second appeal will govern the rest.(3)

Scope of second appeal.—The grounds upon which a second appeal lies and the cases in which it is open to the High Court to interfere with the judgment of the lower Appellate Court, are those set out in sect. 100; and sect. 101 expressly enacts that no second appeal shall lie except on the grounds mentioned in the former section. The Privy Council have, in more than one case, pointed out the necessity of adhering strictly to the provisions of those sections.(4) And no Court in India or elsewhere has power to add to or enlarge those grounds.(5) No second appeal lies against a finding of fact. If the High Court goes through a case as a regular appeal it exceeds the statutory limits of its jurisdiction. It has no power to entertain a case except as an appeal from an appellate decree on the grounds stated in sect. 100, which deprives them of the right to review findings of fact unless these are vitiated with one or other of the errors or defects stated in this section.(6) The limitation to the power of Courts in a second appeal ought to be attended to and strictly followed, and the appellant ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact.(7) It cannot detract from the weight of concurrent findings of fact, that different Courts, in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations. A difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, must necessarily lead to one and the same inference.(8) The consent of parties will not give the High Court a jurisdiction which it does not otherwise possess; (9) so the High Court, even with the consent of the parties, cannot pronounce a decree on the facts in a special appeal.(10) On

(1) Balbhadra *v.* Musst Bhawani, 11 C. W. N. 956, 958 (1907); Baloram *v.* Mangta Das, 11 C. W. N. 959, 962 (1907).

(2) Ram Chandra Anandrao *v.* Pandu, 38 B. 340 (1913).

(3) Chathu *v.* Kunhamed, 11 M. 280, 282 (1887).

(4) Ananga Manjari *v.* Tripura Sundari, 14 C. 740 (1887); s. c., 14 I. A. 101, 110; Pertap *v.* Mohendra, 17 C. 291 (1889); s. c., 16 I. A. 233; Durga *v.* Jawahir, 18 C. 23 (1890); s. c., 17 I. A. 122; Ram Ratan *v.* Nandu, 19 C. 249 (1891); s. c., 19 I. A. 1; Kameshwar Pershad *v.* Amanutulla, 26 C. 53, 70 (1898); s. c., 2 C. W. N. 649, 662. And the same was held as regards the Act of 1853 (XVI.): Sevvaji Vijaya *v.* Chinna Nayana, 10 M. I. A. 151 (1864).

(5) Durga *v.* Jawahir, 17 I. A. 122, 127 (1890); s. c., 18 C. 23, 30; see also Nowbut *v.* Chutter Dharee, 19 W. R. 222, 223 (1873).

(6) Lukhi Narain *v.* Maharajah Jadunath, 21 I. A. 39, 45; s. c., 21 C. 504 (1893).

(7) Pertap *v.* Mohendra, 16 I. A. 239 (1889); s. c., 17 C. 291; Balkrishna *v.* Govind, 26 B. 617, 622 (1902); Luchman *v.* Puna, 16 C. 753, 755 (1889); Pandurang *v.* Anant, 5 Bom. L. R. 956, 969 (1903); Sevvaji Vijaya *v.* Chinna Nayana, 10 M. I. A. 151, 164 (1864); President Taluk Board Sevagunga *v.* Narayanam, 16 M. 317 (1892).

(8) Nilmoni *v.* Kirti Chunder, 20 I. A. 95, 97, 98 (1893); s. c., 20 C. 847.

(9) Kadambinee *v.* Doorga Churn, Marshall 4 (1862); Minakshi *v.* Subramanya, 11 M. 26, 35 (1887); s. c., 14 I. A. 160.

(10) Kadambinee *v.* Doorga Churn, *supra*.

second appeal the High Court have no power to deal with the sufficiency of evidence, they have only a right to entertain questions of law. Their duty being thus confined, it seems that when evidence has been wrongly admitted by the Court below the High Courts have, generally speaking, no right to decide whether the remaining evidence in the case other than that which has been improperly admitted is sufficient to warrant the finding of the Court below. This question of sufficiency of evidence cannot be decided without examining in detail that other evidence and determining, as a question of fact, whether it is sufficient of itself to warrant the lower Court's finding.(1)

In a special appeal, the general affirmation of a judgment below can only be on the points raised by the special appellant. By rejecting a special appeal, it does not follow that the High Court necessarily affirms all the other findings of fact or of law which the lower Appellate Court may incidentally come to.(2)

If the judgment and decree of the lower Appellate Court contain findings, which, though immaterial to the decision of the case and unnecessary for the Judge to decide, yet, as they form part of the judgment and decree, might give rise to the application of the doctrine of *res judicata*, the High Court, on second appeal, may order that such findings shall be expunged from the record.(3) There is no general rule that in every case when evidence is taken on a question of fact the parties are entitled to the decision of two Courts. Therefore when additional evidence is taken by the lower Appellate Court, the High Court cannot go into the facts as in the case of a first appeal.(4)

The Code provides for the manner in which the judgments of Courts are to be revised and corrected, and there is no other lawful mode by which decrees of Courts can be reviewed. Thus where a Court of Appeal directed a remand for a particular purpose, namely, to try the plea of payment, the Court of remand, it was held, should try that plea only and had no authority to try any other plea; if the Court proceeded to hear and determine the whole case over again, the decree passed by it should be revised except as to the plea referred to on remand.(5) A remand order conclusively determines the points of law involved in it, and these cannot be questioned on second appeal.(6) The High Court in special appeal may reverse the finding of the lower Appellate Court instead of remanding the case when it is found that the lower Appellate Court had not in any way disaffirmed the findings of the lower Court.(7) If the facts found by the lower Appellate Court are sufficient to enable the High Court to apply

(1) Womesh Ch. Chatterjee *v.* Chunder, 7 C. 293, 296 (1881).

(2) Shaikh Ahmed *v.* Must. Bandee, 15 W. R. 91, 92 (1871).

(3) Nanda Lal *v.* Bonomali, 11 C. 544 (1885).

(4) Gopal *v.* Jhakri, 12 C. 37 (1885); Balkishen *v.* Jasoda, 7 A. 765 (1885); Beni Pershad *v.* Nand Lal, 24 C. 98, 101 (1896).

(5) Syed Moltan Allee *v.* Sheo Buksh, Marsh 603 (1883). As to remand by mistake, see Mahomed Hashim *v.* Kalee Churn, 13 W. R. 91, 93 (1870).

(6) Ramkuvarbhai *v.* Damodhar, 6 Bom. H. C. R., A. C. J. 146, 148 (1868). As to decision of question of law on an appeal from an order of remand, see Gouri Shankar *v.* Karuna Bibee, 15 A. 413 (1893).

(7) Protap Narain *v.* Raghuram, 6 C. W. N. 185, 189, 190 (1901).

any principle of law to the appeal before them, then they may dispose of the case without any remand ; (1) but it was formerly held that if the lower Appellate Court omitted to record any finding upon a material part of the case, the second Appellate Court were not at liberty to draw any inference of fact from the evidence in the case, and should remand the case for retrial.(2) But see the new sect. 103, *post*.(3)

The above observations as to the limitation on the power to deal with facts must now be read subject to the new provisions contained in sect. 103, *post*.

In adjudicating on issues of fact the first process is to determine as to their existence or non-existence. In order to determine such an issue, inferences are necessarily drawn from other facts as to the existence or non-existence of facts in issue. Such inferences and the conclusions to which they lead are inferences and findings of fact.

An erroneous finding of fact is not an error or defect in procedure, though, as hereinafter pointed out, the Court may in adjudicating on facts vitiate its conclusions by errors of law and procedure. A simple finding of fact, however erroneous or unsatisfactory it may be, is not the subject of second appeal. There is no jurisdiction to entertain such an appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding.(4)

There are, however, decisions which held that if the judgment is not based upon the whole evidence upon the records, and the Judge does not take into consideration all the facts and circumstances of the case, then, there is an error in procedure ; (5) as also where the Judge had erroneously assumed a fact to

(1) Dwarkadas *v.* Adam Ali, 3 Bom. H. C. R., A. J. 105 (1866) ; Rampat Singh *v.* Balbhaddur, 6 C. W. N. 849 (P. C.) (1902).

(2) Dwarkadas *v.* Adam Ali, *supra*.

(3) And Wargankar *v.* Wadekar, 5 Bom. H. C. R., A. C. J. 194 (1868).

(4) Durga *v.* Jawahir, 17 I. A. 122, 127 (1890) ; s. c., 18 C. 23, 30 ; Shivabasava *v.* Sangappa, 29 B. 1, 12 (P. C.) (1904) ; s. c., 8 C. W. N. 875 ; Rummeezeeddeen *v.* Joymala, 15 W. R. 303 (1871) ; Radha *v.* Balkowar, 17 C. [illegible], F. B. (1890) ; Luchman *v.* Puna, 16 C. 75[illegible] (1889) ; Sevvaji Vijaya *v.* Chinna Nayana, 10 M. I. A. 151, 164 (1864) ; Fazal Karim *v.* Moula Baksh, 18 C. 448 (1891) ; s. c., 18 I. A. 67 ; Wise *v.* Heera Lal, 16 W. R. 150 (1871) ; Savi *v.* Punchanun, 25 W. R. 503 (1876) [omission to draw desired inference from conduct of the party]. Ram Ratan *v.* Nandu, 19 C. 249 (1891) ; s. c., 19 I. A. 1 ; Chamroo Singh *v.* Tota Roy, 19 W. R. 430 (1873) ; Kameshwar *v.* Amanatulla, 26 C. 53 (1898) ; s. c., 2 C. W. N. 649 ; Shirinbai *v.* Kharsedji, 22 B. 430 (1896) ; Meer Mahomed *v.* Forbes, 2 I. A. 1, 6 (1874) ; Lukhi Narain *v.* Jadu Nath, 21 C. 504 (1893) ; s. c., 21 I. A. 39 ; Ananda *v.* Parbati, 4 C. L. J. 198 (1906) ; and see cases cited in three preceding notes. In Bal Krishna *v.* Govind, 26 Bom. 617, 622 (1902), it seems to be suggested that the Court might interfere when the inference was wholly unreasonable.

(5) Shundabun Mohunt *v.* Shurut Chunder, 23 W. R. 160 (1875) ; Bhuput Rai *v.* Kali Rai, 6 C. W. N. 357, 359 (1901) ; Abdul Rohoman *v.* Bibee Sofy, 24 W. R. 293 (1875) ; Huro Prosad Roy *v.* Womatara Bibee, 7 C. 263, 267 (1881) ; Goluck Nath *v.* Kirti Chunder, 16 C. 645, 657 (1889) ; Dena Nath Bannerjee *v.* Hari Dasi, 11 C. 499 (1885) ;

exist which does not exist—as where a Judge came to a conclusion on the assumption that a document had not been filed whereas it was on the record.(1) or believes there is no evidence of a fact when there is,(2) or proceeds upon a misconception of the facts proved; (3) or bases his judgment on evidence which is not on the record.(4)

The last four cases of misconception offer no difficulty. This cannot, however, be said as to the first case. There is no doubt as to the principle, that in judging on the facts the Court must consider all of them, otherwise there is not a proper procedure in investigation. The difficulty, however, is in establishing its violation by showing in any particular case that a fact has not been considered even where it may not have been expressly mentioned in the Judgment. If the fact was present to the Judge's mind, but he has either not given it weight, or the degree of weight which it is alleged he should have done, it is sometimes loosely said that the fact has not been considered. But this case is to be distinguished from those above mentioned, and is really tantamount to an appeal as to fact. The line distinguishing the two classes of cases is not infrequently a narrow one, and has perhaps in some cases been overpassed.

In, however, the actual determination of fact there may be error of law. The High Court may consider whether the procedure adopted by the lower Appellate Court in dealing with the facts is proper or not (5) Thus its conclusion may be come to in the absence of all evidence,(6) or be based on

Kooldip Narain *v.* Rummon Singh, 22 W. R. 278 (1874); Ram Das Saha *v.* Mon Mohun Dass, 7 B. L. R. App. 4 (1871); Nowab Khan *v.* Rughoo Nath Das, 20 W. R. 474 (1873); Mohunt Deo *v.* Moonshee Mahomed, 24 W. R. 300 (1875) [disregarding exclusively one side of the case]; Kisto Churn *v.* Dwarka Nath, 10 W. R. 32 (1868); Mt. Roop Narainee *v.* Rissal, 24 W. R. 119 (1875); Moizzunnissa *v.* Mooraree Dhur, 22 W. R. 314, 316 (1874); Appa Kalga *v.* Mallu Mowna, 16 B. 477 (1891); Lallah Jha *v.* Tullebmatool, 21 W. R. 436 (1874) [looking merely to appearance of document and disregarding oral evidence as to it]; Shiboo Soonduree *v.* Chunder Kant Ghose, 21 W. R. 217 (1874). In Kooldeep *v.* Rummon, 22 W. R. 278 (1874); Ram Das *v.* Monmohini, 7 B. L. R. App. 4 (1871), a remand was ordered, as also in Shagur *v.* Mohamaya, 25 W. R. 25 (1875), where the inquiry was held to be inadequate. In Narayana *v.* Muni, 10 M. 363, 365 (1886), the Judge overlooked a postscript in a document, and he was asked to take this fact into consideration and to submit a revised finding.

(1) Mohunt Hur Gobind *v.* Joya Roy, 24 W. R. 146 (1875); Moizzunnissa *v.* Mooraree Dhur, 22 W. R. 314, 316 (1874).

(2) Heera Lal *v.* Kalee Das, 23 W. R. 65, 66 (1874).

(3) Kali Prasad Tewari *v.* Prahlad Sein, 2 B. L. R., P. C. 120, 127 (1869); Goluck *v.* Anant, 25 W. R. 38 (1875) [where issue was taken for granted]; Kooldeep *v.* Rummon, 22 W. R. 278 (1874); Ram Das *v.* Moumohini, 7 B. L. R. App. 4 (1871); Nowab Khan *v.* Rughoo Nath, 20 W. R. 474 (1873), in which last four cases there was a remand.

(4) Moni Lal *v.* Uma Charan, 19 C. L. J. 541 (1914).

(5) Protap Narain *v.* Raghurani, 6 C. W. N. 185, 189, 190 (1901).

(6) That is, where, to use an English expression, "there is no evidence to go to the jury," because that does not arise a question of fact such as arises on the issue itself, but a question of law for the consideration of the Judge. Anangamanjari *v.* Tripurasundari, 14 I. A. 101, 109, 110 (1887); s. c., 14 C. 740, 747; Shivabasava *v.* Sangappa, 29 B. 1, 12; s. c., 8 C. W. N. 875 (1904); Hemanta Kumari *v.* Brojendra, 17 I. A. 65, 69; s. c., 17 C. 875, 882 (1890) [it is an error or defect in procedure]; Beharee Lal *v.* Sree Ram Roy,

what is not legal evidence,(1) or on facts to the exclusion of other facts rejected but admissible,(2) or on personal knowledge of the Judge,(3) or if there be admissible evidence the Court may err in law in its mode of dealing with it. *In such case if the dealing involves the misapplication of principles* of law such erroneous mode vitiates the conclusion of fact which follows it.(4) So the Court may decide the facts upon a wrong view as to the onus of proof,(5) and deal improperly with the presumptions which the law raises,(6) or may dispose of a suit on a case not raised by the parties,(7) or upon irrelevant matters or issues,(8) or omit to consider evidence on the ground that the fact to be proved ought to be proved by evidence of another kind

20 W. R. 259, 261 (1873) [assumption, without evidence, of identity of lands]; Bibee Ameerun *v.* Shaikh Cherag, 24 W. R. 343, 344 (1875) [main fact on which credence given to the defendant had no existence]; foll. in Bhupendra *v.* Peary, 17 C. W. N. 37 (1912); Damoo *v.* Daya Coomaree, **25 W. R.** 101 (1876) [decree based on **plan neith**[illegible] admitted nor proved]; **Himmut**[illegible] Nyamutoollah, **23 W. R. 250 (187**[illegible] tion without evidence]; **Peary**[illegible] Kumar, **14** C. W. N. 83 (1906); **Bidhu Mukhi** *v.* Kefyutullah, 12 C. 93, 95 (1885); **Kirtee**-bash *v.* Ramdhun, B. L. R., **F. B. 658, 661** (1867) [acceptance of rent receipts without proof]; Anund Chunder *v.* Ramessur, 25 W. R. 50 (1875) [pronouncing against unrebutted case]; Surbessur *v.* Arizollah, 8 B. L. R. App. 78 (1872); Poorno *v.* Chunder, 21 W. R. 171, 172 (1815); Vishvanath *v.* Dhondappa, 17 B. 475, 482 (1892); Kali Prasad Tewari *v.* Prahlad Sein, 2 B. L. R. 120, 127 (P. C.), (1869) [substitution of speculation for proof foll. in Mahomed Aizaddi *v.* Shaffi Mullah, 8 B. L. R. 26 (1871)].

(1) Guru Das Day *v.* Sambhu Nath Chuckerbutty, 3 B. L. R., A. C. J. 258 (1869); Chunder [illegible] Soolaminee, 9 W. R. 517 (1868); Shookra [illegible] Ram Lal, 9 W. R. 248 (1865) [admissibili[illegible] f secondary evidence]; Surnomoyee *v.* Lut[illegible]meeput, 9 W. R. 338, 342 (1867); Mohun *v.* Kidge, Marshall, 381 (1863); Palakdhari Rai *v.* Manners, 23 C. 179, 186 (1895); Hunsa Koer *v.* Sheo Gobind Rawat, 24 W. R. 431 (1875); Rohee Lall *v.* Dindoyal Lall, 21 W. R. 257 (1874); Desai Ranchod Das *v.* Rawal Nathulibhai, 21 B. 110, 115 (1895); Kisto Churn *v.* Dwarkanath, 10 W. R. 32 (1868); Mt. Roop Narainee *v.* Rissal, 24 W. R. 119 (1875); Boidonath *v.* Russick, 9 W. R. 274 (1868); Puran *v.* Grish, 9 W. R. 450 (1868) [in these last two cases a remand was ordered]; Nowab Khan *v.* Rughoo Nath, 20 W. R. 474 (1873) [the High Court sent for documents which were not in evidence before the first Court].

(2) Shaikh Charoo *v.* Zobeida Khatoon, 25 [illegible] 54 (1875); Mathoora *v.* Ram Ruchya, [illegible] 482, 484 (1869); Mohim Chandra [illegible]litara Debya, 11 C. W. N. 1028 (1907); [illegible] to rejection it becomes necessary to reconsider the whole case a remand may be ordered: Shaikh Charoo *v.* Mt. Zobeida, 25 W. R. 54 (1875).

(3) Sooraj Kant Acharji *v.* Khoodee Narain, 22 W. R. 9 (1874); Lakshmaya *v.* Sri Raja Varadaraja, 36 Mad. 168 (1913); 17 C. W. N. cclii. (but a Judge may use his general knowledge).

(4) See *per* Phear, J., in Mohur Matoon *v.* Umatum, 18 W. R. 499, 500 (1872).

(5) Mahadevappa *v.* Basagouda, 7 Bom. L. R. 258, 260 (1905).

(6) Surnomoyee *v.* Lutchmeeput, 9 W. R. 338, 342 (1867); Nilatatchi *v.* Venkatachala, 1 M. H. C. R. 131, 134 (1862).

(7) Shivabasava *v.* Sangappa, 29 B. 1 (1904); Gopal *v.* Tincouree, 19 W. R. 348 (1873); Akjoo Bibee *v.* Koonjo, 19 W. R. 287, 288 (1873); Meher Banoo *v.* Kiramut, 22 W. R. 402 (1874) [findings inconsistent with pleadings of parties].

(8) Ram Soondur *v.* Kalee Pershad, 19 W. R. 267 (1873); Palamyandi *v.* Muthusami, 2 M. H. C. R. 441 (1865); cf. Vishnu *v.* Gonesh, 21 B. 325 (1895); Palakdhari *v.* Manners, 23 C. 179, 185, 186 (1895).

than that produced,(1) or misdirect itself as to the nature of proof required by law, as for instance in regard to the elements of a custom which has the force of law.(2) or misapprehend the real issue to be determined (3) and the legal position of the parties.(4)

Further, if it be assumed that no error of law has been committed in the mode of dealing with the facts, that is in determining their existence or non-existence; from the facts so found inferences may be drawn as to the existence of certain matters which are the subject of legal definition. In such a case there is a legal inference from the facts found. Though the finding of fact cannot be questioned, an appeal Court may accept the finding of fact and question the accuracy of the legal inferences therefrom, for this is a matter of law and not of fact. The soundness of conclusions involving matter of law may be questioned.(5) In such a case it is not any fact which is in question, but the soundness of the conclusions of law drawn from those facts. Thus upon the question whether there is a binding agreement a Court may find certain facts and go on to hold upon those facts that they constitute in law an acceptance of the agreement. The finding as to the facts which are the basis of the inference cannot be questioned though the inference, being a legal inference on the facts found, may be.(6) If the legal conclusion derived from the facts found is not consistent with settled principles of law, there is an error of law.(7) So acquiescence is not a question of fact but of legal inference from the facts found;(8) and so is estoppel;(9) and the question of the proper custody of documents,(10) though whether it is credible whether documents were in a particular custody or whether the facts rebut the presumption of authenticity are questions of fact.(11) Construction of a document involves both the meaning of the words and their legal effect, or the effect which is to be given to them. The first is a

(1) Huro Prosad Roy *v.* Womatara Debee, 7 C. 263, 267 (1881); see Ram Dhun *v.* Ram Narain, 11 W. R. 311 (1869), where the suit was dismissed on the sole ground that the plaintiff did not prove his purchase by calling his vendor; but see as to this judgment of Markby, J.

(2) Ram Prosad Das *v.* Rajo Koer, 5 C. L. R. 94, 95 (1879); Desai Ranchod Das *v.* Rawal Nathulibhai, 21 B. 110, 115 (1895).

(3) Chunder Monee *v.* Madhoo, 23 W. R. 166 (1875).

(4) Doorga Churn *v.* Shamanund, 12 W. R. 376 (1879).

(5) Ramgopal *v.* Shama Khaton, 20 C. 93, 99 (1892); s. c., 19 I. A. 228, 231; so in Rampal Singh *v.* Balbhaddar, 6 C. W. N. 849, 854, 855 (1902), it was held that the Appellate Court did not reverse any finding of fact but merely applied the proper law to the facts found. Nilmoni *v.* Kirti Chunder, 20 I. A. 95, 97, 98; s. c., 20 C. 847 (1893) [misapplication of legal principles to facts found]. Krishna Kishore *v.* Mir Mahomed, 3 C. W. N. 255, 260 (1897); Sivvaji Vijaya *v.* Chima Nayana, 10 M. I. A. 157, 164; Chockilingam *v.* Mayandi, 19 M. 485, 493 (1896); Rudr Prasad *v.* Baij Nath, 15 A. 367 (1893); Raja Ram *v.* Ganesh Hari, 21 B. 91, 94, 96 (1895).

(6) A finding as to the existence of an implied contract has been held to be one of facts: Seriparapu *v.* Mallikarjuna, 17 M. 43 (1893).

(7) Eshan *v.* Shama Churn, 11 M. I. A. 7, 23 (1866).

(8) Lala Beni Ram *v.* Kundan Lal, 21 A. 496, 504; s. c., 26 I. A. 58, 65; Ananda *v.* Parbati, 4 C. L. J. 198 (1906).

(9) Narsing Das *v.* Rahimanbhai, 6 Bom. L. R. 140, 141 (1904).

(10) Sharfudin *v.* Govind, 27 B. 452, 463 (1902); Durga *v.* Jawahir, 18 C. 23 (1891).

(11) Ib.

question of fact and the second of law.(1) Misconstruction of a document which is the foundation of a suit is ground for appeal.(2) The question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law or a mixed question.(3)

So again on the question of good faith a finding that certain vendors intended by a transfer to defeat their creditors and that their transferee was aware of an impending execution against them are as findings of facts conclusive. But the conclusion drawn therefrom that the purchase was not in good faith is an inference of law which is capable of correction in appeal.(4) So though a Court of second appeal must accept the facts as found, the conclusion to be drawn whether, assuming such facts to be true, a sale did or did not bind persons is a matter with which it is free to deal.(5) A notice to quit must be reasonable, and this is a question of fact, but it is a question of law whether there is evidence on which the Court can properly arrive at the conclusion of fact.(6) So a conclusion from the fact of one person carrying on business and appearing to be the only partner that there could be no other partner was held erroneous as amounting to an assertion that in no case could there be a dormant partner.(7) Where an Appellate Court had found that a grant of pasture-land held under the special law relating to land tenure in Kumaun was inconsistent with the general wishes and well being of the village community, it was held that this was a finding of fact and not to be disturbed by second appeal.(8)

Lastly, the finding may not be conclusive because of the absence of reasons for it which are required to constitute a legal judgment.(9) But the Court has

(1) *Per* Lindley, L.J., in Chatenay *v.* Brazilian Submarine Telegraph Co., 1 Q. B. 79, 85 (1891); and see Lala Fateh Chand *v.* Rani Kishen, 39 I. A. 247 (1912); 34 A. 579; 16 C. W. N. 1033 (P. C.); 14 Bom. L. R. 1090, construction of documents is a question of law which may be considered in second appeal; and Barhamdeo *v.* Ram Narain, 19 C. L. J. 182 (1914), construction of sale-certificate.

(2) Nowbut Singh *v.* Chutter Dharee Singh, 19 W. R. 223 (1873); and see Ganpat Marwari *v.* Balmakund Behara, 18 C. L. J. 548 (1913); Rudr Prasad *v.* Baij Nath, 15 A. 367, 371 (1893); Nilmoni *v.* Kirti Chunder, 20 I. A. 95, 97, 98; s. c., 20 C. 847 (1893); Ramgopal *v.* Shama Khaton, 20 C. 93 (1892); Chockalingam *v.* Mayandi, 19 M. 485, 493 (1896); Mookhya Hurruckraj *v.* Ram Lal Gomastha, 14 W. R. 435 (1870) [where the effect of a sale certificate was wrongly limited]. Doorga Churn *v.* Shamanund, 12 W. R. 376 (1869); Mt. Ohedoonnissa Bibee *v.* Bepin Behary Dutt, 1 C. W. N., L. C. XVII. (1896); it was held that the question what properties passed under a sale certificate was not a question of law; and in Barhamdeo *v.* Ram Narain, 19 C. L. J. 182 (1914), it was held that this was a mixed question of fact and law.

(3) Luchmeswar Singh *v.* Sheikh Manowar, 19 I. A. 48, 56; s. c., 19 C. 253, 263 (1891); see Raja Ram *v.* Ganesh Hari, 21 B. 91, 94, 96 (1895).

(4) Ishan *v.* Bishu, 24 C. 825, 829; s. c., 1 C. W. N. 665, 669 (1897); see also Luchmeswar *v.* Manowar, 19 C. 253 (1891); Ramgopal *v.* Shama Katon, 20 C. 93 (1892).

(5) Mafuzzul Hossain *v.* Barid Sheikh, 4 C. J. 485, 489; s. c., 11 C. W. N. 71 (1906).

(6) Bidhumukhi *v.* Kefyutullah, 12 C. 93, 95 (1885).

(7) Shoobul Chunder *v.* Koylash Chunder, 14 W. R. 23 (1870).

(8) Gita Ram *v.* Kirpa Ram, 36 A. 257 (1914).

(9) Purmeshwar *v.* Brije Lal, 17 C. 257 (1889); Kamat *v.* Kamat, 8 B. 368 (1884); Ningappa *v.* Shivappa, 19 B. 323, 326 (1894); Purshotam *v.* Durgoji, 14 B. 452, 454 (1890); Pandurang *v.* Anant, 5 Bom. L. R. 956 (1903); Raghunath *v.* Nitu, 9 B. 452, 454 (1883); Sheikh Goburdhun *v.* Sheikh Sadhoo, 1 W. R. 244 (1864).

refused to interfere simply because the Judge did not remark upon every portion of the evidence that he excluded from his consideration,(1) as also where the judgment was sufficiently intelligible to enable the High Court to deal with the case.(2)

Where a Judge states as a fact that an admission was made before him by one of the parties to the suit, the High Court cannot in special appeal inquire whether the Judge was right or wrong in making that statement. If he is wrong, the aggrieved party's remedy is by a review of judgment in the Court below and not by special appeal to the High Court. If the Judge erred in supposing the alleged admission to have been made, the party's proper course is at once to bring the error to the notice of the Judge and to apply for a review of his judgment. If he does not do so, the High Court cannot, it was said, assist him in special appeal.(3)

"From every decree."—As to the meaning of the term "decree," see notes to sects. 2, 96 and 97, *ante*.(4) An order rejecting or dismissing an appeal as out of time is a decree, and a second appeal lies.(5)

Appeal as to costs.—See notes to sects. 35 and 96, *ante*.

"Contrary to law."—The words of the last Code were "*some specified*" law: which term was held to mean specified in the memorandum of appeal and was not limited to specified statute law. The present section omits the word "specified" as being redundant. And now, as heretofore, law is not to be limited in its meaning to statute law.(6) This clause generally applies where the Court wrongly applies the law to facts correctly (that is without error or defect in the procedure) found (7), or fails to apply or refuses (8) to apply the law to the case; though of course there may be cases falling within more than one or all of the clauses. A pure point of law which does not depend upon evidence may be dealt with by the Court of Appeal, though no issue was raised as regards it.(9) Objection as to the necessity

(1) Devaji *v.* Godadbhai, 2 B. H. C. R. 28, 32 (1864).

(2) Shah Jughun *v.* Shaikh Muksood Ali, 6 W. R. 97 (1866). See Devendra Nath *v.* Annada Hadi, 19 C. L. J. 545 (1914), judgment set aside on second appeal because ambiguous.

(3) Bykuntnath *v.* Prosunnomoyee, 5 W. R. 196 (1866).

(4) As to sect. 372 of the Code of 1859, see Maharani Indrajit *v.* Chokowri, B. L. R. F. B. 1 (1863).

(5) Saminatha *v.* Venkata Subha, 27 M. 21 (1903); s. c., 13 Mad. L. J. 300, and cases there cited, and Phoolharee *v.* Bisheshwar, 3 Agra 301 (1868); but see Raghoonath *v.* Rajmohun, 7 W. R. 296 (1867); in which, however, Gopeenath *v.* Gopeenath, 6 W. R. Misc. 106 (1866), was not referred to.

(6) Ram Gopal *v.* Shama Katon, 20 C. 93, 99, 100; s. c., 19 I. A. 228; Durga Chowdhurani *v.* Jawahir Sing, 18 C. 23; s. c., 17 I. A. 122, 124 (1891); Achha Mian *v.* Doorga Churn Law, 25 C. 146, 151 (1897).

(7) See Hari Mohun Misser *v.* Sarindra, 11 C. W. N. 794, 800 (1907); Ram Bahadur Pal *v.* Ram Shankar, 27 A. 685 (1905); Ajodhya Nath Chowdhury *v.* Keshab Chandra, 11 C. W. N. 1127 (1907); Hari Mohun Misser *v.* Surendra Narayan Singh, 6 C. L. J. 19 (1907); s. c., 11 C. W. N. 794.

(8) Ram Bahadur *v.* Ram Shankar, 27 A. 688, 691 (1905).

(9) Bhim Singh *v.* Sarwan Singh, 16 C. 33, 36 (1885); but see Lalla Jawahir *v.* Court of Wards, 27 W. R. 214 (1872).

of notice to quit may be taken in second appeal.(1) There is no appeal upon the question of the credibility of witnesses when the lower Court's views are based upon inferences from the facts proved or appearing, whether the reasons given be right or wrong.(2) While the misconstruction of a document, the foundation of a suit, is a ground of appeal, there is none because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of or effect to be given to it;(3) nor is there properly such a thing as the construction of a deposition of a witness. The word as so used means what the Court thinks is proved by it, and there is no appeal on this point.(4) A misreading or misconception of the evidence is no ground for interference in second appeal.(5) The *bona fides* of the parties is a question of fact.(6) A special appeal does not lie because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. For instance, a writing supposed to contain an admission may be put in as part of the evidence, but a mistake in its meaning is not a misconstruction of a document upon which a special appeal will lie if it is connected with other evidence affecting its construction. The misconstruction of a document which is the foundation of a suit, and which is in the nature of a contract or a document of title is a ground of a second appeal.(7) But to discredit witnesses merely for general reasons not affecting the particular credit of any individual deponent is to commit an error of law which can be subject of a special appeal.(8) Thus where the evidence for the plaintiff was disbelieved because his witness was a relative of his, there was (it was held) an error of law based upon a total misconception of the position of the plaintiff's lessor and substantially affecting the decision of the case on

(1) Dodhu *v.* Madhavarao, 18 B. 110, 113 (1893), and cases there cited; see also Krishnaji *v.* Antaji, 18 B. 256, 259 (1893); Ganoo *v.* Shri Sidheshwar, 26 B. 360, 362 (1900). But see Ram Nuffer *v.* Dhol Gobind, 1 C. L. R. 421, 423 (1878), where tenant denied landlord's title.

(2) Dwarka Nath *v.* Muddon, 6 W. R. 292 (1866); Mt. Putrahu *v.* Sheo Pershad, 24 W. R. 61 (1875) [cf. Juggernath *v.* Mahomed Mokam, 17 W. R. 161 (1872)]; Sheo Dyal *v.* Hodgkinson, 24 W. R. 342 (1875) [Ameen's report]. It is for the lower Appellate Court to determine the amount of credit to be attached to particular proof: Muthra Dass *v.* Magh Singh, 2 A. H. C. R. 207, 208 (1870); Munee Dutt *v.* Campbell, 11 W. R. 278, 280 (1869); Dhoondh Bahadoor *v.* Priag Singh, 12 W. R. 314 (1872); Oomut Fatima *v.* Bhujo Gopal, 13 W. R. 50, 57 (1870).

(3) Nowbut Singh *v.* Chutter Dharee Singh, 19 W. R. 223 (1873); Luchman *v.* Kanhya Lal, 22 I. A. 51, 57; s. c., 22 C. 609 (1894); Lukhi Narain *v.* Maharajah Jadu Nath, 21 I. A. 39, 44, 46; s. c., 21 C. 504 (1893); Rudr Prasad *v.* Baij Nath, 15 A. 367, 371 (1893); Buzlul *v.* Satis, 15 C. W. N. 752 (1911).

(4) Himmut Ali *v.* Nyamutoollah, 23 W. R. 250 (1875).

(5) Ananda *v.* Parbati, 4 C. L. J. 198 (1906); referring to Hassan Kuli *v.* Nakshedi, 33 C. 200 (1905); Govind *v.* Vithal, 20 B. 753 (1895); Issur *v.* Satis, 30 C. 207; s. c., 7 C. W. N. 126, 129 (1902).

(6) Bhuban *v.* Sowdamini, 5 B. L. R. App. 59, 60 (1870).

(7) Nowbut *v.* Chutter Dharee, 19 W. R. 222, 223 (1873); but see Lalla Imrit Lall *v.* Mahomed, 18 W. R. 447, 449 (1872); Buzlul *v.* Satis, 15 C. W. N. 752 (1911).

(8) Sheo Purshun *v.* Brun Pandey, 24 W. R. 251, 252 (1875); see also Juggurnath *v.* Mahomed Mokeem, 17 W. R. 161 (1872); Mackenzie *v.* Jawahir, 25 W. R. 137, 138 (1876).

the merits; (1) as also where a witness was disbelieved not for anything he said nor for anything deposed to in the evidence of the other witnesses, but simply because he was a *patnari* (2) or by caste a weaver,(3) or believed because he was a cultivator.(4)

Discretion when used by a Court must be judicial and not arbitrary, and where a lower Appellate Court has exercised its discretion in a sound and reasonable way, after a careful consideration of the facts, and not arbitrarily, the second Appellate Court has no power to interfere.(5) But the discretion of a Court is liable to review or appeal where it is not judicial but arbitrary and perverse, caused by caprice or prejudice, or where the discretion is exercised without any proper legal material to support it.(6) It has been held that there may be the exercise of so bad a discretion as to amount to an irregularity in law, and on this ground the High Court has looked into the grounds upon which the Lower Appellate Court has admitted an appeal after the lapse of the period allowed by the Limitation Act.(7) But probably the correct rule in such a case or its converse is that the High Court will not interfere if the discretion is judicially exercised, even though the course ultimately adopted be not that which the High Court itself would have taken.(8)

The following have been considered matters of discretion:—Refusal to summon plaintiff at instance of defendant; (9) passing further orders in regard to plaintiff who disregards Court's summons to attend; (10) refusal to add parties; (11) disallowing additional evidence; (12) or interest; (13) directing

(1) Huro Chunder *v.* Gobind, 17 W. R. 255, 256 (1872).

(2) Mackenzie *v.* Jawahir, 25 W. R. 137, 138 (1876).

(3) Juggurnath *v.* Mahomed Mokeem, 17 W. R. 161 (1871).

(4) Ib.

(5) Ram Bahadur *v.* Ram Shankar, 27 A. 688, 691 (1905); Tulsee *v.* Gajraj, 25 A. 71, 72 (1902); see *infra*, Ranchodji *v.* Lallu, 6 B. 304, 307 (1882); Parvati *v.* Ganpati, 23 B. 513, 517 (1898); Hamid Ali *v.* Gayadin, 26 A. 327 (1904).

(6) Ranchodji *v.* Lallu, 6 B. 304, 307 (1898); Ram Bahadur *v.* Ram Shankar, *supra*; Tulsee *v.* Gajraj, *supra*.

(7) Mowri Bewa *v.* Surindra, 10 W. R. 178 (1868); s. c., 2 B. L. R. (A. C.), 184 note; Chunder *v.* Boshoon, 8 C. 251, 253 (1881).

(8) Tulsee *v.* Gajraj, 25 A. 71 (1902); Hamid Ali *v.* Gayadin, 26 A. 327 (1904); Ranchodji *v.* Lallu, 6 B. 304 (1882)

(9) Indro Lochun *v.* Grish, 10 W. R. 134 (1868).

(10) Narain Das *v.* Mahtab Chand, 10 W. R. 174 (1868); Kisto *v.* Gobind, W. R. 133 (1864).

(11) Gyaram Seal *v.* Issur Chunder, 2 W. R. 158 (1865); Poran *v.* Sham Chand, 1 W. R. 220 (1864); Juggodumba *v.* Haran Chunder, 10 W. R. 108, 110 (1868); s. c., 6 B. L. R. 526; see Karman *v.* Misri Lal, 2 A. 904 (1880).

(12) Ram Piari *v.* Kallu, 23 A. 121 (1900); see also Beckwith *v.* Kishto Jeebun, Marsh 278 (1863); Golam Mukdoom *v.* Hafeezoonissa, 7 W. R. 484, 490 (1867); Mohesh *v.* Soshee, 6 W. R. 196 (1866); Radhanath *v.* Khellut, 17 W. R. 558 (1872); Kulpo Singh *v.* Thakoor Singh, 15 W. R. 429 (1871); Rakhal *v.* Protap, 12 W. R. 455 (1869); though a refusal to exercise the discretion vested would be an error of procedure. Ram Piari *v.* Kallu, *supra*, where again the Court, though not satisfied that evidence is necessary, allows it, the High Court may interfere, Hafiz Abdul *v.* Sri Kissen, 11 C. 139, 142, 143 (1884); Durga *v.* Jai Narain, 33 A. 379 (1911).

(13) Poresh Nath *v.* Kisto Mohan, 3 B.L.R. App. 105 (1869).

local investigation; (1) arranging for execution of joint-decree; (2) refusal of petition to amend plaint; (3) mode of execution; (4) dismissal of suit for specific performance for delay; (5) refusal to pass an order allowing an appeal by a father to stand as an appeal by his son who had since come of age; (6) refusal to punish a recusant witness.(7)

When appeals in analogous cases are pending in a Superior Appellate Court, the Inferior Court of Appeal, if it decide the appeal without waiting for the decision of the Superior Appellate Court in the analogous cases, does not exercise a wise discretion.(8)

"Or to some usage."—Usage having the force of "law" means a local or family usage as distinguished from the general law.(9) A finding upon the evidence on a question of custom is one of fact.(10) The right of user is substantively a question of fact to be determined upon the evidence furnished by the litigants. If the Lower Appellate Court has not made any error of law in drawing an inference from the evidence produced to support such a right, then the High Court in second appeal will not interfere.(11) A local usage or custom being in its nature such as might necessarily affect not only parties to the particular litigation and their privies, but whole bodies of people, stands on a footing similar to a matter of law derived from other sources than usage. So, though this section disallows a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently it is the duty of the High Court, when it has to pronounce upon that question, to examine evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it.(12) Whether or not a custom exists, is a

(1) Graham *v.* Lopez, 1 W. R. 141 (1864); Bykunt *v.* Pearce, 1 W. R. 196 (1864); Poorno *v.* Chunder Nath, 1 W. R. 249 (1864); Rash Beharee *v.* Saheb Roy, 12 W. R. 76 (1869) [but the Court will interfere if very strong grounds are shown].

(2) Hera Roy *v.* Gungadhar, 24 W. R. 286 (1875).

(3) Watson *v.* Digwar, 10 W. R. 87 (1868).

(4) Dwarkanath *v.* Unnoda, 8 W. R. 319 1867).

(5) Mokund *v.* Chotay Lall, 10 C. 1061, 1067 (1884).

(6) Shama Charan Ghose *v.* Tarak Nath Mukhopadhya, 3 B. L. R. 115 (1869).

(7) Pran Kisto *v.* Kalee Dass, 7 W. R. 460 (1867).

(8) Gobind Ramanuja *v.* Lakhmi, 11 C. W. N. 112, 116 (1906).

(9) Ram Gopal *v.* Shama Khaton, 20 C. 93 at p. 99 (1892).

(10) Syed Ali *v.* Gopal Das, 13 W. R. 420, 422 (1870); compare Kakarla Abbayya *v.* Raja Venkata, 29 M. 24, 28 (1905); Hasim Ali *v.* Abdul Rahman, 28 A. 698 (1906). See Durga Charan *v.* Raghunath, 18 C. L. J. 559 (1913), evidence of a custom.

(11) Mahomed Ali *v.* Jugal Ram, 5 B. L. R. Ap. 84 (1870); s. c., 14 W. R. 124; see Wuzeerooddeen *v.* Sheobund, 11 W. R. 285, 286 (1869).

(12) Kakarla Abbayya *v.* Raja Venkata, 29 M. 24, 28 (1905); see also Hanumantamma *v.* Rami Reddi, 4 M. 272 (1881); Mirabivi *v.* Velleyanna, 8 M. 464 (1885); Eranjoli Vishnu *v.* Eranjoli Krishnan, 7 M. 3 (1883), *contra*; see Hurechar *v.* Judoonath, 10 W. R. 153 (1868); Syed Ali *v.* Gopal Das, 13 W. R. 420, 421 (1870); Hurry Churn *v.* Nimai Chand, 10 C. 138 (1883); Bai Shirin Bai *v.* Khorsedji, 22 B. 430, 433 (1896).

question of fact. But if the Lower Appellate Court has acted upon illegal evidence or has come to a decision upon evidence as to the custom which is legally insufficient to establish a custom, the High Court can treat the question as one of law. Again, if it appeared that the Lower Appellate Court has clearly from its judgment disregarded legal evidence, the Court can interfere. But the High Court in second appeal is not bound to examine and consider the evidence in all cases when the existence or non-existence of an alleged custom is the sole question at issue.(1)

"**Failed to determine some material issue.**"—As to failure to determine a material issue, see cases noted.(2) The Lower Appellate Court, if it does not accept, must displace the findings arrived at by the first Court.(3)

It is impossible to lay down any general rule as to when the Court should consider that the reasons for a particular finding by the Lower Appellate Court must be stated. There may be many cases in which the omission to state the reasons would render the judgment so unintelligible that the Court, in second appeal, could not pronounce any opinion upon whether it was right in law. In such a case a Court would no doubt require the reasons to be stated. But there may be cases in which the Court would not think it necessary to require them and the case will not be sent back. It is not the law that whenever the Judge of an Appellate Court thinks that one set of witnesses is trustworthy, he is bound to give his reasons for it.(4) Where the Lower Appellate Court fully adopts the reasoning and the conclusions of the first Court, it is not bound to set out the reasons for its decision with the same fulness as if it was deciding the case in the Court of first instance or as if it was reversing the judgment below. It may supply some additional reasons, but the insufficiency of these additional reasons, or the absence of any, would not justify a second appeal.(5) When a person has put forward his defence in a general way and allowed an issue to be framed upon it which has been found against him in the Lower Appellate Court, he will not be allowed to say, in special appeal, "here is a question of fact which the Courts below have not

(1) Hashim Ali *v.* Abdul Rahman, 28 A. 698 (1906).

(2) Kailash *v.* Kunja, 4 C. L. J. 86 (1906); Ramkar Gopalji *v.* Gangarani, 16 B. 545, 547 (1891); Gopal *v.* Tekaet, 8 W. R. 333 (1867); Wise *v.* Heera Lal, 16 W. R. 150 (1871) [where this is by mistake application may be by review]; Bistoo *v.* Lalla Byjnath, 16 W. R. 50 (1871); Goluck Nath *v.* Kirti Chunder, 16 C. 645, 651 (1889); Kristo Gobind *v.* Ganga Pershad, 23 W. R. 266 (1875); Googlee Sahoo *v.* Premlal Sahoo, 7 C. 148, 150 (1881); Mohorum Sheikh *v.* Nakowri, 7 B. L. R. App. 17 (1870); Kristo Churn *v.* Dwarkanath, 10 W. R. 32 (1868).

(3) Protap Narain *v.* Raghurani, 6 C. W. N. 185, 189, 190 (1901); Trailokya Mohini Dasi *v.* Kali Prasanna Ghose, 11 C. W. N. 380, 389 (1907).

(4) Shumshurooddy *v.* Jan Mahomed, 21 W. R. 260, 261 (1874).

(5) Shamoo Mahomed *v.* Prodhan Palee, 5 W. R. 178 (1866); but where the Appellate Court rejects evidence accepted by the first Court or comes to a contrary conclusion it should give its reasons for differing. Sheodyal *v.* Hodgkinson, 24 W. R. 342 (1875); Salu Madhav *v.* Venkatesh, 16 B. 540, 545 (1891); Abdul Rohman *v.* Sofy, 24 W. R. 293 (1875); though as to the omission to do so, see Mukdum-un-nissa *v.* Nokhy Singh, 25 W. R. 296 (1875); Luckhee Monee *v.* Rajkissore, 4 W. R. 106 (1865).

found, and therefore I am entitled to have the decree reversed;" when, if the question had been raised before the lower Courts, there might have been a finding upon it.(1)

"**Error or defect in the procedure.**"—An error or defect in procedure may consist in the omission to settle issues; (2) improper remand; (3) dismissing a suit for false verification instead of disposing of it on the merits; (4) adjudicating in the absence of, and without notice to, the respondent; (5) allowing a review of judgment without inquiring into the existence of grounds upon which a review is permissible.(6) The amount of damage is a question of fact unless such amount be beyond legal limits if there be any.(7) A mistake of account is not an error of law or procedure.(8) though the principle on which it has been taken may be. The Court has interfered where a commission returned unexecuted was not sent a second time.(9) There is error where a Court which has ordered a local investigation proceeds to determine the case before its return.(10) Refusal to take or record evidence (11) is an error of procedure. So is the omission to state the real question to be determined and to examine evidence with reference to the right issues; (12) and to take notice of serious irregularities in the first Court and to render accurate its decree; (13) deciding a suit on a case not set up by the parties nor warranted by the evidence.(14) For other cases see notes to the section *passim*. It is not sufficient that there should be such error. It must have been substantial and such as may possibly have affected the decision on the merits (*vide post*).

(1) Bykunt *v.* Dhunput, 19 W. R. 104, 105 (1873).

(2) See Mt. Mitna *v.* Syud Fazl Rub, 13 M. I. A. 573, 580, 583 (1870); Rewan Pershad *v.* Jankee Pershad, 11 M. I. A. 25, 27 (1866); Sheo Sahoy *v.* Bechun Singh, 22 W. R. 31 (1874); Jugobundhoo *v.* Sree Narain, 20 W. R. 188 (1873); Gunga Monee *v.* Issur Chunder, 17 W. R. 465 (1872); Ram Kaut *v.* Guneshee, 6 W. R. 47 (1860); Nowcowrie *v.* Mookta, 2 W. R. 181 (1865).

(3) See Ram Kant *v.* Guneshee, *supra*; Nanabhai Narotamdas *v.* Ramshet, 6 B. H. C. R., A. C. J. 156, 158 (1869).

(4) Shama Soondree *v.* Rohimooddeen, 24 W. R. 71 (1875).

(5) Balaji Rau *v.* Sithabhoy, 19 M. 414 (1896).

(6) Bhyrub Chunder Surmah *v.* Madhub Ram, 20 W. R. 84, 85 (1873); Chunder Auggrodany *v.* Loodun Ram, 25 W. R. 324 (1876); Parbutty *v.* Protap, 23 W. R. 275 (1875); Koleemooddeen *v.* Heerun, 24 W. R. 886 (1875).

(7) Jogeshwar *v.* Dinaram, 3 C. L. J. 140 (1898); Banee Madhub *v.* Bholanath, 10 W. R. 164, 165 (1868); Johuroodeen *v.* Dabee Pershad, 13 W. R. 22, 23 (1870).

(8) Ram Kant *v.* Kalee Mohun, 22 W. R. 310 (1874).

(9) Jhotee Singh *v.* Gopal Singh, 22 W. R. 457 (1875).

(10) Madho Singh *v.* Kashi Sing, 16 A. 342, 343 (1894).

(11) Monilal *v.* Khiroda, 20 C. 740, 743 (1893); Surm Rae *v.* Ubhman Rae, 2 A. H. C. R. 209 (1870); Ramessar *v.* Shib Narain, 14 W. R. 419, 420 (1870) [procedure to be followed in such cases, see also Raj Lukhee *v.* Gokool, 13 M. I. A. 209, 225, 226 (1869)]; Mohun Singh *v.* Jugbutty Kooer, 24 W. R. 297 (1875).

(12) Chunder Monee *v.* Madhoo Dey, 23 W. R. 166 (1875), where a remand was ordered.

(13) Ram Coomar *v.* Kalee Coomar, 10 W. R. 279 (1868) (case remanded).

(14) Shivabasapa *v.* Sangappa, 29 B. 1 (1904).

"**Upon the merits.**"—This is one of several provisions in which the Legislature has indicated its intention that substantial justice and not technicality is to be looked to. An error in procedure which does not affect the decision of the case on the merits will not confer a right of second appeal.(1) This is a matter which must be determined in each case according to its circumstances. In sect. 372 (Act VIII. of 1859) the word "possibly" did not occur. It ran as follows: "*which may have produced error or defect,*" and the word "*may*" was construed not to imply "may by some possibility" but "may not improbably." It was for the High Court Judges to exercise their discretion in determining whether there was such a probability, whether there had been a fair and sufficient trial, and whether litigation had reached a stage at which it ought to cease or not. The word "possibly" was accordingly introduced,(2) which avoided any necessity for the consideration of the evidence.

Ex parte **appellate decree.**—A respondent in whose absence an appeal has been heard *ex parte* and against whom judgment has been given, may prefer a second appeal from the decree under this section, and his remedy is not limited to an application under O. XLI. r. 2 to the Court which passed the decree to rehear the appeal.(3) The objection that the first Court did not make sufficient inquiry before admitting an application for rehearing and setting aside a former *ex parte* decree in favour of the plaintiff and dismissing the plaintiff's suit should be taken in the lower Appellate Court, and if it is not taken there it can not be raised in second appeal, because it would not be doing justice to restore an *ex parte* decree which the lower Courts have, on a subsequent trial on the merits, found should not be renewed. If the objection was a substantial one it should have been raised before the lower Court at the proper time.(4)

Scope of appeal.—The general rule on this point may be stated to be

(1) See Jugobundhoo *v.* Sree Narain, 20 W. R. 188 (1873); Buldeo Pershad *v.* Golab Khan, 6 N. W. P., H. C. R. 101, 103 (1874); Gujraj Singh *v.* Bijai Singh, 6 N. W. P. 114, 117 (1874); Mohima Chandra *v.* Atul Chandra, 24 C. 540 (1897) [misjoinder of causes of action]; Heera Lall *v.* Bistoo Lal, 22 W. R. 288 (1874); Mahomed Hosscin *v.* Potnu, 20 W. R. 147 (1873) [*id.*]; Hur Chunder *v.* Wooma Soonduree, 23 W. R. 170 (1875)[document received without objection]; Haran *v.* Russick, 20 W. R. 63 (1873) [want of stamp]; Jadu *v.* Kailash, 37 C. 63 (1909); Biswanath *v.* Baidyanath, 12 C. 199, 203 (1885); Bhagvatsangji *v.* Pertabsangji, 4 B. H. C. R. 105, 108 (1867); Pran Kisto *v.* Kalee Dass, 7 W. R. 460 (1867) [defective judgments]; Muthusami *v.* Nalla Kullantha, 18 M. 418 (1894); Kisto Churn *v.* Dwarkanath, 10 W. R. 32 (1868); Govinda *v.* Karunakar, 24 M. 43 (1900) [error of valuation]; Hukum-un-nissa *v.* Muckdoonum, 1 W. R. 246 (1864) [hearing of appeal before sale fixed: pleaders present]; Narainbhai *v.* Naroshanker, 7 B. H. C. R., A. C. J. 98, 102 (1867); [deposition read instead of oral examination: see also Jadu Rai *v.* Kanizak Husain, 8 A. 576, 591 (1886)]; Shoobul Chunder *v.* Koylash Chunder, 14 W. R. 23 (1870) [erroneous conclusion of law]; Shaikh Lall Mahomed *v.* Peer Nuzun, 18 W. R. 112 (1871) [depositions of witnesses not taken regularly].

(2) Ram Chowdhury *v.* Kashee Mohun, 21 W. R. 57, 59 (1873).

(3) Ajudhia Prasad *v.* Balmukund, 8 A. 354 (1886).

(4) Boro Khasia *v.* Jata Sirdar, 8 B. L. R. 78, 80 (1871); s. c., 15 W. R. 315.

that it must coincide with that of the appeal before the Lower Appellate Court, as the latter should be limited to the case made in the Court of first instance. Throughout the litigation the same ground of attack and (save as mentioned) of defence should be put forward. A plaintiff appellant will not be allowed to present his case in an entirely new shape and raising fresh issues to fall back upon a new and different title or cause of action from that first asserted.(1)

A case is not to be decided in special appeal upon a question which was not raised or tried or considered by the lower Courts. Parties must not be allowed to come before the High Court in special appeal and raise a question or take an objection which, if raised or taken in the first Court or even in the Appellate Court, might have been met in those Courts by adopting a course which cannot be adopted when the case comes before the High Court in special appeal.(2) But where there was sufficient reason for the question not having been raised in the lower Courts the case may be remanded in second appeal with a view to have that question determined.(3) An appellant is not entitled to raise a question of fraud which was not alleged in the written statement and as to which no issue was raised in the original Court.(4) Where a specific title has been alleged but not proved and the plaintiff endeavours to succeed in the first Court or second Court of appeal upon a title by twelve years' adverse possession, he must be prepared to show that this other title by twelve years' adverse possession was raised in the Court of first instance with sufficient clearness to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific

(1) Madan *v.* Malki, 6 A. 428, 430 (1884); Soorja *v.* Gunja, 12 W. R. 80 (1869); Hemangince *v.* Pitambar, 5 W. R. 197 (1866) [though it is a different thing to vary the relief given to a party who has proved his title. See in this connection Tacoordeen *v.* Nawab Syed Ali, 1 I. A. 192 (1874)]; Muthusami *v.* Ramkrishna, 12 M. 292 (1889); Kripa Nath *v.* Saroda, 1 W. R. 283 (1864); Sheo Das *v.* Bhagwan Dutt, 2 B. L. R. App. 15 (1869); Gopal Narhar *v.* Hanmant, 6 B. 107, 110 (1881) [unless under very special circumstances]; Puriag Dutt *v.* Brojo Koonwar, 9 W. R. 503, 505 (1868); Teriet put Sing *v.* Gossain Sudersan Das, 4 C. 46, 50 (1878); Brindabun *v.* Dhununjoy, 5 C. 246, 250 (1879); Joytara *v.* Mobaruck, 8 C. 975, 980 (1882); Secretary of State *v.* Nurya, 5 M. 163 (1882); Jamsedji Sorabji *v.* Lukshmiram Rajram, 13 B. 323 (1888). It has, however, been held [Judoo Nath Mullick *v.* Kalee Kristo Tagore, 22 W. R. 73 (1874)], that it is sufficient that the plaint should set out the facts necessary to support the plea even though the plea itself be not expressly set forth: Sree Dassee *v.* Ranee Lalun Monee, 12 M. I. A. 470, 475 (1869); Mohummud Zahoor *v.* Rutta Koer, 11 M. I. A. 468, 485, 486 (1867); Indur Chunder *v.* Radha Kishore, 19 C. 507, 512 (1892); Ilahi Khan *v.* Sher Ali, 26 A. 331, 334 (1904); Tekait Doorga Pershad *v.* Musst Doorga, 13 W. R. 10, 11 (1870). The case of Sankana Kalana *v.* Virupakshapa, 7 B. 146, 150 (1883), was disapproved in Perumal *v.* Kaveri, 16 M. 121, 125 (1892).

(2) Shib Suhagi *v.* Nursingh Lall, 22 W. R. 352, 354 (1874), per Couch, C.J.; see also Meer Bahadoor *v.* Sunee Churoo, 6 W. R. 157 (1866); Bunsee Lal *v.* Shaikh Auladh, 22 W. R. 552, 553 (1874); Jugdeep Narain *v.* Deendyal, 20 W. R. 174, 176 (1873). This case went up to the Privy Council, where the decree was varied on other grounds: 3 C. 198; s. c., 4 I. A. 247 (1877).

(3) Bonomalee *v.* Kylash Mojoomdar, 24 W. R. 72 (1875).

(4) Prayrag Rai *v.* Goukaran, 6 C. W. N. 787, 791 (1902).

title alleged.(1) The plaint has been allowed to be amended and the case remanded for retrial.(2)

As regards objections by defendants, such as are based on pure points of law, may be taken in second appeal for the first time provided that they do not involve the taking of any additional evidence on matters of disputed fact,(3) that is questions arising on the findings and not affected by any facts outside those findings,(4) and capable of being determined without the consideration of any evidence other than that on the record.(5) And such a point may be taken after remand though not raised in appeal before the remand.(6) Such as want of cause of action; (7) the legal status of the plaintiff to come into Court at all; (8) limitation; (9) want of jurisdiction; (10) *res judicata* (11); want of registration; (12) the legality of a translation; (13) the

(1) Krishna Baisack *v.* Protab Surma, 7 C. 560, 563 (1881); see also Shivo Kumari Debi *v.* Govind Tanti, 2 C. 418, 423 (1877).

(2) Mohummud Zahoor *v.* Thakoorance, 11 *M. I. A. 468, 485, 486 (1867)*; Joseph *v.* Solano, 9 B. L. R. 441, 453 (1872); in Krishnaji *v.* Wamanji, 18 B. 144, 146 (1893), amendment was refused.

(3) Gavdappa *v.* Girimallappa, 19 B. 331, 335 (1894); and see Ramtorak *v.* Dinanath, 7 B. L. R. 184, 185; s. c., 24 W. R. 414 (1871); Kali Mohan *v.* Kali Krishna, 11 W. R. 183; s. c., 2 B. L. R. app. 39 (1869); Jan Ali *v.* Khondkar, 14 W. R. 420, 421 (1870) [no ground of appeal allowed when it would have to be dealt with in connection with the evidence in the cause or appears capable of explanation]; Gajapathi *v.* Vasudeva, 15 M. 503, 511 (1892) [it is not possible to lay down any precise rule and it is not always easy to say what matters of fact would have to be ascertained for the proper decision of each proposition of law]; Ajodhya Nath Chowdhury *v.* Keshab Chandra Mukherjee, 11 C. W. N. 1127 (1907).

(4) Nagesh *v.* Guru Rao, 17 B. 303, 305 (1892); Sharfudin *v.* Govind, 27 B. 452, 466 (1902). In Rachawa *v.* Shivayogapa, 18 B. 679, 683 (1893), the Court refused to allow defendant to set up a new right differing in kind and not merely in degree.

(5) Fakir *v.* Ananda, 14 C. 586, 590 (1887).

(6) Darimba *v.* Nilmonee, 15 W. R. 181 (1871).

(7) Lachman *v.* Bahadur, 2 A. 884, 887, 888 (1880), Spankie, J., dissent.; Jan Ali *v.* Khondkar, 14 W. R. 420, 421 (1870), *contra*; Buksh Ali *v.* Joyamut, 11 W. R. 248 (1869); and see *per* Markby, J., in Trilochan *v.* Gugan, 24 W. R. 413 (1875).

(8) Id.; Balaram *v.* Mangta Das, 11 C. W. N. 959 (1907).

(9) Id.; *contra* Shivapa *v.* Dod Nagaya, 11 *B. 114, 119 (1886)*; *and in Raghu Nath v.* Pareshram, 9 C. 635, 636 (1882), no objection under sect. 561 of the last Code was taken. As to objection after remand, see *In re* Mirza Bahadoor, B. L. R., F. B. 429, 432 (1866); Dattu *v.* Kasai, 8 B. 535 (1884). See notes to O. XLI. r. 2.

(10) Id.; Ramayya *v.* Subbarayadee, 13 M. 25, 27 (1887); Sayad Nyamtula *v.* Nana, 13 B. 424, 427; Velayudam *v.* Arunachalam, 13 M. 213 (1889); Nidhi Lal *v.* Mazhar Husain, 7 A. 230 (1884). In Bhikaji *v.* Pandu, 19 B. 43 (1893); Azzuddin *v.* Ramanagra, 14 C. 605, 610 (1887); Biru Mahata *v.* Shyama Churn, 22 C. 483 (1895); the objection was held not to go to jurisdiction. As to objections after remand, see Keshav *v.* Vinayak, 23 B. 22, 26 (1897); Timulji *v.* Farvanji, 5 B. H. C. R., A. C. J. 167 (1868).

(11) Muhammad Ismail *v.* Chutter Singh, 4 A. 69, 71 (1881); some of Strachey, J.'s, observations were held to be *obiter dicta* in Kanahai Lal *v.* Suraj Kunwar, 21 A. 446, 447, 448 (1899) [but not if it cannot be decided on the record and fresh issues are necessary]; Ranchod *v.* Bezanji, 20 B. 86, 92 (1894) [objection to pauper suit].

(12) Oomatool Fatima *v.* Ghunnoo, 19 W. R. 23 (1872); but see Joy Gopal *v.* Thakoomonee, 11 W. R. 381 (1869).

(13) Kuppa Guru Kal *v.* Dorasami, 6 M. 76, 78 (1882). In Joytara Dassee *v.* Roy Chunder, 1 W. R. 136 (1864), the objection as to the invalidity of the adoption was not taken in the grounds of appeal, nor in Roy

irrelevancy of evidence,(1) for an erroneous omission to object to the omission of irrelevant testimony does not make it available as a ground of judgment; an objection appearing on the face of a notice.(2)

An objection on the ground of misjoinder,(3) whether of parties or causes of action, must now under sect. 99 show that the merits have been affected.

But a mixed question of law and fact cannot be raised for the first time in second appeal. So an objection has been disallowed on a question of title; (4) as also that a suit was barred under sect. 244 of the last Code, the objection being one not of pure law but depending upon the facts (5) and as to the competence of an agent to sue.(6) And defendants will not be allowed to set up for the first time in second appeal a case which involves an inquiry into facts not ascertained in the Court below.(7) A question of jurisdiction, or indeed any other question which depends upon a question of fact which has not been determined by the lower Court or admitted by both parties, will not be allowed to be raised.(8) It has been recently held that the construction of a document is a question of law which Judges in second appeal are not precluded from considering by any finding of a lower Appellate Court based on such document.(9)

A defendant may estop himself from setting up a defence. So a defendant has not been allowed to change the whole nature of his defence at the last moment and to set up in appeal a plea which he has directly and fraudulently repudiated in the Court below.(10) So a party who waives an objection to the use of depositions taken in a former litigation cannot object in appeal that the witnesses

Goodur *v.* Dhunneshur, 7 C. L. R. 117 (1880); where the question was as to the execution of aliquot portion of decree: Lachman *v.* Bahadur, 2 A. 884 (1880); but see Bombay Burmah, etc.; Corp. *v.* Smith, 17 B. 197, 221 (1892).

(1) Miller *v.* Madho Das, 23 I. A. 106 (1896); Authors' Evidence Act, 4th ed. p. 32, quære therefore as to Bapukhandu *v.* Baji Jivaji, 14 B. 372, 377 (1889).

(2) Ahsanulla *v.* Huree, 19 I. A. 191, 195; s. c., 20 C. 86 (1892).

(3) See Moidin Kutti *v.* Krishnan, 10 M. 322, 329 (1887); Dhondiba *v.* Ramchandra, 5 B. 554, 561 (1881); Manla *v.* Gulzar, 16 A. 130 (1893); Tarinee *v.* Hunsman, 20 W. R. 240 (1873); Majahir *v.* Narayana, 3 M. 359, 363 (1881); Ram Dyal *v.* Ram Doolal, 11 W. R. 273 (1869); Tiluck *v.* Muddun, 12 W. R. 504 (1869); Boydo Nath *v.* Grish, 3 C. 26, 29 (1877); Ghulam *v.* Mustakiri, 18 A. 109, 111 (1895) [objection under sect. 89 Transfer of Property Act]; Dodhu *v.* Madhavrao, 18 B. 110, 113 (1893); Dhurum Das *v.* Shama Soondri, 3 M. I. A. 229, 242 (1843).

(4) Varanji *v.* Lallu Akhu, 9 B. 285, 287 (1885); Umrao Bibi *v.* Mahomed Rojabi, 27 C. 205, 207 (1899); s. c., 4 C. W. N. 76.

(5) Biru Mahata *v.* Shyama Churn, 22 C. 483 (1893).

(6) Soorendro Nath Roy *v.* Rughoobur Dyal, 15 W. R. 392 (1871).

(7) Umbika *v.* Nadir, 11 W. R. 133, 134 (1869).

(8) Lutcefoonnissa *v.* Poolin, W. R. F. B. 31, 32, 33 (1862); see also The Court of Wards *v.* Roop Moonjuree, 25 W. R. 260 (1876); Ramanund *v.* Urnokalee, 2 W. R. 257 (1865); and see where there are findings. Nilratan *v.* Rani Rutton, 5 C. W. N. 627, 629 (1901).

(9) Lala Fatch Chand *v.* Rani Kishen, 39 I. A. 247 (1912); 34 A. 579; 16 C. W. N. 1033 (P. C.); 14 Bom. L. R. 1010.

(10) Suttyabhama Dassee *v.* Krishna Chunder Chatterjee, 6 C. 55, 58, 59 (1880); see Dabee Misser *v.* Mungur Meah, 2 C. L. R. 208 (1878); Norendra *v.* Bhupendra, 23 C. 374, 392 (1895).

should have been called and examined.(1) Parties who allow a suit to be conducted in the lower Courts as if a certain fact was admitted cannot afterwards in special appeal question it and recede from the tacit understanding.(2) And if any irregularity has been committed at the instance of an appellant or with his consent he has no just ground of complaint in appeal.(3)

The not taking or pressing an objection in the lower Court may not only satisfy the Court that the parties did not intend to take it as they knew there was nothing in it; (4) but may also act, where facts are involved, by way of estoppel. For had the objection been taken it might have been met. On the same principle an objection for the first time in appeal that the plaint did not ask for further relief has been disallowed, for if taken the plaint might have been amended and may be amended in appeal.(5) An objection will not be allowed which, if taken at the proper time, might have been removed.(6) On this principle, if secondary evidence is admitted without objection, the Court of Appeal will not entertain an objection that primary evidence should have been given.(7) In the case of alleged irregularity it is a safe maxim for a Court of Appeal to be governed by, that an objection, which, if taken, might have been cured, and which was not taken in the Court below, shall not be taken in the Court of Appeal.(8) An appellant will not be allowed to raise in the Court of Appeal a point which he did not raise in the Court below, even though there is some evidence in support of it, if the nature of that evidence is such that, by any possibility, the respondent might have been able to rebut it if the point had been raised originally.(9)

If an appellant in a second appeal was contented, and by his conduct he shows that he elects to take his chance of having the decree of the first Court confirmed on appeal on the evidence before the Court, he cannot be heard afterwards to complain in second appeal that there was a material irregularity in the conduct of the case, on the ground that all his evidence was not before the appeal Court which reversed the first decree. It is his business to have brought to the notice of the lower Appellate Court that all his witnesses were not examined before the first Court, and not having done so, he cannot in second appeal, take the objection in order to have the chance of a second trial.(10) Such objection, if not raised in the Court below, and if it appears that

(1) Lakshman *v.* Amrit, 24 B. 591 (1900); see also Wazeer Jemadar *v.* Noor Ali, 12 W. R. 33 (1869). See Easin *v.* Abdul, 15 C. W. N. 10 (1910), where second appeal allowed on the ground of waiver.

(2) Dwaji *v.* Godadbhai, 2 B. H. C. R. 28 (1865); Mohima Chunder *v.* Ram Kishore, 15 B.L. R. 142, 155 (1875).

(3) Maharajah Nitrasur *v.* Nund Lal Singh, 8 M. I. A. 199, 220 (1860).

(4) Soorendro Nath Roy *v.* Rughoobir Dyal, 15 W. R. 392 (1871).

(5) Limba Krishna *v.* Rama Pimplu, 13 B 548, 551 (1888); Chomu *v.* Umma, 14 M. 46, 48 (1890). Similarly in the case of an objection that the case was not one in which a declaratory decree should have been made, Maganlal *v.* Govind Lal, 15 B. 697, 701 (1891).

(6) Avudh Beharee *v.* Ram Roy, 18 W. R. 105 (1872).

(7) See Authors' Evidence Act, 4th ed. p. 32.

(8) Dhurum Das *v.* Shama Soondri, 3 M. I. A. 229, 242 (1843).

(9) *Ex parte* Firth, 19 Ch. D. 419, 429 (1881).

(10) Gulam *v.* Haji Badrudin, 13 B. 336, 337 (1888).

irrelevancy of evidence,(1) for an erroneous omission to object to the omission of irrelevant testimony does not make it available as a ground of judgment; an objection appearing on the face of a notice.(2)

An objection on the ground of misjoinder,(3) whether of parties or causes of action, must now under sect. 99 show that the merits have been affected.

But a mixed question of law and fact cannot be raised for the first time in second appeal. So an objection has been disallowed on a question of title; (4) as also that a suit was barred under sect. 244 of the last Code, the objection being one not of pure law but depending upon the facts (5) and as to the competence of an agent to sue.(6) And defendants will not be allowed to set up for the first time in second appeal a case which involves an inquiry into facts not ascertained in the Court below.(7) A question of jurisdiction, or indeed any other question which depends upon a question of fact which has not been determined by the lower Court or admitted by both parties, will not be allowed to be raised.(8) It has been recently held that the construction of a document is a question of law which Judges in second appeal are not precluded from considering by any finding of a lower Appellate Court based on such document.(9)

A defendant may estop himself from setting up a defence. So a defendant has not been allowed to change the whole nature of his defence at the last moment and to set up in appeal a plea which he has directly and fraudulently repudiated in the Court below.(10) So a party who waives an objection to the use of depositions taken in a former litigation cannot object in appeal that the witnesses

Goodur *v.* Dhunneshur, 7 C. L. R. 117 (1880); where the question was as to the execution of aliquot portion of decree: Lachman *v.* Bahadur, 2 A. 884 (1880); but see Bombay Burmah, etc.; Corp. *v.* Smith, 17 B. 197, 221 (1892).

(1) Miller *v.* Madho Das, 23 I. A. 106 (1896); Authors' Evidence Act, 4th ed. p. 32, quære therefore as to Bapukhandu *v.* Baji Jivaji, 14 B. 372, 377 (1889).

(2) Ahsanulla *v.* Huree, 19 I. A. 191, 195; s. c., 20 C. 86 (1892).

(3) See Moidin Kutti *v.* Krishnan, 10 M. 322, 329 (1887); Dhondiba *v.* Ramchandra, 5 B. 554, 561 (1881); Manla *v.* Gulzar, 16 A. 130 (1893); Tarinee *v.* Hunsman, 20 W. R. 240 (1873); Majahir *v.* Narayana, 3 M. 359, 363 (1881); Ram Dyal *v.* Ram Doolal, 11 W. R. 273 (1869); Tiluck *v.* Muddun, 12 W. R. 504 (1869); Boydo Nath *v.* Grish, 3 C. 26, 29 (1877); Ghulam *v.* Mustakiri, 18 A. 109, 111 (1895) [objection under sect. 89 Transfer of Property Act]; Dodhu *v.* Madhavrao, 18 B. 110, 113 (1893); Dhurum Das *v.* Shama Soondri, 3 M. I. A. 229, 242 (1843).

(4) Varanji *v.* Lallu Akhu, 9 B. 285, 287 (1885); Umrao Bibi *v.* Mahomed Rojabi, 27 C. 205, 207 (1899); s. c., 4 C. W. N. 76.

(5) Biru Mahata *v.* Shyama Churn, 22 C. 483 (1893).

(6) Soorendro Nath Roy *v.* Rughoobur Dyal, 15 W. R. 392 (1871).

(7) Umbika *v.* Nadir, 11 W. R. 133, 134 (1869).

(8) Lutcefoonnissa *v.* Poolin, W. R. F. B. 31, 32, 33 (1862); see also The Court of Wards *v.* Roop Moonjuree, 25 W. R. 260 (1876); Ramanund *v.* Urnokalee, 2 W. R. 257 (1865); and see where there are findings. Nilratan *v.* Rani Rutton, 5 C. W. N. 627, 629 (1901).

(9) Lala Fatch Chand *v.* Rani Kishen, 39 I. A. 247 (1912); 34 A. 579; 16 C. W. N. 1033 (P. C.); 14 Bom. L. R. 1010.

(10) Suttyabhama Dassee *v.* Krishna Chunder Chatterjee, 6 C. 55, 58, 59 (1880); see Dabee Misser *v.* Mungur Meah, 2 C. L. R. 208 (1878); Norendra *v.* Bhupendra, 23 C. 374, 392 (1895).

If the suit is actually tried by a Small Cause Court, then no appeal is allowed. There are, however, many suits which would be triable by a Small Cause Court if one existed with local and pecuniary jurisdiction, but which are in fact tried as original suits by a District Munsif Court because there is no Small Cause Court competent to try them. In these suits a first appeal is allowed by the Code. But a second appeal is disallowed by this section as it is considered that such cases as come within it are not sufficiently important to be entitled to a second appeal.(1)

"**No second appeal.**"—The section refers to second appeals, that is appeals from appellate decrees and not to appeals from orders,(2) and does not interfere with a right of appeal from order where elsewhere given. This section, which bars a second appeal in cases of the nature stated, applies equally to orders passed in execution as to the original decree itself.(3) For the purpose of determining whether a second appeal lies in execution in a suit of a Small Cause nature, the test is not the amount claimed in the execution proceedings, but the amount of the subject-matter of the suit.(4)

"**Of the nature cognizable.**"—The nature of a suit must be ascertained by considering all the allegations in the plaint and the prayer. In determining whether or not a second appeal is barred, the Court ought to regard the suit not as it ought to have been framed but as it is in fact framed and brought, unless the plaintiff has, with the object of evading the jurisdiction of a Court of Small Causes and bringing the suit in the ordinary Courts, added a claim for a relief to which he knows he is not in law entitled.(5) The Court must look to the nature of the suit as brought by the plaintiff, and not to the nature of the defence, to determine whether or not the Court of Small Causes has jurisdiction. It is not in the power of a defendant to oust the Court of a jurisdiction that it otherwise has, by the mere raising of a plea of title. The *bona fides* of the plea can not affect the question, for such a plea, whether made *bonâ fide* or not, would have to be inquired into. Where such a plea is raised the Court of Small Causes has the power to inquire into it and

(1) See Soundaram Ayyar *v.* Sennia Naickan, 23 M. 563 (1900).

(2) Aghandh Mahto *v.* Aliullah, 11 C. W. N. 862, 865 (1907); Collector of Bijnor *v.* Jafar Ali Khan, 3 A. 18 (1880) [order of remand]; Mahadev Narsingh *v.* Ragho Keshau, 7 B. 292 (1883) [dist. Mathuranath Ghose *v.* Nabin Chandra Kundu, 24 C. 724 (1897), which was followed in Jhanday Lal *v.* Sarman Lal, 21 A. 291 (1899), in which it was held that no appeal lay from an order of remand when such order was itself made in an appeal under sect. 588 of the last Code from an order under sect. 485 of that Code]; Gulam Husen *v.* Sayad Musa, 8 B. 760 (1884); Chunna Tambi *v.* Chinnanna, 19 M. 391, 339 (1896).

(3) Sri Bullov *v.* Baburam, 11 C. 169 (1885); Lala Kandha Pershad *v.* Lala Behary Lal, 25 C. 872 (1898); Shyama Charan Mitter *v.* Dibendra Nath Mukerjee, 27 C. 484, 487 (1900); Aithala *v.* Sabhanna, 12 M. 116 (1888) [see at p. 117 as to execution against immoveable property]; Harakh *v.* Ram Sarup, 12 A. 579 (1890); Din Doyal *v.* Patrakhan, 18 A. 481 (1896); Peary Lal Singh *v.* Radha Nath Singh, 11 C. W. N. 861 (1907); Narayan *v.* Nagindas, 30 B. 113 (1905).

(4) Mavula Ammal *v.* Mavula Thambi, 17 M. L. J. 376 (1906); Sri Bullov Bhattacharji *v.* Baburam Chattopadhya, 11 C. 169 (1885).

(5) Harish Chandra *v.* Narayana, 24 M. 508, 510, 511 (1901); see also Mullapudi *v.* Venkatanarasimha, 19 M. 329 (1896).

determine it for the purpose of the suit which it has jurisdiction to try.(1) By merely asking, in the alternative, for an account of the profits, the plaintiff can not convert a suit cognizable by a Court of Small Causes into one of a different nature. Where a definite sum only is to be ascertained, viz. the amount of profits received by the defendant during the years in question, from which by a simple calculation what the plaintiff's share in those profits amounts to can be ascertained, there is no account within the meaning of Art. 31, sect. II. of the Small Cause Court Act to be taken and no second appeal lies.(2) Where all the relief which the plaintiff claimed in his plaint could be obtained in his suit without asking for a declaration, the addition of the prayer for a declaration was held not to prevent the suit being of the nature cognizable in Courts of Small Causes.(3) The value of the subject-matter of the suit must be determined by reference to the value put by the plaintiff upon it in the plaint, not only for fiscal purposes, but also for purposes of jurisdiction.(4) The terms of the section do not refer to the amount in dispute at the time the appeal is preferred, but to the amount or value of the subject-matter of the original suit.(5) The provisions of sect. 144 Bengal Tenancy Act do not over-ride the provisions of this section. The former section determines the *venue*, but it has no bearing upon the question of the nature of the suit.(6) Where a plaint is presented in a Court having both ordinary and Small Cause jurisdiction, the suit is still cognizable by a Small Cause Court.(7) Where it was urged that though actually a "Small Cause" the suit having been instituted and dealt with in the ordinary Court, that circumstance involved the consequence that a second appeal would lie, it was ruled that this was not so: that the nature of the cause was not variable in any way according to the Court in which it was brought, and that a Small Cause was such wherever instituted. The words "suit of the nature cognizable, etc.," are equally applicable whether the suit is brought in a Small Cause or any other Court.(8) When a Subordinate Judge invested with Small Cause Court Jurisdiction tries a Small Cause suit under his ordinary jurisdiction, the character of the suit is not altered by the mode in

(1) Bapuji *v.* Kuvarji, 15 B. 400, 405 (1890); see also Rivett Carnac *v.* Goculdas, 20 B. 15, 45 (1895); Mohesh *v.* Sheik Piru, 2 C. 470 F. B. (1877); see also Monappa *v.* McCarthy, 3 M. 192, 199, 200 F. B. (1881); Kali Krishna *v.* Izzatannissa, 24 C. 557, 560, 561 (1897); Soundaram *v.* Sennia, 23 M. 547, 557 F. B. (1900); Narayan *v.* Balaji 21 B. 248 (1895).

(2) Narayan *v.* Balaji, 21 B. 248, 250 (1895); see also Vasudev *v.* Damodar, 6 Bom. L. R. 370, 373 (1904).

(3) Ramachendraiyar *v.* Noorulla, 30 M. 101, 103 (1906).

(4) Hansraj *v.* Ratni, 27 A. 200, 202 (1904).

(5) Sri Bullov *v.* Baburam, 11 C. 169, 172 (1885); see also Mavula Ammal *v.* Mavula Maracoir, 30 M. 212, 213 (1906); Kali *v.* Fazlar, 15 C. W. N. 454 (1910).

(6) Rango *v.* Holloway, 26 C. 842, 844 (1899); s. c., 4 C. W. N. 95.

(7) Venayak *v.* Krishnarao, 25 B. 625, 629 (1901).

(8) Kalian Dayal *v.* Kalian Narer, 9 B. 259, 265 (1884); Lala Kandha Pershad *v.* Behary Lal, 25 C. 872 (1898). Upon the question whether a second appeal lies in a matter of jurisdiction: [Dyebukee Nundan *v.* Mudhoo Mutty, 1 C. 123 (1875); diss. from Mohadeo *v.* Budhoo Ram, 26 A. 358 (1904)]; the law has been altered since the passing of that decision: Suresh Chandra Moitra *v.* Kristo Rungini Dasi, 21 C. 249, 251 (1893).

which the Subordinate Judge exercises his jurisdiction.(1) Moreover, a suit does not cease to be a suit cognizable by a Small Cause Court by reason of the defendant having by way of set off made a counter claim for Rs. 120, when the pecuniary limit of the jurisdiction of the Court invested with the jurisdiction of a Court of Small Causes was Rs. 50.(2) If a suit is cognizable by a Court of Small Causes, then, notwithstanding the fact that the plaint was returned by the Small Cause Court to be filed in the Civil Court, on the ground that the suit involved a question of title, this section applies if the value of the subject-matter of the suit is below Rs. 500. Sect. 23 of the Provincial Small Cause Court Act is only an enabling section, and enables the Court, at any stage of the proceedings, to return the plaint in order that it may be presented to any Court which could determine the title, but that section does not say that such suits shall not be cognizable by the Small Cause Court.(3) Even if such a suit is instituted in the ordinary Court the section will apply; because its applicability depends on the nature of the suit and not on the Court in which it is instituted, and it will apply even to a case in which the Court which entertained the suit had no jurisdiction to take cognizance of it.(4)

The words "of a nature cognizable" seem to have reference to the subject-matter of the suit as distinguished from the amount of the claim.(5) In determining whether a second appeal lies under this section, the nature of the suit as it was originally framed is to be considered, and not any form it may subsequently assume.(6)

Each case must be decided on its own facts with reference to the provisions of the Act applicable, but for the purposes of reference it may be stated that the following suits have been held to be cognizable: suit for money had and received to plaintiff's use; (7) suit by widow for personal property taken from her husband in his lifetime; (8) suit for recovery of certain books and money collected; (9) claim on bond specially registered; (10) claim for contribution in respect of debt created by virtue of the payment

(1) Shankarbhai *v.* Somabhai, 25 B. 417 (1900); Balchand *v.* Baloram, 5 Bom. L. R. 398, 403 (1903); Indra Chandra Mukerjee *v.* Srish Chandra Banerjee, 40 C. 537 (1913).

(2) Balchand *v.* Baloram, 5 Bom. L. R. 398, 403 (1903).

(3) Kali Krishna Tagore *v.* Izzatannissa, 24 C. 557, 560 (1897); see also Muttu Karappan *v.* Sellan, 15 M. 98 (1891); Sada Sankar *v.* Brij Mohun, 20 A. 480 (1896); Venayak *v.* Krishnarao, 25 B. 625, 628, 629 (1901); Soundaram *v.* Sennia, 23 M. 547, 557 (1900); see also Rash Behari *v.* Sridhar, 6 C. W. N. 687, 688 (1902).

(4) Mohadeo *v.* Budhai Ram, 26 A. 358, 360 (1904); see also Lala Kandhar *v.* Lala Lal Behary, 25 C. 872, 873 (1898).

(5) Soundaram Ayyar *v.* Sennia Naickan, 23 M. 547, 556, *per* Sir Arnold White, C.J., in which case the section is fully considered. Gouri Dutt *v.* Amar Chand, 15 C. L. J. 49 (1911).

(6) Lakshmandas *v.* Anna R. Lane, 32 B. 356 (1904); Cherryom *v.* Nhera Poyilil, 22 M. L. J. 47 (1911).

(7) Muhamdi Begum *v.* Abbas Ali, 3 A. 531 (1883).

(8) Kapalee *v.* Keshoram Koreh, 11 W. R. 93, 94 (1869).

(9) Hans Raj *v.* Ratni, 27 A. 200, 203 (1904) [held suit was not one for rescission of contract as argued].

(10) Sri Bulluv *v.* Baburam, 11 C. 169, 171 (1885); dist. Nilcomal Bannerjee *v.* Madhusudan, 6 B. L. R. 177, 180 (1870).

itself; (1) suit for contribution where lands assessment of which had been paid were in exclusive enjoyment of defendant; (2) suit by co-sharer to recover share of *Khoti* profits realized by another co-sharer,(3) complaint of the act of a judicial officer; (4) suit for definite sum as income of land although defendant raised the question of title; (5) a suit for rent; (6) suit by tenant for recovery of excess-payment taken by landlord in respect of rent; (7) suit for mesne profits; (8) suit for restoration of moveable property either to plaintiff or some one as agent for him; (9) suit to recover from decree-holder money paid for property bought in execution on ground that debtor had no saleable interest; (10) suit for damages for cutting and carrying away of grass; (11) suit for money due on adjustment of accounts of profits of land; (12) suit for money due on contract, though it may be necessary to go into account to see whether amount claimed is due; (13) a suit for arrears of *Kathibadi* and *Karnams* emoluments, not being a charge on immoveable property; (14) original suit for money on bond decided on *solenama* whereby land was given in lieu of money; (15) cases falling within the provisions of sect. 69 of the Contract Act.(16)

The following have been held not cognizable:—Suit for contribution by sharer in joint property; (17) suit for damages for illegal or improper distress or attachment; (18) or otherwise sounding in damages; (19) suit for money on

(1) Mavula Ammal *v.* Mavula Maracoir, 30 M. 212 (1906).

(2) Sreenivasa *v.* Sivakolundu, 12 M. 349, 351 (1889).

(3) Vasudev *v.* Damodar, 6 Bom. L. R. 370 (1904).

(4) Moti Lal Ghose *v.* Secretary of State, 9 C. W. N. 495 (1905); a doubt was expressed, the case being decided on the merits.

(5) Venayak *v.* Krishnarao, 25 B. 625, 628 (1901).

(6) Soundaram Ayyar *v.* Sennia Naickan, 23 M. 547, 564 (1900).

(7) Rango Roy *v.* Holloway, 26 C. 842, 844 (1898).

(8) Kunjo Behary Singh *v.* Madhub Chandra Ghose, 23 C. 884, 894 F. B. (1896): see also Sishagiri *v.* Marakathammal, 22 M. 196 (1898); Annamalai *v.* Subramanyan, 15 M. 298 (1892); Subba Rao *v.* Sataramayya, 24 M. 118 (1900) [such a suit is not for account but for damages]; *contra* Antone *v.* Mohadev, 25 B. 85, 88, 89 (1900); and see Vasudev *v.* Damadar, 6 Bom. L. R. 370 (1904).

(9) Kalian Dayal *v.* Kalian Narer, 9 B. 259, 265 (1884).

(10) Makund Ram *v.* Badh Kishen, 20 A. 80 (1897).

(11) Krishna Prosad *v.* Maizuddin, 17 C. 707, 710 (1890); see also Annamalai *v.* Subramanayan, 15 M. 298 (1892).

(12) Asman Sing *v.* Durga Roy, 6 C. 284, 288, 289 (1880); see also Sunkar Lal *v.* Ram Kalu, 18 W. R. 104.

(13) Debukee *v.* Madhoo Muttee, 24 W. R. 478 (1875), it being held that the contention that a Small Cause Court cannot take cognizance of any case in which an account is to be taken is untenable; Asman Singh *v.* Durga Roy, 6 C. 284, 289 (1880).

(14) Mullapudi Balkrishnayya *v.* Venkatanara Sinha, 19 M. 329 (1896).

(15) Talun Bibi *v.* Tenu Bibi, 15 W. R. 65, 66 (1871).

(16) Krishno Kamini *v.* Gopi Mohun Ghose, 15 C. 652 (1888).

(17) Srinivasa *v.* Siva Kolundu, 12 M. 349, 351 (1889); Mavula Ammal *v.* Mavula Maracoir, 30 M. 212 (1906).

(18) Dewan Roy *v.* Sundar Tewary, 24 C. 163, 165 (1896) [where the suit is brought to recover damages for the tort and not for money paid in excess under pressure]; Karuppanan *v.* Rama Sami, 21 M. 239 (1897); see also Panun Sanyasi *v.* Zamindar of Jayapur, 25 M. 540, 542 (1901).

(19) Kalian Singh *v.* Chuni Lal, 6 A. 10, 12 (1883).

bond where property pledged under bond is liable for amount of decree; (1) suit to enforce debt secured upon immoveable property; (2) a suit for *malikana* allowance; (3) suits which directly involve questions of title to immoveable property; (4) suit on bond hypothecating certain crops; (5) suit against sons of Hindu debtor on bond executed by father; (6) a suit in respect of the withholding of a rent receipt, and for recovery of money alleged to have been paid to *ijaradar* on account of arrears of rent; (7) or for arrears of *Chowkidari* tax payable by the *putnidar* under the *putni kabuliat*; (8) suit for drainage charges under sect. 42 (*b*) of the Bengal Drainage Act (VI. of 1880, B. C.); (9) or for compensation for illegal distress or attachment not being for the recovery of specific property.(10)

103. *In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal but not determined by the lower appellate Court.*

Power of High Court to determine issues of fact.

Determination of question of fact.—This section is new. Notwithstanding the opinion to the contrary of Petheram, C.J.,(11) which the section in effect embodies, it has hitherto been the practice of the division Benches of the High Courts in second appeals not to determine in any case issues of fact. This practice, however, in many instances has led to unnecessary expense and delay. Some small question of fact may have been left undetermined, and though its solution may be obvious, the Court has deemed itself precluded from dealing with the matter and bound to order a remand. The present provision, which is entirely new, is therefore a very useful one. The power to determine fact is, however, a discretionary one which the Court will exercise according as it thinks proper.(12)

(1) Tripoora Sundaree *v.* Koylash, 15 W. R. 265 (1871).

(2) Atmaram *v.* Sadashiv, 2 B. H. C. R. 1, 3 (1864).

(3) Mahomed *v.* Abdool, 1 A. H. C. R. 205 (1869); see also Churaman *v.* Balli, 9 A. 591, 601 (1887).

(4) Churaman *v.* Balli, *supra.*

(5) Kalka Prosad *v.* Chandan Singh, 10 A. 20 (1887).

(6) Narasinga *v.* Sabba, 12 M. 139, 141 F. B. (1887); but see as to this case Penasami *v.* Sutharama, 27 M. 243 (1903); s. c., 14 M. L. J. 84.

(7) Brojo *v.* Shumbhoo, 18 W. R. 25 (1872); Shoylendra *v.* Patoo Das, 23 W. R. 304, 305 (1875).

(8) Assanulla *v.* Tirthabashini, 22 C. 680, 684 (1895); see also as regards Dak-Cess, Watson *v.* Sree Kristo, 21 C. 132 (1893).

(9) Basanta Kumar *v.* Ram Chandra, 17 C. W. N. 499 (1903).

(10) Panun Sanyasi *v.* Zamindar of Jayapur, 25 M. 540, 542 (1901).

(11) See Balkishen *v.* Jasoda Kuar, 7 A. 765 (1885); affirmed in Deo Kishen *v.* Bansi, 8 A. 172 (1885); Straight and Brodhurst, JJ., dissent. but overruled by the F. B. in Gridhari Lall *v.* Crawford, 9 A. 147 (1886). Where a wrong issue has been framed but there is a finding on the point raised by a correct issue the Court has refused to remand: Vishnu Ramchandra *v.* Ganesh Appaji, 21 B. 325 (1895).

(12) Narain Dey *v.* Durga Dei, 35 A. 138 (1913).

APPEALS FROM ORDERS.

104. (*1*) An appeal shall lie from the following orders, *and save as otherwise expressly provided in the body of this Code or by any law for the time being in force* from no other orders :— [s. 588, second para.]

Orders *from which appeal lies.*

(*a*) *an* order superseding an arbitration *where the award has not been completed within the period allowed by the Court ;*

(*b*) *an order on an award stated in the form of a special case ;*

(*c*) *an* order modifying *or correcting* an award ;

(*d*) *an order filing or refusing to file an agreement to refer to arbitration ;*

(*e*) *an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ;*

(*f*) *an order filing or refusing to file an award in an arbitration without the intervention of the Court ;*

(*g*) *an order under section 95 ;*

(*h*) *an* order under any of the provisions of this Code imposing *a* fine or *directing* the arrest or *detention in the civil prison* of any person except where such arrest or *detention* is in execution of a decree ;

(*i*) *any order made under rules from which an appeal is expressly allowed by rules.*

(*2*) *No appeal shall lie from any order passed in appeal under this section.*

Appeal from orders.—As regards these the Special Committee said : "A comparison of clause 104 of the Bill with sect. 588 of the existing Code (1)

(1) As regards that Code clause 6 referred to orders passed by the Appellate Court : Wahid-ullah *v.* Kanhaya Lal, 25 A. 174 (1902) ; foll. in Dalip Singh *v.* Kundan Singh, 36 A. 58 (1913) ; Chinnasami Pillai *v.* Karuppa Udayan, 21 M. 234 (1896) ; Goor Bux Sahoo *v.* Birj Lal Benka, 3 C. W. N. 243 ; 26 C. 275 ; Raghunath Charan Singh *v.* Shama Koeri, 31 C. 344 (1903) [but not where Appellate Court returns memorandum of appeal : diss. from Kunhikutti *v.* Achotti, 14 M. 462 (1891)], and no second appeal lies, Chinnasami *v.* Karuppa, *supra ;* but see Joynath Roy *v.* Lall Bahadur Singh, 8 C. 126 (1881) ; as to power of Court to which suit is transferred to return plaint, see Pachaoni Awasthi *v.* Ilahi Baksh, 4 A. 478 (1882). See now O. XLIII. r. 1 (*a*). Orders returning plaints for amendment have been omitted. Orders refusing amendment were not appealable, Sarsuti *v.* Kunj Behari, 5 A. 345 at p. 356 (1883) ; Watson and Co. *v.* Nidhoo Digwar, 10 W. R. 87 (1868). No second lay from order remanding case : Mathura Nath Ghose *v.* Nobin Chandra Kundu, 24 C. 774 (1897) ; Jhanday Lal *v.* Sarman Lal, 21 A. 291 (1899) ; Venkatapathi *v.* Tirumalai, 24 M. 447 (1901) ; Timanna *v.* Mahabala, 19 M. 167 (1895), but there was a second appeal where the order did not come within this section, but sect. 244 (now 47) ; Doyamasi Dassi *v.* Sarat Chunder Mojumdar, 25 C. 175 (1897). As to clause 18 of former section, see Mehdi

would support a prima facie inference that the right of appeal from orders had been restricted. But this inference is dispelled on looking at s))). clause (*h*) [now (*c*)] which allows an appeal from any order made under Rules from which an appeal is expressly allowed by Rules. We have gone carefully into the question of the cases in which an appeal should be allowed from these orders and our conclusion is expressed in the Rules themselves." See O. XLII. r. 1.

As appeared from the wording of the first clause in the last Code an appeal was given only in respect of orders "*under this Code.*" Thus it has been held that an order under sect. 5 of the Court Fees Act was not within this section ;(1) and that no appeal lay against an order directing a penalty to be enforced under the Stamp Act.(2) Chapter XLIII. of the last Code was not extended to suits and proceedings under the Agra Tenancy Act.(3)

It has been held that on an appeal from an order of an Appellate Court, the High Court was bound to accept as in a second appeal from a decree the findings of fact arrived at by the Lower Appellate Court.(4) The orders passed in appeal being final, no second appeal lies.(5) The right of appeal from interlocutory orders was held to cease with the disposal of the suit.(6)

It has been held that sub-section 1 (*c*) of this section does not confer an unrestricted right of appeal, for when an order has been made by which an award has been modified the validity of the whole award cannot be called in question in an appeal against that order.(7) And it has been pointed out that in cases under O. XXI. r. 89 (sect. 310A of last Code) only a first appeal is now permitted,

Hasain *v.* Sughra Begam, 25 A. 206 (1902); Balabai *v.* Ganesh, 4 Bom. L. R. 980 (1902); s. c., 27 B. 162; and as to clause 24, see Khagendra Narain Singh *v.* Sashadhar Jha, 31 C. 495 (1904); s. c., 8 C. W. N. 608. As regards clause 28 of former Code, see Chinnatambi *v.* Chinnanna, 19 M. 391 (1896) [right of appeal is not controlled by sect. 586, now 342, cases there cited dist. in Aithola *v.* Subbanna, 12 M. 116 (1888)]; Agandh Mahto *v.* Aliullah, 11 C. W. N. 862 (1907); Madhu Sudan Sen *v.* Kamini Kanta Sen, 32 C. 1023 (1905); as to entering into merits on the appeal from order of remand, see notes to O. XLI. r. 23, and Lokhi Mahto *v.* Aghoree Ajail, 5 C. 144 (1879); Noimollah Pramanick *v.* Grish Narain Moonshee, 8 C. 674 (1882). No appeal under Letters Patent against order passed under this clause: Venganayyan *v.* Ramasami Ayyan, 19 M. 422 (1896). As to appeals from Court of Revenue to District Judge: Partap Singh *v.* Narain Das, 16 A. 375 (1894); and adjudication by Collector in proceedings under Act VIII. of 1865: Veeraswamy *v.* Manager Pittapur Estate, 26 M. 518 (1902), and clause 29. See Sonaka Chowdhrain *v.* Bhoobunjoy Shaha, 5 C. 311 (1879); Navivahoo *v.* Narotamdas, 7 B. 5 (1882) [contempt orders]; as to this, see next section.

(1) Balkaran Rai *v.* Gobind Nath Tewari, 12 A. 129, 156, 157 (1890).

(2) Sonaka Chowdhrain *v.* Bhoobunjoy Shaha, 5 C. 311 (1879).

(3) Vilayat Husen *v.* Mahendra Chandra Nundy, 28 A. 88 (1905).

(4) Tika Ram *v.* Shama Charan, 20 A. 42 (1897); and see Venganayyan *v.* Ramasami Ayyan, 19 M. 422 (1896).

(5) See Bhagbut Lall *v.* Narku Roy, 21 C. 789 (1894); Nana Kumar Roy *v.* Golam Chunder Dey, 18 C. 422 (1891); Gopi Koeri *v.* Gopi Lal, 21 C. 799 (1894); Aubhoya Dassi *v.* Pudmo Lochun Mondul, 22 C. 802 (1895); "final" here refers to finality so far as further appeal is allowed: Azim-ud-din *v.* Baldeo, 3 A. 554 (1881).

(6) Madhu Sudan Sen *v.* Kamini Kanta Sen, 32 C. 1023, 1029 (1905); Janaki *v.* Promotha, 15 C. W. N. 830 (1911). But see Lakshmi *v.* Maru Devi, 37 M. 29 (1914).

(7) Rajbuns Sahai *v.* Soorjee Lal, 17 C. W. N. 617 (1911).

for the order is made appealable under O. XLIII. r. 1, cl (*j*) and consequently a second appeal is barred under sub-section 2 of this section; but that an order under sect. 174 of the Bengal Tenancy Act is not appealable under O. XLIII., and therefore this sub-section does not bar a second appeal from such an order.(1)

It has also been held that this section only relates to an appeal from an order which is not a decree, and that the exception in cl. (*h*) of sub-section 2 has been made because provision is made elsewhere for an appeal from an order of arrest or detention in execution of a decree, such an order being made under sect. 47 and being appealable under sect. 96.(2)

In a recent case it was held that appeals only lie from decrees under sect. 2 or orders under this section, and that an order extending time under sect. 148 comes under neither heading and is therefore not appealable.(3)

Whether section affects Letters Patent.—The Governor-General in Council may pass laws which shall have the effect of amending or altering the provisions of the Letters Patent.(4) The question in each case is, has this been done? This is a matter of construction of the Letters Patent and the particular section of the Code which is alleged to have modified them. By sect. 117 the provisions of the Code, except as otherwise specially provided, apply to the High Courts. In the first place as regards appeals under the Letters Patent the order appealed against must be a "judgment," that is an order deciding finally any question at issue in the case or the rights of any of the parties to the suit. If it is not a "judgment" it is not appealable.(5) Nextly, assuming that it is a judgment, it may be in respect of a matter not dealt with by the Code. So an order for attachment for contempt is not an order in exercise of civil jurisdiction, and therefore, does not come within sect. 591 (now 105) of the Code.(6) If, however, an order is passed in civil jurisdiction which is a "judgment" under the Letters Patent, the question then arises as to how far, if at all, the Letters Patent are controlled by the Code. As regards this Chapter in the last Code the earlier decisions of the Madras High Court and the decisions of the Allahabad High Court held that sect. 588 of that Code, which this section replaces, modified the Letters Patent, and that the right of appeal given by them was subject to the limitations on appeal prescribed by the Code.(7) It was, however, subsequently held and probably now is, so

(1) Asimuddi *v.* Sundari, 38 C. 339 (1911); Raghubar *v.* Jadunundan, 16 C. W. N. 736 (1911); Narbat *v.* Baldeo, 33 A. 479 (1911).

(2) Ardeshirji Framji *v.* Kalyan Das, 32 A. 3 (1909).

(3) Suranjan Singh *v.* Ram Bahal Lal, 35 A. 583 (1913).

(4) Vasudeva Upadyaya *v.* Visvaraja Thirthasami, 20 M. 407, 415 (1897); Achaya *v.* Ratnavelu, 9 M. 253 (1885).

(5) Aubhoy Churn *v.* Shamont Lochun, 16 C. 788 (1889) [Review of Judgment]; Lutf Ali *v.* Asgur Reza, 27 C. 455 (1890) [order granting certificate to appeal to Privy Council]; Kishen Pershad *v.* Tilukdhari Lall, 18 C. 182 (1890) [order refusing to extend time to furnish security]. See notes to sect. 2, *ante*.

(6) Navivahoo *v.* Narotamdas, 7 B. 5 (1882). See Mohendra Lall *v.* Anundo Coomar, 25 C. 236 (1897).

(7) In *Re* Rajagopal, 9 M. 447 (1886) [order under sect. 592 refusing leave to appeal as pauper]; Sankaran *v.* Raman Kutti, 20 M. 152 (1896) [passing final decree instead of order of remand]; Vasudeva Upadyaya *v.* Visvaraja Thirthasami, 20 M. 407 (1897) [order passed on appeal from order of remand]; Banno Bibi *v.* Mehdi Husain, 11 A.

far as the Calcutta and Madras High Courts are concerned, that the interpretation to be placed on the decision of the Privy Council (1) is that this section does not touch the right of appeal given by the Letters Patent.(2) These decisions consider that of the Privy Council to be of general application, and proceed upon the construction that the scheme of the Code as to appeals is that they lie from one Court to another, and that therefore this section has no application to a case where the appeal is from one Judge of a Court to the Full Court.(3) As regards other sections it has been held that sect. 597 (now 111) of the Code modifies sect. 39 of the Letters Patent; (4) and that sect. 15 of the Letters Patent is controlled by sect. 629 (now O. XLVII. r. 7) of the Code, which provides that an order of a civil Court rejecting an application for review of judgment shall be final.(5)

[s. 591.]

Other orders.

105. (1) *Save* as *otherwise expressly* provided, no appeal shall lie from any order *made* by *a* Court in the exercise of its original or appellate jurisdiction; but, *where a* decree *is* appealed *from*, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) *Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.*

Appeal. An order may or may not be a decree (see sect. 2). The former are appealable as such. The latter orders may or may not be appealable under sect. 104 or O. XLIII. r. 1, which deals with what may be described as immediate appeals from orders.(6) A party against whom an appealable order has been made may at once prefer his appeal. He is, however, not bound to do so. There

375 (1889) [order refusing leave to appeal as pauper; see editor's notes giving earlier cases]; Muhammad Naim-ul-Jah *v.* Ihsan-ullah, 14 A. 226 (1892) [order directing amendment of decree].

(1) Hurrish Chunder *v.* Kali Sunderi, 9 C. 482; 10 I. A. Sc. (1882).

(2) Toolsee Money *v.* Sudevi Dassee, 26 C. 361 (1899); Chappan *v.* Moidin Kutti, 22 M. 68 (1898); Sabhapathi Chetti *v.* Narayanasami Chetti, 25 M. 555 (1901).

(3) See *per* Subramania Ayyar, J., in Vasudeva *v.* Visvaraja, 20 M. at pp. 417, 418 (1897).

(4) Vasudeva *v.* Visvaraja, 20 M. at p. 413, *per* Benson, J. (1897).

(5) Achaya *v.* Ratnavelu, 9 M. 253 (1885); approved in Aubhoy Churn *v.* Shamont Lochun, 16 C. 788, 794 (1889); disapproved in Toolsey Money *v.* Sudevi Dossee, 26 C. 361, 367 (1899), where, however, no mention is made of the fact that the first cited case referred not to sect. 588, but to sect. 629. The result may or may not be the same, but whatever it be, it must be arrived at on a construction of the particular section in question.

(6) See Luckmidas *v.* Ebrahim, 2 B. at p. 648 (1878).

is no law in India which renders it imperative upon a suitor to appeal from every interlocutory order by which he may conceive himself aggrieved under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the Appellate Court.(1) Formerly though no appeal had been filed from an order which was a preliminary decree within the period of limitation, that order might have been questioned on the appeal from the final decree.(2) This, however, is not so now; see sect. 97. In the case of orders not decrees, an order made under the Code from which an appeal is given under sect. 104 may be questioned under this section in an appeal from the decree in the suit, although no appeal from such order has been preferred under sect. 104.(3) The same rule applies where, though the order is not one of those mentioned in sect. 104, it is a judgment within the meaning of sect. 15 of the Letters Patent. The order may equally, as in the other cases, be questioned under this section.(4) It has been held that where a suit has been remanded on appeal, an appeal from the order after the suit has been taken up by the first Court on remand and finally disposed of will not lie and that this clause has no bearing on such cases.(5)

Orders of remand have now, by the second clause, been excepted. As to the previous law, see note (3), *infra*.

And where an order under the group of sections relating to representatives has been made excluding a person from the record, that person must seek his or her remedy in appeal against the order, and is not entitled to appeal against the decree so long as the order stands, the reason being that the question whether

(1) Maharajah Mohesher Singh *v.* Bengal Government, 7 Moo. I. A. at pp. 302, 303 (1859); Sheonath *v.* Ramnath, 10 M. I. A. 413 (1865); Forbes *v.* Ameeroonissa Begum, 10 M. I. A. 340 (1865); Shah Mukhun Lall *v.* Sree Kishen Singh, 12 M. I. A. 157 (1868); Savitri *v.* Ramji, 14 B. at p. 235 (1889).

(2) Id. [order granting review of judgment]; Biswa Nath Chaki *v.* Beni Kanta Dutta, 23 C. 406 (1896) [order directing amounts]; Khadem Hossein *v.* Emdad Hossein, 29 C. 758 F. B. (1901) [preliminary decree for partition]; overruling Boloram Dey *v.* Ram Chandra Dey, 23 C. 279 (1895); Shah Mukhan Lal *v.* Baboo Sree Kishen Singh, 10 M. I. A. at pp. 184, 185 (1868) [interlocutory decree as to interest].

(3) Sheo Nath Singh *v.* Ram Din Singh, 18 A. 19 F. B. (1895); Forbes *v.* Ameeroonessa Begum, 10 M. I. A. at p. 359 (1865); Cheda Lall *v.* Badullah, 11 A. 35 (1888); Rameshur Singh *v.* Sheodin Singh, 12 A. 510 (1889); Savitri *v.* Ramji, 14 B. 232 (1889); Kanto Prashad Hazari *v.* Jagat Chandra Dutta, 23 C. 335 (1895); Mohesh Chunder Das *v.* Jahiruddi Mollah, 5 C. W. N. 509 (1901); these were all cases of objections in the final decree to previous orders of remand. Whether illegal orders of remand affected the merits was a question to be determined in each case: Savitri *v.* Ramji, *supra*, at pp. 235, 236; Mohesh *v.* Jahiruddi, *supra*, at p. 515; if the order did not affect the merits, then sect. 578 cured the defect, ib. 510. See now clause 2 of the section. Googlee Sahoo *v.* Premlall Sahoo, 7 C. 148 (1881) [order under sect. 32]; Har Narain Singh *v.* Kharag Singh, 9 A. 447 [order under sects. 32, 356, 367]; Goodall *v.* Mussoorie Bank, 10 A. 97 (1887) [order under sect. 372]; Sheonath *v.* Ramnath, 10 M. I. A. 423 (1865) [order nominating arbitrators]; Mowree Bewa *v.* Soorundarnath Roy, 10 W. R. 178 (1868) [order admitting appeal out of time]; Joykishen Mookerjee *v.* Parbutty Churn Ghoosal, 22 W. R. 183 (1874); Bhyrub Chunder *v.* Madhub Ram, 20 W. R. 84 (1873) [order granting review which can only be challenged on the grounds stated in sect. 629]; Baroda Churn Ghose *v.* Gobind Proshad Tewary, 22 C. 984 (1895); Dhamara Kumara *v.* Bukkapatnam, 34 M. 228 (1910).

(4) Jamsetji *v.* Dadabhoy, 24 B. 302 (1900); s. c., 2 Bom. L. R. 648.

(5) Janoki *v.* Promotha, 15 C. W. N. 830 (1911).

the order below was right or wrong goes to the very root of the question as to the party's right to be a party to the proceedings below, or to come up at all in appeal.(1) If an order is non-appealable, then it may be questioned under this section subject to the terms thereof. While sect. 104 deals with what may be styled immediate appeals from orders, this section is in substance the grant of an ultimate appeal against any order affecting the decision of the case, but making such ultimate appeal contemporaneous with an appeal against the decree.(2) It has been held that if there is an appeal against an order made under any rule, there is also an appeal against any order made under part of that rule.(3)

Order must be under this Code.—This section must be read with sect. 104, and should be construed as if the words "*under this Code*" were inserted between the words "*by a Court*" and the words "*in the exercise of.*" To hold otherwise would have the effect of abolishing many appeals given by other Acts of the Legislature, some of which were passed before the Code came into force; for example, appeals from decisions in Companies cases.(4) So also an order for attachment for contempt is not an order in exercise of the High Court's civil jurisdiction, and therefore does not come within the provisions of this section. Contempts are in the nature of offences, and therefore under sect. 15 of the Letters Patent, 1865, an appeal lies from an order of committal for contempt.(5)

The section contemplates two things—there being a regular appeal about something else, and in that appeal the insertion in the memorandum of appeal of a ground of objection under this section.(6) This section does not enable a litigant to avoid limitation by coming up under this section when the only ground of appeal is an order made under sect. 562, now O. XLI. r. 23.(7) No appeal lies where no objection is taken to the decree as regards the merits of the case, those merits having been enquired into,(8) but the grounds are solely directed against an interlocutory order passed in the suit.(9) Where, however,

(1) Sankali *v.* Murlidhar, 12 A. 200 (1890); a party to the decree may formally appeal, but in this case the appellant was not a party, and the order complained of decided that she was not entitled to be a party; dist. Har Narain *v.* Kharag Singh, 9 A. 447 (1887), and see Balabai *v.* Ganesh, 27 B. 162 (1902), in which the Lower Appellate Court had dismissed the suit on the ground that one B was not the representative of the deceased plaintiff.

(2) See Luckmidas *v.* Ebrahim, 2 B. at pp. 648, 649 (1878).

(3) Eastern Mortgage and Agency Co. *v.* Fakiruddin, 17 C. W. N. 16 (1912); Mohunt Anand *v.* Ram Perkash, 14 C. W. N. 183 (1909).

(4) Wall *v.* Howard, 17 A. 438, 440 (1895); Umrao Chand *v.* Bindraban Chand, 17 A. 475, 477 (1895).

(5) Navivahoo *v.* Narotamdas Candas, 7 B. 5 (1882). In dealing with an appeal from such an order the Appellate Court will not go behind the order the disobedience to which constitutes the contempt: ib.

(6) Sheonath Singh *v.* Ram Din Singh, 18 A. 19 F. B. (1895); foll. Sher Singh *v.* Diwar Singh, 22 A. 366, 367 (1900).

(7) Ib.

(8) In Krishna Chandra Gotedar *v.* Mohesh Chandra Laha, S. A. 2310 of 1902, Cal. H. C. 6 April, 1905, the Lower Appellate Court had refused to inquire into the merits because it illegally set aside an order which had been made under sect. 108 restoring the suit.

(9) Sher Singh *v.* Diwar Singh, *supra* (appeal against an order setting aside the dismissal of a suit for default).

the order of the lower Appellate Court as to abatement was embodied in the judgment and decree, it was held that objection thereto was properly taken by way of second appeal against the decree. In this case the Court was asked to set aside the decree on the ground that the trial on the merits was contrary to law; but even if the order that by reason of the death of one of the respondents the appeal against her failed were treated as an order in the suit separate from the findings upon which the decree was based (which it was held not to be), then there was an objection that the appeal ought to have abated altogether and not partially.(1)

Order.—The words "*prior to decree*" which appeared in sect. 363 of the Code of 1859, were omitted from the Code of 1877, as from the last and present Code, and thus the section is applicable to orders affecting the decision of the case whether such orders were made before or after the decree.(2) The words "*affecting the decision of the case*" did not apply to "*such orders*" in the former section, but to the previous words "*error, defect or irregularity.*" So in an appeal from an *ex parte* decree in a summary suit upon a promissory note, it was held that an appeal lay from an order made after decree under sect. 534 (now O. XXXVII. r. 4), refusing to set aside the *ex parte* decree.(3) The Court also observed that if the Court made an order to set aside the decree, stay execution, and give leave to the defendant to appear and defend, it "affects the decision," and by refusing to do so it also "affects the decision" inasmuch as it thereby upholds the decree against the party applying to have it set aside.(4) The word "*such*" has now been deleted. The order must be one passed under the Code. A decision under sect. 5 of the Court Fees Act is not an order under this section.(5)

Decree.—The section only applies where there is an appeal from a "decree." As to the meaning of this term, see notes under sect. 2, *ante*. Where the order appealed from was not a decree nor an order under sect. 588 of the former Code, it was held no appeal lay.(6)

Error, defect, or irregularity.—These words mean in this section error, defect, or irregularity in procedure or in law, and not in matters of fact.(7)

"Affecting the decision of the case."—These words mean "affecting the decision of the case with reference to the merits of it." (8) Therefore, when an *ex parte* decree was set aside by an order under sect. 108 (now O. IX. r. 13), and the suit heard upon the merits and dismissed, it was held that such order was not an order affecting the decision of the case under this section; it did

(1) Hem Kunwar *v.* Amba Prasad, 22 A. 430 (1900).

(2) Luckmidas *v.* Ebrahim, 2 B. 644 at p. 649 (1878).

(3) Ib.

(4) Ib. at p. 648.

(5) Balkaran Rai *v.* Gobind Nath Tewari, 12 A. 129 F. B. at p. 158 (1890).

(6) Hirdhamun Jha *v.* Jinghoor Jha, 5 C. 711 (1880).

(7) Sankali *v.* Murlidhar, 12 A. 200 (1890); Balabai *v.* Ganesh, 27 B. 162, 187 (1902).

(8) Chintamony Dassi *v.* Raghoonath Sahoo, 22 C. 981 (1895); Gulab Kunwar *v.* Thakur Das, 24 A. 464 (1902); Tasadduq Husain *v.* Hayat-un-Nissa, 25 A. 280 (1903); Balabai *v.* Ganesh, 27 B. 162, 187, 188 (1902).

not determine on the merits, but merely insured a hearing upon the merits.(1) So an order readmitting an appeal which had been dismissed for default is not an order affecting the decision of the case,(2) nor is an order allowing a plaintiff to sue as a pauper.(3) The orders which may be considered under this section are, in short, those by which the Judge may have been misled in deciding the case.(4)

Clause (2).—See *ante*, notes, "Appeal."

[s. 589.]

What Courts to hear appeal.

106. *Where* an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or *where* such order is *made* by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

Appellate Courts.—The proviso to sect. 589, which this section replaces, has been omitted as the Code no longer deals with insolvency proceedings.

GENERAL PROVISIONS RELATING TO APPEALS.

[s. 582, first part.]

Powers of Appellate Court.

107. (*1*) *Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—*

(*a*) *to determine a case finally;*

(*b*) *to remand a case;*

(*c*) *to frame issues and refer them for trial;*

(*d*) *to take additional evidence or to require such evidence to be taken.*

(*2*) *Subject as aforesaid,* the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted *therein.*

Appellate Court's powers.—An appeal is a continuation of the original suit, and therefore the powers and duties of both Courts must be to a large extent

(1) Chintamony *v.* Raghoonath, 22 C. 981 (1895); foll. Krishna Chandra Goldar *v.* Mohesh Chandra Saha, 9 C. W. N. 584 (1905); dist. Krishna *v.* Ganesh, 26 B. 201, 203; Tasadduq *v.* Hayat-un-Nissa, 25 A. 280 (1903); Kariman *v.* Forbes, 1 Cal. L. J. 27 N. (1905).

(2) Gulab Kunwar *v.* Thakur Das, 24 A. 464 (1902).

(3) Mumtazan *v.* Rasulan, 23 A. 364, 367 (1901). In an early case, however, where a Court gave leave to sue as a pauper, a previous application having been refused, the suit was dismissed on appeal: Bishessur Singh *v.* Muhessur Baksh, S. D. N. W. 1864, vol. ii. p. 189.

(4) See also Sankali *v.* Murlidhar, 12 A. 200 (1890); Balabai *v.* Ganesh, 27 B. 162, 187, 188 (1902), in which the order was held not to have affected the decision.

the same. Thus the Appellate Court has powers as regards the amendment (1) and return (2) of the plaint and memorandum of appeal, the withdrawal (3) of the suit and addition of parties (4) to the appeal; the reference of the subject-matter of the suit and appeal to arbitration; (5) the abatement of the appeal; (6) assignment; (7) substitution of party where mistake; (8) separation and trial

(1) Percival *v.* Collector of Chittagong, 30 C. 516, 520 (1900); Peary Mohun *v.* Narendra, 5 C. W. N. 273, 279 (1900); see also Bai Majirabja *v.* Magantal, 19 B. 303, 307 (1894); Shyam Chand *v.* Land Mortgage Bank, 9 C. 695, 698 (1883); Dhani Ram *v.* Bhagirath Shaha, 22 C. 692 (1895); Seshamma *v.* Chenappa, 20 M. 467 (1897); Krishnaya *v.* Panchu, 17 M. 187 (1893).

(2) Wahidullah *v.* Kanhaya Lal, 25 A. 174, 176 F. B. (1902) (overruling Bindeshri *v.* Nandu, 3 A. 456); see also Chinna Sami Pillai *v.* Karuppa Udayan, 21 M. 234 (1896); Pachoni *v.* Ilahi, 4 A. 478 (1882); Goor Bux Sahoo *v.* Brij Lal Benka, 26 C. 279 (1889); Raghunath Charan Singh *v.* Shamo Koeri, 31 C. 344, 347 (1903) [dissenting from Kunhi Kutti *v.* Aghotti, 14 M. 462 (1891)]; Sarala Sundari *v.* Saroda Prosad, 2 C. L. J. 602, 607 (1904); Dalip Singh *v.* Kundan Singh, 36 A. 58 (1913).

(3) Ganga Ram *v.* Dala Ram, 8 A. 82, 84 (1885); but a plaintiff cannot by withdrawing of his own free will and without permission annul rights created by the decree of the first Court: Satyabhamabhai *v.* Ganish, 29 B. 13, 18 (1904).

(4) Gyanananda *v.* Kristo, 8 C. W. N. 404, 406 (1901) (apart from the section the Court has inherent powers in this respect); Rangit *v.* Sreo Prasad, 2 A. 487, 491 (1879); Vasudev *v.* Salubai, 10 B. 227, 229 (1885).

(5) *In re* Sangaralingam, 3 M. 78 (1880); Bhugwan Das *v.* Nund Lall, 12 C. 173, 175 (1885); Suresh *v.* Ambica, 18 C. 507, 509 (1891); see also Russool Bebee *v.* Jan Ali, 17 W. R. 31 (1871); as regards the effect of this section on sect. 522 of the former Code, see Shyama Charan *v.* Prohlad, 8 C. W. N. 390, 393 (1904); dissenting from Naurang Singh *v.* Sadapal Sing, 10 A. 8 (1887).

(6) Gopal Gonesh *v.* Ramchandra, 26 B. 597, 606, 607 (1902) [death of appellant; held also that it by no means follows that the right to appeal against a decree partakes of the nature of the original cause of action—defamation suit]; Paraman *v.* Sundarja, 26 M. 499 (1902) [death of appellant—suit for malicious prosecution]; Bai Full *v.* Adesang, 26 B. 203 (1901) [abatement only as regards certain respondents]; Chintamun *v.* Gungabai, 27 B. 284 (1903) [death of one appellant; dealing with whole case on appeal of survivor]; Chandarsing *v.* Khimabhai, 23 B. 718, 721 (1897) [death of one appellant cannot affect right of others to proceed with the appeal; and see Alla Baksh *v.* Madharam, 23 A. 22 (1900); Ram Sewak *v.* Lambar Pande, 25 A. 27 (1902); Chintaman *v.* Gungabai, 5 Bom. L. R. 90 (1903)]; Hun Kunwar *v.* Amla Prasad, 22 A. 430, 433 (1900) [right of appeal not surviving against surviving respondent, but against them and representative of deceased]; and see Raj Chunder *v.* Gunga Dass, 31 C. 187 (P. C.) 31; 1 A. 71, 8 C. W. N. 442; Renga Srinivasa *v.* Gungaprakasa, 30 M. 67, 68 (1906); Dharanjit *v.* Chandeshwar, 11 C. W. N. 504, 506 (1907); Joy Govind *v.* Manmotha, 33 C. 580 (1906); Susya Pillai *v.* Anyakanna Pillai, 29 M. 529 (1906) [second appeals]; Muhammad Hussain *v.* Khushalo, 10 A. 223, 235 (1888) [ascertainment of legal representative of deceased; inherent power]; Shyamanand *v.* Rajnarain, 4 C. L. J. 568, 570 (1906) [right to appeal surviving against surviving respondents]; Upendra Kumar *v.* Sham Lal Mandal, 6 C. L. J. 715 (1907); s. c., 34 C. 1020, 11 C. W. N. 1100; Madhuban Das *v.* Nairan Das, 29 A. 535 (1907).

(7) *In re* Durga Prasad, 22 A. 231 (1899) [dist. Collector of Muzaffarnagore *v.* Hossain Begum, 18 A. 86 (1895)]; *In re* Sarat Chander Singh, 18 A. 285 (1896); Raja Ram *v.* Jilni, 9 B. 151; Ramji *v.* Ellis, 20 B. 167 (1895); moreover, O. XXII. r. 13, has not now the qualifying words "*arising out of the death, marriage, or insolvency,*" etc.

(8) The decision in Dwarka Nath Biswas *v.* Debendra Nath Tagore, 4 C. W. N. 58, 62 (1899), proceeded on the language of the former section, *vide post.*

of misjoined suits; (1) sending for and examining an Ameen on his report; (2) power to award costs against the estate of a deceased plaintiff; (3) power to pass an order under sect. 108 of the last Code; (4) and the like. An Appellate Court has wider powers of remand than under the last Code.(5)

The words of the section confer and impose upon an Appellate Court very wide powers,(6) in fact, the same powers as those of the first Court as nearly as may be. It was, however, sometimes a question whether the general powers thus stated in the first part of the section were controlled by the second portion,(7) which dealt with the death, marriage and insolvency of parties. This portion has now been removed to O. XXII. r. 13, the object of which is to obviate the necessity of repeating the provisions of the order so as to make them applicable to appeals, and that order is itself stated in wider terms, being no longer limited to proceedings arising out of the death, marriage or insolvency of parties to an appeal.(8) The amended section, disencumbered of the portion referred to, should now make it clear that the powers of an Appellate Court are as nearly as may be the same as those of the first Court; that is, while they are as extensive, they are subject to the same limitations.(9) This principle has been held to be applicable to all cases where the Appellate Court has a plenary, and not merely a limited, jurisdiction.(10) The first sub-clause is new, and has been inserted because it was thought desirable to have in the body of the Code a general provision about the powers of an Appellate Court. The second sub-clause is taken from the first part of sect. 582 of the former Code.

[ss. 587, 590.]

Procedure in appeals from appellate decrees and orders.

108. The provisions *of this Part relating to appeals from original decrees* shall, *so* far as may be, apply to appeals—

(a) from appellate decrees, and

(1) Shoroop Chunder Paul *v.* Mathoor Mohun, 4 W. R. 109 (1865); Ameerun *v.* Waseehun, 12 W. R. 11, 13 (1869).

(2) Sheo Dyal Singh *v.* Hodgkinson, 24 W. R. 342 (1875); though a Judge should not order a Subordinate Judge whose judgment is before him on appeal to go and inspect: Roy Sultan *v.* Laloo Kooer, 17 W. R. 300 (1872).

(3) Rajmonee *v.* Chunder, 8 C. 440 (1881); Lakshmibai *v.* Balkrishna, 4 B. 654 (1880); there is now no scope for the doubt expressed in the first case.

(4) Sankara Bhatta *v.* Subraya Bhatta, 17 M. L. J. 436 (1907); s. c., 30 M. 535.

(5) Gora Chand *v.* Basanta, 15 C. L. J. 258, 262 (1911).

(6) See Muhammad Husain *v.* Khushalo, 10 A. 223, 233 (1888); as to the meaning of the term "powers," see Kali Krishna Chandra *v.* Harihar Chuckerbutty, 1 B. L. R. 155 (1868).

(7) See Dwarka Nath Biswas *v.* Debendra Nath Tagore, 4 C. W. N. 58, 62 (1899); where on this ground it was held that the earlier part of this section did not make all the provisions applicable to suits applicable also to appeals.

(8) Collector of Muzaffarnagar *v.* Husaini Begum, 18 A. 86, 88 (1895); though even under the last Code the power might have been found in the first part of the section; *In re* Durga Prasad, 22 A. 232 (1899); the present rule speaks of a plaintiff including "an appellant, etc.," instead of "a plaintiff appellant or defendant appellant, etc.," but the meaning is the same, as an appellant may be a plaintiff or defendant; see *per* Mahmood, J., in Narain Das *v.* Lagga Ram, 7 A. 693, 699 (1885); and see as to the question of limitation there referred to, Mitra's Limitation, 4th edition, p. 1103.

(9) See in illustration cases cited *ante passim* and Durga Prasad *v.* Khairati, 1 A. 545 (1878), where it was held that the Appellate Court should (as well as the Court of first instance) confine itself to deciding matters put in issue by the parties.

(10) Tej Mal *v.* Papayamma, 22 M. L. J. 225 (1911).

(*b*) from orders made under this Code or under any special or local law in which a different procedure is not provided.

"**As far as may be.**"—These words mean "as far as is consistent with the principles on which appeals from appellate decrees [and orders] are admitted and determined." In second appeal the Court cannot go into the facts. So it was held that no objection could be taken under sect. 567 of the last Code.(1) corresponding with the present O. XLI. r. 27. So also sect. 565 (now r. 25 of the same Order) was held not to apply to second appeals.(2) So while sects. 562 and 564 of the last Code were held strictly binding on all Courts of first appeal, cases frequently occurred in which the Court in second appeal remanded cases for reasons not contemplated in the former section.(3) So the appellate Court has set aside a decree where there was no proper judgment and remanded the case for a decision *de novo*,(4) and has made a remand where evidence was improperly admitted; (5) and for a finding on an issue.(6) Where the first Court dismissed a suit on one of the issues, viz., that of title, observing that it was not necessary to decide the other issues, one of which was an issue as to limitation, and the second Court decreed the suit by reversing the finding of the first Court on the issue of title, but omitted to record a finding on the issue of limitation; the case was remanded to the Lower Appellate Court for findings on the remaining issues.(7) And though there was no section strictly authorizing a remand, the Court was held under the circumstances warranted *ex debito justitiæ* in setting aside the proceedings and directing a retrial of the case.(8) Sect. 587 of the last Code was held to authorize an application to bring in a plaintiff respondent in second appeals and to extend to such appeals the provisions of sects. 368 and 582 of that Code (now O. XXII. r 4, sect. 107, O. XXII. r. 11).(9) It was, however, subsequently held, though the Allahabad and Calcutta High Courts dissent, that the reference to sect. 582 in the Limitation Act did not include by implication second appeals referred to in the section corresponding to this.(10) This section may be read with sect. 582, now 107, *ante*, O. XXII. r. 11, *post*.(11)

(1) Hindo *v.* Brayan, 7 M. 52 (1883) [as to the portion of this decision dealing with the treatment of additional evidence by the Court of second appeal, see Gopal Singh *v.* Jhakri Rai, 12 C. 37 (1885)]; Sohawan *v.* Balu Nand, 9 A. 26, 29 (1886); Kelu Mulachiri *v.* Chenda, 19 M. 157 (1895).

(2) Sheo Ratan *v.* Lappu Kuan, 5 A. 14 (1882); Girdhari Lall *v.* Crawford, 9 A. 147 (1886) [dealing also with sect. 566].

(3) Ganesh Bhikaji *v.* Bhikaji Krishna, 10 B. 398, 400 (1886); Habib Bakhsh *v.* Baldeo Prasad, 23 A. 167, 170 (1901).

(4) Sheoambar Singh *v.* Lallu Singh, 9 A. 29 n.; Sohawan *v.* Balu Nand, 9 A. 26 (1886).

(5) Wazeer Ali *v.* Kalee Coomar, 11 W. R. 228 (1869).

(6) Lalla Ram Lall *v.* Mohurput Roy, 21 W. R. 52 (1873).

(7) Kailash Chandra Kundu *v.* Kunja Bihari Goswami, 4 C. L. J. 86 (1906).

(8) Durga Dihal *v.* Anoraji, 17 A. 29 (1894); and see Habib Bakhsh *v.* Baldeo Prasad, 23 A. 167, 170 (1901).

(9) Vakkalagadda *v.* Vahizulla, 28 M. 498 (1905).

(10) Surya Pillai *v.* Aryakannu Pillai, 29 M. 529 (1906), dissented from in Madhuban Das *v.* Narain Das, 29 A. 535 (1907), and Upendra Kumar Chuckerbutty *v.* Sham Lal Mandal, 34 C. 1020; 11 C. W. N. 100; 6 C. L. J. 715 (1907).

(11) Sarala Sundari Dasi *v.* Saroda Prosad Sur, 2 C. L. J. 602, 607 (1904).

APPEALS TO THE *KING* IN COUNCIL.

[s. 595.] **109.** Subject to such rules as may, from time to time, be made by *His* Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to *His* Majesty in Council—

What appeals lie to *King* in Council.

(*a*) from any decree *or final order* passed on appeal by a High Court or *by* any other Court of final appellate jurisdiction;

(*b*) from any decree *or final order* passed by a High Court in the exercise of original civil jurisdiction; and

(*c*) from any decree *or order*, when the case, as hereinafter provided, is certified to be a fit one for appeal to *His* Majesty in Council.

[s. 596.] **110.** In each of the cases mentioned in clauses (*a*) and (*b*) of section *109*, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the *subject*-matter in dispute on appeal to *His* Majesty in Council must be the same sum or upwards,

Value of subject-matter.

or the decree *or final order* must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree *or final order* appealed from affirms the decision of the Court immediately below the Court passing such decree *or final order*, the appeal must involve some substantial question of law.

[s. 597.] **111.** Notwithstanding anything contained in section *109*, no appeal shall lie to *His* Majesty in Council—

Bar of certain appeals.

(*a*) from the *decree or order* of one Judge of a High Court established under the *Indian High Courts Act, 1861*, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, *where* such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(*b*) from any decree *from* which under section 102 *no second appeal lies.*

112. (*1*) Nothing contained *in this Code* shall be *deemed*– [s. 616.]

Savings.

(*a*) to bar the full and unqualified exercise of *His* Majesty's pleasure in receiving or rejecting appeals to *His* Majesty in Council, or otherwise howsoever, or

(*b*) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to *His* Majesty in Council, or their conduct before the said Judicial Committee.

(*2*) Nothing *herein contained* applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

Appeal to His Majesty in Council.—This matter is dealt with both in the above sections and in O. XLV. The provisions are substantially the same as in the last Code. Sects. 613–615 of that Code have not been re-enacted, and rr. 4 and 5 of O. XLV. are new.

In the Common Law of England must be found the origin of the jurisdiction of the Sovereign in Council, but the Statute Law has recognized and affirmed such jurisdiction. In 1726, by a charter granted by George I., an appeal lay in the case of the Mayors' Courts to the Governor or President in Council and in important cases (1) to the King in Council. The appeal to the Privy Council from the Court of Sudder Dewany Adawlut (which the High Court on its appellate side represents) was granted by 21 Geo. III. c. 70. The power to admit an appeal was first conferred upon the Sudder Dewany Adawlut by Reg. XVI. of 1797, sect. 2.(2) In 1833 the Judicial Committee of the Privy Council was created,(3) and by orders of Her Majesty in Council of the 10th April, 1838, passed in pursuance of 3 and 4 William IV. c. 41, certain restrictions were placed upon the exercise of the power of the Sudder Dewany Adawlut to admit an appeal. The practice of the Calcutta High Court in the admission of appeals has been regulated by rules of the Court made by the Sudder Dewany Adawlut on the 17th December, 1858, and by the High Court on the 30th July, 1870.(4) The Charter Act of 1861 (24 and 25 Vict. c. 104) substituted the High Courts of Calcutta, Madras, and Bombay for the Supreme Courts established under the Charters of 1774, 1800, and 1823 respectively. The Rules now in force have been issued under the powers vested in the High Court by 24 and 25 Vict. c. 104, sect. 13, by the Letters Patent of the High Court, 1865, and by the Code of Civil Procedure. These Rules came into force from 1st July, 1891.(5) The right of appeal to the King in

(1) Ilbert's Government of India, 2nd Ed. p. 32.

(2) In the matter of the Petition of Feda Hosscin, 1 C. 444 (1876).

(3) Safford and Wheeler's Privy Council Practice, 450.

(4) In the matter of the Petition of Feda Hosscin, 1 C. 444 (1876).

(5) Belchamber's Rules and Orders, Appellate Side Rules, Introductory Rule, also Pt. I., Ch. II., r. viii., Pt. II., Ch. IV. etc.

Council now rests on clause 39 of the Letters Patent of 1865, read with sects. 109 and 110 of this Code, and O. XLV.(1) Though appeals from the High Courts in India are regulated by positive Statute, yet the Sovereign in Council possesses by virtue of the Royal Prerogative a clear appellate jurisdiction over the judgments of all Courts of Justice established in any of the British dominions beyond the seas, and notwithstanding the express statutory rights of appeal from the decisions of the High Courts, it has been repeatedly held that, notwithstanding the statutes which prescribe the time and mode of appealing, and the limits in point of amount, the power of the Sovereign in Council to entertain petitions for leave to appeal where the conditions imposed by the Statute have not been complied with, remains in full force. The jurisdiction was exercised in 1862 in an appeal from Oudh, where there was no positive Statute law, Regulation or Order in Council applicable to the admission of appeals from the Court of the Judicial Commissioner of Oudh to Her Majesty in Council.(2) Thus also it is quite discretionary with the Judicial Committee to admit an appeal in cases far below the appealable amount mentioned in the Statutes, and long after the period prescribed by the Statute for filing a petition of appeal in India has expired. Such petitions have been admitted and have led to reversal of the judgment of the Courts below. But the High Courts have no power to allow or entertain a petition for leave to appeal, or to stay execution or to take security for costs of an appeal, except strictly in accordance with the terms of the Statute or with any order the Privy Council may make in the particular case.(3) The Judicial Committee act only as advisers to the Crown and not as a Court of Judicature,(4) and "humbly recommend" their conclusions to His Majesty. But a commission appointed by the Governor General for the purpose of inquiring into the truth of an imputation against a Chief and of reporting to the Governor General in Council how far the same was true to the best of their judgment and belief, was held to be a commission appointed by the Governor General himself for the information of his own mind, in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and not in any sense a Court, or if a Court not a Court from which an appeal lay to His Majesty in Council.(5) Nor is there any appeal to His Majesty in Council from the Courts of Assistant Political agents, Political agents in Kathiawar or from the decision of the Governor of Bombay in Council.(6) By the terms of the Charter (and also the Code) the appeal given is confined to Judicial acts, namely from decrees and orders, though special leave may be

(1) Chataprat Singh Dugar *v.* Kharag Singh Lachmiram, P. C., 40 C. 685 (1913).

(2) Salik Ram *v.* Azim Ali, 8 M. I. A. 270, 272, 274 (1862).

(3) Salik Ram *v.* Azim Ali, 8 M. I. A. 270, 272 (1862) (note). For right of appeal to the Privy Council in Criminal Case, see Joy Kissen Mookherjee Petitioner, 1 W. R. P. C. 13 (1862); Gangadhar Tilak *v.* Queen Empress, 25 I. A. 1, 8 (1897); s. c., 22 B. 528, 532; Ataur Singh *v.* R., 18 C. L. J. 121 (1913); and Chintamon Singh *v.* King-Emperor, 18 C. L. J. 119 (1908).

(4) Safford and Wheeler's Privy Council Practice, p. 1.

(5) *In re* Maharaja Madhana Singh, 31 I. A. 239, 241 (1904); s. c., 32 C. I, 4, 5; 8 C. W. N. 841.

(6) Hem Chand *v.* Azam Sakarlal, 10 C. W. N. 361, 420, 421 (1905).

granted by the Privy Council.(1) Thus it has been held by the Privy Council that no appeal lies to it under the Land Acquisition Act (I. of 1894), sect. 54, since an award by the High Court under that Act is neither a decree under sect. 2 of this Code nor a decree, final judgment or order within the meaning of the Letters Patent, but is the last of a series of arbitration proceedings.(2) Where a matter has been referred by His Majesty to the Judicial Committee, which is not strictly an appealable grievance, their Lordships of the Privy Council may, under the reservations contained in 3 & 4 William IV. c. 41, advise His Majesty to grant the petitioner leave to appeal.(3) Special leave to appeal was given in a case against an order made by the Judges of the Supreme Court of Madras dismissing the Master of that Court from his office for alleged official misconduct, because the order was not made in the course of a judicial proceeding.(4) But in *Ex parte Robertson* (5) it was held that the Judicial Committee have no jurisdiction to take into consideration the propriety of the dismissal of a public servant, who held his office during pleasure, unless the matter is expressly referred to them by the Crown. Following this case, it has been held that the Privy Council have no jurisdiction to grant special leave to appeal against an order of the High Court at Calcutta under sect. 26, clause (2) of Beng. Reg. V. of 1831, dismissing a Munsiff for corruption in the exercise of his functions as a Judge.(6)

As stated, the King in Council, by virtue of the Royal Prerogative, possesses an appellate jurisdiction over the judgment of all Courts of Justice established in any of the British Dominions beyond the seas, and it is quite discretionary with the Judicial Committee to admit an appeal in cases far below the appealable amount mentioned in the Code, and long after the period prescribed for filing a petition of appeal in India has expired.(7) Thus, when the High Court in India has refused the necessary certificate, the aggrieved party may present a petition for the exercise of the prerogative right of the Crown to admit an appeal, and the Judicial Committee, in a fit case, will advise His Majesty that leave to appeal should be allowed on the usual terms as to security. In a fit case their lordships will advise His Majesty to grant (8) an order staying proceedings, where the High Court in India refused to make such an order on the ground that the Code gave them no jurisdiction over the subject-matter pending an appeal not certified by themselves.(9) As a rule, in cases under the appealable amount, before special leave is petitioned from His Majesty in Council an application should be made to the High Court for a certificate that the case is nevertheless a fit one for appeal.(10)

(1) *In re* Minchin, *per* Lord Brougham, 4 M. I. A. 220, 221 (1847).

(2) Rangoon Botatoung Co., Ltd. *v.* Collector Rangoon, P. C., 40 C. 21 (1912); and see Special Officer Salsette Building Sites *v.* Dossabhai Bezonji, 37 B. 506 (1912).

(3) *In re* Minchin, *per* Lord Brougham, 4 M. I. A. 220, 221 (1847); Morgan *v.* Leech, 2 M. I. A. 428 (1841).

(4) *In re* Minchin, *supra*.

(5) 11 M. P. C. cases 288, 295 (1857-58).

(6) In the matter of Sree Mohun Ghuttuck 13 M. I. A. 343, 346 (1870).

(7) Salik Ram *v.* Azim Ali, 8 M. I. A. 270, 272 (1862); see sect. 112

(8) Rahimbhoy *v.* Turner, 18 I. A. 8, 9 (1890); s. c., 15 B. 155; Saiyid Muzhar Hossein *v.* Badha Bibi, 17 A. 112, 116 (1894).

(9) Mohesh Chandra *v.* Satenghan, 27 C. 1, 4 (1899); s. c., 26 I. A. 281; 4 C. W. N. 34.

(10) Moti Chand *v.* Ganga Prasad Singh, 29 I. A. 40 (1901).

Special leave, by the Privy Council, when granted.—The Privy Council will not advise His Majesty to exercise this prerogative and to give special leave to appeal unless there is some substantial question of law of general interest involved.(1) The petition for special leave to appeal is not by way of appeal from the decision of the Court, but it is presented for an exercise of the prerogative right of the Crown to admit an appeal. Although it is not an appeal, it is perhaps a more convenient proceeding than an appeal, because the Privy Council can then grant leave on any other ground, if other ground appears for the indulgence that is sought, and if it finds that, in a case in which the appeal is claimed as of right, the Court below has refused the certificate for a reason which appears to them to be an unsound reason, then they will advise His Majesty to admit the appeal.(2) The Privy Council is not bound by the provisions of the Code. Thus where in an appeal to it by one of the defendants, it set aside a decree of the High Court and restored that of the first Court, and it appeared from the wording of the decree of the Privy Council that the defendants generally were entitled to have the benefit of the decree, held that the defendants generally were entitled to the benefit of the decree though there was no common ground such as is referred to in the Code.(3)

Special leave without requiring further security.—Where the High Court passed a separate decree on a cross-appeal, identical in terms with those of the decree passed on appeal in the same suit, and granted leave to appeal in one and refused it in the other, their lordships granted special leave without requiring further security than had already been taken by the High Court.(4)

Leave to appeal, granted without authority—special leave granted.—An objection that an appeal has come before the Judicial Committee without proper authority, viz. that the leave to appeal should not have been given, ought to be taken at the earliest moment, for the obvious reason that the great expense of preparing for the hearing is thereby saved, which is uselessly incurred if, when the objection is ultimately taken, the Privy Council feel obliged to yield to it, but it is clearly competent to the Judicial Committee to hear such an objection at any stage of the appeal, and it is not unfrequently heard when the appeal is called on and before the arguments on the merits have commenced.(5)

Special leave to appeal—contents of the petition.—Such a petition should contain a full statement of the facts and legal grounds showing that there is a substantial case on the merits, and a point of law involved, proper to be determined by the Privy Council. Thus, where the statements contained in the petition were of a too general character to enable the Privy Council to judge of the propriety of granting the special leave prayed for, their lordships

(1) Moti Chand *v.* Ganga Prasad, 29 I. A. 40, 42 (1901); s. c., 24 A. 174; 6 C. W. N. 362, 364; 4 Bom. L. R. 139.

(2) Rahimbhoy *v.* Turner, 15 B. 155, 158 (1890).

(3) Luchmeeput *v.* Khoobunnissa, 14 W. R. 280 (1870).

(4) Mahammad Ikram-ud-din *v.* Najiban, 23 I. A. 167 (1896); s. c., 19 A. 95.

(5) Gajadhur Porshad *v.* Widows of Eman Ali Beg, 15 B. L. R. 221, 223 (1875).

ordered that the petition should be either dismissed, with liberty to present another petition, or stand over to amend the petition.(1) If a serious question of law is involved in the appeal, special leave will be granted by the Privy Council, though leave had been refused by the High Court.(2) Special leave has been refused in the following cases:—merely because the Judge had omitted to record any reason while granting a review, which he should have done; (3) and where the High Court dismissed an appeal as barred by limitation, the Judicial Committee not being satisfied that the refusal of the High Court to admit the appeal out of time was wrong.(4)

Rescission of special leave to appeal.—Where there is an omission of any material facts, whether it arises from improper intention on the part of the petitioner, or whether it arises from accident or negligence, still the effect is just the same if the Court has been induced to make an order which, if the facts were fully before it, it would not, or might not, have been induced to make.(5) So an Order in Council made upon an *ex parte* application granting special leave to appeal upon an allegation as to the value of the property in dispute was rescinded, where there were omissions in the petition of proceedings in the suit, which showed the true value of the property. Generally an Order in Council obtained upon an *ex parte* petition, which omits to state the true facts, will be discharged with costs, but if there has been laches in applying to discharge the order on the part of the respondent, no costs will be given.(6) Where special leave to appeal is granted upon a petition in which material misstatements are made, objections should be taken by the respondent by a preliminary motion to rescind the leave to appeal, or at any rate before the hearing of the appeal, when called on, has been entered on. Where it is not clear that the material misstatements in the petition had been made with an intention to deceive, and the objection to the appeal is taken at a late stage of the hearing, the Judicial Committee may decline to dismiss the appeal, but refuse the appellant the costs of the appeal. But if their Lordships are satisfied that the misstatements were intentionally made to deceive them, they will, even at a late stage, dismiss the appeal.(7)

Powers of High Court after admission.—The question has arisen and been answered affirmatively whether the High Court, after the admission of an appeal to the Privy Council, has any further authority in the suit, and competence to do any judicial act relating to it. Thus on the death of a party on the record of an appeal pending before the Privy Council, evidence must be given in the Court from which the appeal has been preferred, of the representative character of the person or persons by or against whom revivor is sought. The

(1) Goree Monee *v.* Juggat Indra, 11 M. I. A. (1866).

(2) Goonesher *v.* Gonesh Das, 3 C. W. N. CCXXXVIII. (1899).

(3) Shankar Buksh *v.* Balwant Singh, 27 I. A. 79 (1899); s. c., 4 C. W. N. 203.

(4) Ram Narain *v.* Pareneswar, 30 C. 309 (1902).

(5) Mohun Lal Sookul *v.* Bibee Doss, 8 M. I. A. 193 (1861); *per* Lord Kingsdown, p. 195, Ameena Khatoor *v.* Radha Benode Misser, 7 M. I. A. 261, 263 (1859).

(6) Ibid.; see also Mussoorie Bank *v.* Raynor, 4 A. 500, 508 (1882); s. c., 9 I. A. 70.

(7) Ram Sabuk *v.* Kaminee, 14 B. L. R. (P. C.) 394, 406 (1874); s. c., 23 W. R. 113.

Court below should give its own opinion as to who are the parties who should be substituted upon the record, and should make and send a certificate or statement on which their Lordships can act.(1) When only the petition for leave to appeal has been filed and before it is allowed, the High Court has jurisdiction to entertain applications relating to the appeal.(2) Further, if the appellant has taken no steps towards prosecuting the appeal, the petition of appeal may be struck off the file by the High Court.(3) The Judicial Committee have no jurisdiction to entertain any application in an appeal until the petition of appeal is lodged there, though the transcript has been registered in the Council office.(4) If after the admission of the appeal no steps are taken by the appellant within reasonable time, the Judicial Committee, upon a certificate of the Registrar of the High Court that no further proceedings have been taken after the admission of the appeal, will dismiss it.(5) It was considered that an appeal to the Privy Council having once been admitted, whether properly or erroneously, the High Court had no further jurisdiction to review its order and declare the appeal rejected.(6) But in a later case Prinsep, J., held that an order granting leave to appeal to the Privy Council was open to review.(7) And an order refusing leave to appeal to the Privy Council can be reviewed by the Court which made it.(8)

Rehearing of appeal by the Privy Council.—It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in the Privy Council can be reheard, and that an order once made, that is a report submitted to His Majesty and adopted, by being made an Order in Council, is final, and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal. Whatever, therefore, has been really determined in these Courts must stand, there being no power of rehearing for the purpose of changing the judgment pronounced. Nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by Common Law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. It is impossible to doubt that the indulgence extended in such cases, is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where by some accident, without any blame, the party has not

(1) Haidar Ali *v.* Tassadduk Rasul, 16 C. 184 (1888).

(2) Hurro Soondery *v.* Kistonauth, Fulton 10 (1842).

(3) Gobardhan *v.* Mani Bibi, 5 B. L. R. 76 (1870); Thakoor Kapilnath *v.* The Government, 1 C. 142 (1876).

(4) Gungadhur *v.* Radhamoney, 9 Moo. P. C. 411 (1855).

(5) Rabutty Dassee *v.* Radhananth, 6 M. I. A. 346 (1856).

(6) Ameerunnissa *v.* Indurjeet, 6 W. R. 97 (1866).

(7) Gopinath Birbar *v.* Goluck Chunder, 16 C. 292 (1884) [this case on the interpretation of substantial question of law appears to be overruled by the Privy Council case]; Tulsi Persaud Bhakt *v.* Benayek Misser, 23 I. A. 102 (1894); s. c., 23 C. 918; Sukalbutti *v.* Babu Lal, 28 C. 190, 193 (1900); s. c., 5 C. W. N.

(8) Nand Kishore *v.* Ram Golam, 39 C. 1037 (1912); 16 C. W. N. 1089.

been heard, and an order has been inadvertently made as if the party has been heard. Under the peculiar circumstances of this case their Lordships recommended the restoration of the appeal dismissed *ex parte*.(1) Even before report, whilst the decision of the Board is not yet *res judicata*, great caution has been observed in permitting the rehearing of appeals.(2) After the respondent has had notice of a pending appeal, he is not entitled to further notice that the record has been transmitted or that the appeal is set down for hearing, and he cannot ask for a rehearing of the appeal on the ground that he had no such notice.(3) The unusual indulgence of recommending a re-hearing of an appeal to His Majesty ought never to be granted except under very special circumstances, and only where the *ex parte* hearing has not been occasioned by any default in the party applying for a re-hearing.(4) An Order in Council rescinding a previous Order in Council, granting special leave to appeal, may be discharged and the appeal restored.(5) Also an appeal dismissed for want of prosecution (under Rule 5 of the Order in Council of 1853) has been restored on explanation of delay incurred and on conditions as to costs and security to be given in England.(6)

Appeals from decision given on second appeal.—In an appeal to the Privy Council from a decree of the High Court made on a second appeal, the hearing before their Lordships must be based upon the materials which were open to the High Court, and the findings of the Subordinate Judge on matters not involving questions of law must be taken as conclusive,(7) and in such cases the findings of fact by the first Court are binding on the Judicial Committee.(8)

Concurrent judgments on fact.—The Judicial Committee will not interfere with concurrent judgments of the Courts below on pure matters of fact,(9) unless very definite and explicit grounds for that interference are

(1) Rajendernarain *v.* Bijai Govind, 1 Moo. I. A. 117, 126, 134, 142 (1836), *per* Lord Brougham.

(2) Venkata Narasinha *v.* Court of Wards, 13 I. A. 155, 158 (1886); s. c., 10 M. 73, 78; Yarlagadda Durga *v.* Mallikarujuna, 14 M. 439 (1891).

(3) Lalta Pershad *v.* Azzizuddin, 24 I. A. 49 (1896); s. c., 19 A. 209; Surnomoyee *v.* Shoshee Mokhee, 12 I. A. 257 (1868).

(4) Rajender Narain *v.* Bijai Govind, 1 Moo. P. C. 117 (1836); Surnomoyee *v.* Shoshee Mokhee, 12 I. A. 257 (1868).

(5) Mohun Lall *v.* Bibee Dasa, 8 Moo. I. A. 492, 497 (1861), see ib., at p. 193.

(6) Rabiabai *v.* Mahomed Ismail, 24 I. A. 128; s. c., 21 B. 723 (1897).

(7) Lachmeswar Singh *v.* Manowar Hossein, 19 C. 253, 260 (1891); s. c., 19 I. A. 48, 53; LuchmanSingh *v.* Puna, 16 C. 753, 755 (1899); s. c., 16 I. A. 125; see Pestonji Modi *v.* Queen Insurance Coy., 25 B. 332, 336 (1900).

(8) Anangamanjari *v.* Iripura Soondari, 14 I. A. 101, 110 (1887); s. c., 14 C. 740, at p. 748; Munnalal *v.* Gajraj, 17 C. 246 (1889); Durga Chowdhrani *v.* Jawahir, 18 C. 23 (1890).

(9) Moung Tha Huyeen *v.* Moung Pan Nyo, 27 I. A. 166 (1900); s. c., 28 C. 1; 4 C. W. N. 808; Dharam Chand *v.* Bhawani Misrani, 25 C. 189, 194 (1897); s. c., 24 I. A. 183; 1 C. W. N. 697; Bireswar *v.* Shib Chander, 19 I. A. 101 (1892); s. c., 19 C. 452, 461; Ram Narain *v.* Bhim Ganjhu, 3 C. W. N. 249 (1898); Sundaralinga Swami *v.* Rama Swami, 26 I. A. 55, 57 (1899); s. c., 22 M. 515; Hari Har *v.* Uman Parshad, 14 I. A. 7 (1886); s. c., 14 C. 296; Krishnan *v.* Sudevi, 12 M. 512 (1889); Ram Lal *v.* Mehdi Husain, 17 C. 882 (1890); Asghar Reza *v.* Mehdi Hossein, 20 C. 560, 572 (1892); s. c., 20 I. A. 38, 47; Parbati Dasi *v.* Baikunta Nath, P. C., 19 C. L. J. 129 (1913).

assigned,(1) and it is satisfied that there is miscarriage of justice or the violation of any principle of law or procedure.(2) But where there are concurrent findings of facts and there is no substantial question of law in issue, their Lordships, in order to see how far the Courts have concurred in their view of the facts, will examine precisely what their findings are.(3) Where the Courts in India have come to a certain conclusion on a certain issue, that is a fact which, considering the advantages the Judges in India generally possess, of forming a correct opinion of the probability of a certain transaction, and in some cases of the credit due to the witness, affords a strong presumption in favour of the correctness of their decisions, yet that circumstance does not and ought not, to relieve the Judicial Committee, the Court of last resort, from the duty of examining the whole evidence and forming for itself an opinion on the whole case.(4) But the duty of a Court of ultimate appeal is to judge from the evidence and not to infer from probabilities.(5) In a recent case where in a mortgage-deed a fictitious entry had been made (which if correct would have brought it within the jurisdiction of the Calcutta High Court), and there was no evidence that there was an error, it was held by the Privy Council that concurrent findings of error were not findings of fact, since a decision that there is no evidence to support a finding is a decision of law.(6)

The Judicial Committee has refused to depart from the rule as to concurrent findings of fact, merely because the High Court has admitted documents tendered by the appellant which the first Court had rejected.(7) It cannot detract from the weight of concurrent findings of fact, that different Courts, in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations. A difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, must necessarily lead to one and the same inference, and there will be no interference by the Privy Council in such cases.(8) Where no question of law, either as to the construction of documents or any other point, arises on the judgment of the High Court, and there are concurrent findings of the two Courts below on the oral and documentary evidence submitted to them, their Lordships will not entertain an appeal.(9) When the question is not one of construction of one or more deeds, which would be a question of law, but is

(1) Moung Tha Huyeen *v.* Moung Pan Nyo, 27 I. A. 166 (1900); s. c., 28 C. 1; 4 C. W. N. 808.

(2) Rani Srimati *v.* Khajendra Narayan, 31 I. A. 127, 131 (1904); s. c., 31 C. 871; 9 C. W. N. 74; Mudhoo Soodun *v.* Suroopchunder, 4 M. I. A. 431 (1849); s. c. 7 W. R. P. C. 73; Meka Venkataramayya Apparow *v.* Shri Raja Parthasarathy Apparow, 17 C. W. N. 1222, P. C. (1913).

(3) Asghar Reza *v.* Mehdi Hossein, 20 C. 560, 572 (1892); s. c., 20 I. A. 38, 46.

(4) Mudhoo Soodun *v.* Saroop Chunder, 4 M. I. A. 431, 433 (1849); Musadee Mahomed Cazeem *v.* Meerza Ally, 6 M. I. A. 27, 49 (1854); Chunder Monee *v.* Munmohince, 8 M. I. A. 477, 489 (1861); Tayammaul *v.* Saschachalla, 10 M. I. A. 429 (1865).

(5) Wise *v.* Sunduloonissa, 11 M. I. A. 177 (1867).

(6) Harendra Lal *v.* Hari Dasi Debi, P. C., 19 C. L. J. 484 (1914).

(7) Hurri Bhusan *v.* Upendra Lal, 23 I. A. 97, 100 (1895); s. c., 24 C. 1.

(8) Nilmoni Singh *v.* Kirtichunder, 20 C. 847, 852 (1893); s. c. 20 I. A. 95.

(9) Toolsey Persaud *v.* Benayek, 23 I. A. 102, 104 (1896); s. c., 23 C. 918; see also Sukulbutti *v.* Babulal Mandar, 28 C. 190 (1901); s. c., 5 C. W. N. 455.

a question as to the effect to be given to decrees, leases and other documents as evidence of certain facts (*e.g.* that of adoption and its consequences), the concurrent findings against the *factum* of the adoption will not be disturbed merely because the evidence largely consisted of leases and other written documents.(1)

The well-known rule of the Judicial Committee not to disturb concurrent findings of fact by the lower Courts, unless they are shown to be erroneous, is none the less applicable, although the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence. Thus their Lordships declined to disturb such finding where one Court relied on the oral and the other on the documentary evidence.(2) In boundary cases the appellant must come prepared to show clearly where the decree appealed from is wrong, and what other course is right; it is insufficient to raise doubts as to the correctness of the decision.(3)

It has been recently held that the provisions as to concurrent findings on fact would be misconstrued if the Judges in India were by implication subjected to the duty of making their narrative of circumstances minutely exhaustive, under the penalty of being presumed to have overlooked elementary considerations.(4)

The Judicial Committee will not, on the ground that there was some imperfection in the pleadings, set aside the decree of a High Court, when the High Court were right on the merits of the case.(5) Nor will their Lordships allow any new point to be taken for the first time in the Privy Council.(6)

Reversal of decree on preliminary question: entry into merits.—In Fischer *v.* Kamala Naicker (7) it was arranged, in the commencement of the argument, with the consent of the counsel on both sides, that if their Lordships should be of opinion that the decision of the Court below could not be sustained on the grounds on which it had been based, they should proceed to consider the whole case on its merits, and finally dispose of it. And their Lordships, being of opinion that the decision could not be sustained on the grounds on which it had been based, considered the whole case on its merits and dismissed the appeal without costs, saying that as they dismissed the appeal on wholly different grounds from those relied on by the Court below the dismissal should be without costs.

Costs.—When a cause is remanded by the Privy Council and the miscarriage of the suit was occasioned by the manner in which the issue was framed

(1) Luchman Lal *v.* Kanhya Lal, 22 I. A. 51, 58 (1894); s. c., 22 C. 609, 618.

(2) Anugra Narain *v.* Hanuman Sahai, 30 C. 303, 308 (1902); s. c., 30 I. A. 41; 7 C. W. N. 225.

(3) Rajcoomar Ray *v.* Gobind Chander, 19 I. A. 140, 147 (1892); s. c., 19 C. 671.

(4) Mirza Sajjad *v.* Wazir Ali, 39 I. A. 156 (1912); 16 C. W. N. 889; 14 Bom. L. R. 1055.

(5) Gunga Pershad *v.* Moharani Bibi, 12 I. A. 47, 51 (1884).

(6) Sundaralinga Swami *v.* Ramaswami, 26 I. A. 55, 57 (1899); s. c., 22 M. 515; Sambhunath *v.* Surjamoni, 24 I. A. 191 (1897); s. c., 25 C. 187; 1 C. W. N. 649; Imambandi *v.* Kamaleswari Pershad, 21 C. 1005, 1017 (1894); s. c., 21 I. A. 118.

(7) 8 M. I. A. 170, 188, 189 (1860).

by the Judge, the costs of appeal should be directed to be costs in the cause.(1) In the case (2) cited their Lordships, while remanding the case, ordered that if the respondent failed to appear in the High Court, or if the appeal should be decided against him, the respondent should pay the appellant's costs of the appeal in England, and the costs (if any) paid under the decree of the High Court were to be repaid to him. When an appeal is heard *ex parte* in the absence of the respondent and it is dismissed, the respondent is entitled to costs up to, and including, the lodgment of his printed case, and also to the costs of appearance for applying for the same.(3)

Pauper appeal.—In an early case (4) leave to appeal in *forma pauperis* was granted on an application to the High Court on an unstamped paper, but certified by counsel that there was reasonable ground of appeal. It has been recently held that the High Court cannot entertain an application for leave to appeal to the Privy Council in *forma pauperis* and to be exonerated from depositing the respondent's costs and the usual fees.(5) The question whether it is necessary to apply for leave to prosecute an appeal in *forma pauperis* in England, although the Courts in India admitted such an appeal, was referred to in Munni Ram *v.* Sheo Churn.(6)

Appeal pending; effect on rights of owner.—The pendency of an appeal to England does not put the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.(7)

Decree.—This term is defined in sect. 2 (2), and under that definition a decree may be either preliminary or final. The distinction between the two is pointed out in the explanation to that section. Under sect. 97, parties aggrieved by preliminary decrees are required to appeal therefrom. Sect. 594 of the last Code ran as follows: "*decree includes also judgment and order.*" (8) Decree now includes a final order. Clauses (*a*) and (*b*) of sect. 595 of the last Code spoke of "*final decrees.*" Sect. 109 now speaks of "any decree or final order." Apparently, then, an appeal will lie from a decree which may be either final or preliminary and from an order which is final. This is in accordance with previous decisions. A final decree was always appealable. And the Privy Council held that "final" for this purpose did not mean the last

(1) Rajah Saheb Perhlad Sein *v.* Run Bahadoor, 12 M. I A. 289 (1869).

(2) Kalee Pershad *v.* Binda Lall, 12 M. I. A. 343, 349 (1869).

(3) Sambhu Nath *v.* Surjamani, 24 I. A. 191 (1897); s. c., 25 C. 187, 189; 1 C. W. N. 649.

(4) *In re* Jowad Ali, 8 W. R. 48 (1867). This order was made on condition that the usual security for costs was to be given and the costs of translation deposited.

(5) Jagadanand *v.* Rajendra, 17 C. L. J. 381 (1912).

(6) 4 M. I. A. 114, 136 (1846).

(7) Rajah Saheb Perhlad Sein *v.* Budhoo Singh, 12 M. I. A. 275, 342 (1869); s. c., 2 B. L. R. (P. C.) 111, 142; 2 W. R. (P. C.) 6, 20.

(8) It has been held that therefore the provision in sect. 588 of the last Code did not restrict the provision in sect. 599 that an appeal might be brought to the King in Council from a final order: Krishna Prasad *v.* Motichand, 40 I. A. 140; 17 C. L. J. 573 (1913); 17 C. W. N. 637.

decree but a decree determining rights finally, such as a preliminary decree establishing the liability to account and directing accounts to be taken.(1) In the case cited it was said that, to decide whether a decree is final or not, the Court should look at what was the real question before the Court when the decree was made. Where the plaintiff alleged that the defendant was accountable to him upon several claims, and the defendant alleged that he had got legal defences to every one of those claims and that he was not accountable at all, and the Court held that the legal defences put forward were valid as to some of the claims, and as to others of the claims they were invalid and therefore the defendant must account, and passed a decree for account; such a decree directing accounts was held to be a "final" decree under the last Code.(2) "It is true," said Lord Hobhouse, "that the decree that was made does not declare in terms the liability of the defendant, but it directs accounts to be taken which he was contending ought not to be taken at all, and it must be held that the decree contains within itself an assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay it. Therefore the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him. Now that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suits. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree against the defendant in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of the Code.(3)

An order of remand, where the first Court has disposed of a suit on a preliminary point, is not a final, but an interlocutory decree.(4) But where a remand was made under the wrong section and the order of the High Court decided a cardinal issue in the suit, which could never, while the decision stood, be disputed again, there was held to be a final decree, notwithstanding that there might be inquiries yet to be made in disposing of the suit, *e.g.* where the High Court, reversing the decree of the first Court, held that a valid bequest

(1) Rahimbhoy *v.* Turner, 18 I. A. 6, 7; s. c., 15 B. 155 (1890).

(2) Rahimbhoy *v.* Turner, 15 B. 155, 159 (1890); s. c., 18 I. A. 6: cf. Aben Sha *v.* Cassirao, 6 B. 260 (1882); Ishvargar *v.* Candasama, 8 B. 548 (1884).

(3) Rahimbhoy *v.* Turner, 18 I. A. 6, 7 (1890); s. c., 15 B. 155. See also Saiyid Muzhar Hosscin *v.* Bodha Bibi, 22 I. A. 1 (1894); s. c., 17 A. 112, 116; Hafiz Abdul *v.* Hari Raj, 22 A. 405, 407 (1900); Shantaram *v.* Jamsetji, 4 Bom. L. R. 212 (1902).

(4) Mahant Ishvargar Budhgar *v.* Candasama Amarsang, 8 B. 548, 551 (1884); Habib-un-nissa *v.* Munawar-un-nissa, 25 A. 629, 630 (1903); Forbes *v.* Ameeroonissa, 10 M. I. A. 340, 359 (1866); s. c., 1 Suth P. C. 621, 627; Tirunarayana *v.* Gopalasami, 13 M. 349 (1889); Tussuduk Rasul *v.* Farzand Hasain, 2 C. W. N. ccci. (1898); Ahmad *v.* Gobind, 33 A. 391 (1911); Krishna Chandra *v.* Ram Narain, 18 C. L. J. 124 (1913).

was made by a will and remanded the case for the trial of other issues.(1) Where the High Court affirmed the liability of the appellant, which could never be questioned again and was the cardinal point in the suit,(2) an appeal was held to lie.(3) Where a candidate at an examination for pleadership was erroneously declared by a notification in the Government Gazette to be qualified for admission as a vakil of the High Court, but when the mistake was found out the notification was cancelled, on application for leave to appeal, *held* that Chapter XLV. of the last Code had no application, and that the matter was not one in which the High Court was concerned to give or refuse leave to appeal.(4) Where, after the admission of an appeal to the Privy Council, the Court below passed a judgment in review in the same case, which judgment was sent up and notified to the Council, and put on record in the appeal case, it was held open to the Judicial Committee to pass judgment on the appeal, without prejudice to the subsequent judgment which was passed on review.(5)

Final order.—As regards orders made prior to decree which are only so many steps towards the ultimate decree, they may be styled preliminary or interlocutory, and in this sense not final. By final order is apparently meant an order which terminates the proceedings in favour of one of the parties.(6) In the case cited, Markby, J., said: "I do not know any meaning to the word 'final' which can be applied to orders made subsequent to decree." *Sed qu.* Such an order cannot, it is true, possess finality in the sense in which that term is opposed to orders which are steps towards the decree, for the decree has *ex hypothesi* been made, but the order may be final as terminating the particular proceedings in which it is made, and the final character of such orders is recognized in sect. 2 with reference to matters determined under sect. 47, *ante*.(7) It has been held that the question of finality must be determined with reference to the precise relation in which it stands to the proceedings before the Court.(8) It is not always easy to distinguish between what is a final and what is an interlocutory order. The Court of Appeal (in England) has not attempted to give an exhaustive definition, and the Legislature in the Judicature Act, 1875, sect. 12 has not given such a definition.(9) Sect. 2, clause (2), Explanation, of this Code, says that a decree is final when the adjudication completely disposes of the suit. "No order, judgment, or other proceeding," says Brett, L.J.,(10) "can be final

(1) Muzhar Hossein *v.* Badha Bibi, 17 A. (P. C.) 112, 116 (1894). But see Baij Nath *v.* Sohan Bibi, 31 A. 545 (1909).

(2) Rahimbhoy Habibhoy *v.* Turner, 15 B. 155 (1890); s. c., 18 I. A. 6; cf. Aben Sha *v.* Cassirao, 6 B. 260 (1882).

(3) See Habib-un-nissa *v.* Munwar-un-nissa, 25 A. 629, 630 (1903).

(4) In the matter of the petition of Sukhnandan Lal, 6 A. 163 (1884).

(5) Toondun Singh *v.* Pokhnarain, 1 I. A. 342, 345 (1874).

(6) Jagessur Sahai *v.* Muracho Koer, 1 C. L. R. 354, 358 (1877).

(7) See Ram Taruk *v.* Mosahebali, 6 C. W. N. 246 (1901).

(8) Harish *v.* Nawab Bahadur of Moorshidabad, 13 C. L. J. 688 (1911); 15 C. W. N. 879; Secretary of State *v.* B. I. S. N. Coy., 13 C. L. J. 90 (1911).

(9) Lewis *v.* Williams, 31 Ch. D. 623 (1886), *per* Chitty, J., p. 627.

(10) Standard Discount Co. *v.* La Grange, 3 C. P. D. 67, 71 (1877); s. c., 47 L. J. C. P. 3; cf. White *v.* Witt, 5 Ch. D. 589 (1877).

which does not at once affect the status of the parties, for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff." "I conceive," says Fry, L.J., "that an order is final only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined." When any further step is necessary to perfect an order (1) or judgment, it is not final but interlocutory.(2) A judgment may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined.(3) An order dismissing a petition, presented under the Indian Companies Act (Act XII. of 1895) for confirmation of the alteration in the Memorandum of Association, on the ground that no such resolution as the law requires has been passed, was held appealable under the former section.(4) The order of a High Court setting aside an order of a District Judge calling on to his own file proceedings pending in the Court of a Subordinate Judge, and directing that the proceedings be remitted to the Court of the Subordinate Judge, and that the application presented to that Court may be disposed of, is not a final order,(5) nor is an order refusing to appoint a Receiver in a suit.(6) An order of a High Court setting aside an order of a lower Court refusing to set aside an *ex parte* decree is a purely interlocutory and not a final order,(7) and so is an order rejecting an application for stay of execution of a decree under appeal.(8) An order under the Rules and Orders merely refusing to re-open a Registrar's report is not final;(9) nor is an order deciding only that the Respondent should be at liberty to sue in *formâ pauperis*.(10) But an order of the High Court based on the ground that the plaint does not disclose any cause of action against the defendant is a final order within the meaning of this clause;(11) and so is an order setting aside the decision of a lower Court as to the respective shares of the parties to a partnership suit and directing fresh accounts to be

(1) Salaman *v.* Wadner, 1 Q. B. 734, 736 (1891); s. c., 60 L. J. Q. B. 624; 64 L. T. 598; 39 W. R. (Eng.) 547.

(2) Collins *v.* Paddington, 5 Q. B. D. 368, 370 (1880), *per* Baggallay, L.J.

(3) The Justices of the Peace for Calcutta *v.* The Oriental Gas Company, 8 B. L. R. 433, 452 (1872), *per* Couch, C.J., and Markby, J.; cf. Rahimbhoy *v.* Turner, 15 B. 155 (1890); s. c., 18 I. A. C. 15 B. 155 (1890).

(4) Bombay Burma Trading Co. *v.* Dorabji, 5 Bom. L. R. 348 (1903); s. c., 27 B. 415.

(5) Palakdhari *v.* Radha Prasad, 2 A. 65, 67 (1878).

(6) Chundi Dutt *v.* Pudmanund, 22 C. 928, 930 (1895).

(7) Rai Radha Kissen *v.* Collector of Jaunpore, 5 C. W. N. 153, 157 (1900); s. c., 23 A. 220, and the mere fact that the High Court, apparently on the assumption that it was such an order, have certified the sufficiency of the amount and value of the suit, cannot make appealable an order which does not fulfil the statutory conditions.

(8) Srinivasa *v.* Kesho Prasad, 13 C. L. J. 681 (1911); Krishna Chandra *v.* Ram Naram, 18 C. L. J. 124 (1913).

(9) Royal Insurance Co. *v.* Akhoy Coomar Dutt, 6 C. W. N. 41 (1901).

(10) Sakan Singh *v.* Gopal Ch. Neogi, 8 C. W. N. 296 (1904).

(11) Harish *v.* Nawab Bahadur of Moorshidabad, 13 C. L. J. 688 (1911); 15 C. W. N. 879.

taken.(1) The dismissal of an appeal to the Privy Council for want of prosecution is not a final order within the meaning of Art. 179, Sch. II. of the Limitation Act.(2)

Appeal under Letters Patent not falling within the Code.—Where, by an Order in Council, a case was remitted to the High Court with a direction to take an account between the parties on certain principles, and it was further ordered that if, on the taking of the accounts, anything should be found due to the plaintiff, a decree should be made in his favour, and if nothing should be found due to him the suit would be dismissed, and when the case came back to the High Court, a Division Bench took the accounts and made a decree against the defendants; *held* that sects. 595, 596 of the former Code did not apply to such a case, but a right of appeal to His Majesty in Council might be successfully claimed under clause 39 of the Letters Patent, the amount in dispute being over Rs. 10,000, because it was a final decree of a Division Court of the High Court from which an appeal did not lie to the High Court under clause 15 of the Letters Patent. The expression "a Division Court" in sect. 39 (it was held) did not apply only to a Division Court sitting on the original side.(3)

"**Passed on appeal.**"—This does not mean the same thing as any order passed in the exercise of appellate jurisdiction. So an order rejecting an application to review a judgment passed on appeal is not an order made on appeal from which an appeal lies to the Privy Council.(4) Nor is an order rejecting an application to amend a decree; (5) nor is an order refusing to admit an appeal presented beyond the prescribed period.(6) Two essential elements to be considered in deciding whether an order is one passed in appeal are whether the relationship of a Superior and an Inferior Court exists, and whether the Superior Court possesses the power to review, affirm or modify the decisions.(7) An order passed by the High Court in the exercise of its revisional jurisdiction under sect. 115 or its power of superintendence under sect. 15 of the High Courts Act of 1851 is made or passed on appeal within the meaning of this clause.(8)

"**Or by any other Court of final appellate jurisdiction.**"—As, for example, from the final order of a District Judge, when there is no appeal to the High Court.(9)

(1) Dwarka *v.* Haji Mahomed, 15 C. W. N. 60 (1910).

(2) Batuk Nath *v.* Mt. Munni Dei, P. C., 19 C. L. J. 574 (1914); and see Abdul Majid *v.* Jawahir Lal, P. C., 19 C. L. J. 626 (1914) (such an order in Council is not an order affirming a decree).

(3) Guru Prasanno Lahiri *v.* Jotindra Mohun Lahiri, 32 C. 963 (1905); s. c., 9 C. W. N. 566.

(4) Rajah Enact Hossein *v.* Rowshun Jehan, 10 W. R. (F. B.) 1 (1868); Soudamonee Dassee *v.* Mahatab Chand, 6 W. R. Misc. 102 (1866).

(5) Sunder Koer *v.* Chandeshwar Prosad, 30 C. 679 (1903).

(6) Kassondas *v.* Gangabai, 9 Bom. L. R. 566 (1907); 32 B. 108.

(7) Harish *v.* Nawab Bahadur of Moorshidabad, 13 C. L. J. 688; 15 C. W. N. 879 (1911).

(8) Harish *v.* Nawab Bahadur of Moorshidabad, *supra*.

(9) Saadatmand Khan *v.* Phul Kuar, 25 I. A. 146 (1898); s. c., 20 A. 412, 416.

"**In the exercise of original civil jurisdiction.**"—There is no right of appeal from a decree made by the High Court in the exercise of original jurisdiction, if an appeal will lie to the High Court itself under clause 15; but there is a direct appeal from a decree made in the exercise of original jurisdiction by a Division Bench of two Judges. There is no appeal, under clause 40 of the Letters Patent, to the Privy Council from an interlocutory judgment or order of a Judge of the High Court (*e.g.* an order for inspection of documents), until such judgment or order has been subjected to an appeal to the High Court, under clause 15 of the Letters Patent, except in those cases, in which, by reason of the number of the Judges who have made such order, an appeal under clause 15 is given directly to the Privy Council.(1) There is no appeal against the decision of a High Court passed on appeal from an award of compensation made by the Court to which a reference had been made under sect. 18 of the Land Acquisition Act, for such a decision is an award.(2)

"**Any decree or order, when the case is certified.**"—The certificate is given under O. XLVI. r. 3 that the case is "otherwise" a fit one for appeal. This provision is intended to meet special cases where the point in dispute is of importance, though not measurable in money.(3) In all cases below the appealable value an application should be made to the High Court for such a certificate, before application is made for special leave from the Privy Council itself.(4) This clause includes cases where it cannot be said that the amount or value of the subject-matter of the suit is Rs.10,000 or upwards, or that the amount or value of the dispute on appeal is of that sum or upwards,(5) where the amount or value of the subject-matter of the suit in the Court of first instance is below Rs.10,000, but the amount or value of the dispute on appeal is Rs.10,000 or upwards (6) and where the matter in dispute is under the appealable value. Where the certificate of the High Court simply said, "Let a certificate be granted that this is a fit case for appeal to His Majesty in Council, and let the usual notices be issued," it was held to have been given pursuant to sect. 595 (c) and the latter alternative of sect. 600 of the former Code.(7) The discretion vested in the Court by this clause should be sparingly used.(8) This clause is not to be interpreted as restricted to "final orders."(9)

"**Fit one.**"—Thus an order, rejecting a petition for confirmation of an alteration in Memorandum of Association presented under the Indian Companies Act (XII. of 1895) on the ground that no such resolution as required

(1) Sonbai *v.* Ahmedbhai Habibhai, 9 Bom. H. C. R. 398, 400 (1872).

(2) Special Officer Salsette Building Sites *v.* Dasabhai, 17 C. W. N. 421 (1913).

(3) Banarsi Prasad *v.* Kashi Krishna, 28 I. A. 11, 13 (1900); Srinivasa *v.* Kesho Prasad, 13 C. L. J. 681, 686 (1911).

(4) Moti Chand *v.* Ganga Prasad, 29 I. A. 40, 42 (1901).

(5) Bombay Burma Trading Co. *v.* Dorabji, 5 Bom. L. R. 348 (1903). See also Banarsi Prasad *v.* Kashi Krishna, 22 I. A. 11, 13 (1900); s. c., 23 A. 227.

(6) Amar Chand *v.* Shoshi, 31 C. 305, 306, 309 (1903); Moti Chand *v.* Ganga Prasad, 29 I. A. 40, 42 (1901); s. c., 24 A. 174; 6 C. W. N. 362.

(7) Webb *v.* Macpherson, 31 C. 57, 74 (1903); s. c., 30 I. A. 238; Amar Chandra *v.* Shoshi, 31 C. 305, 310 (1903). But cf. Tassaduq Rasul *v.* Kashi Ram, 25 A. 109 (1902); 30 I. A. 35.

(8) Srinivasa *v.* Kesho Prasad, *supra*.

(9) Ib.

by law had been passed, can be certified to be a fit case on the ground that the financial and commercial position of the Company may be seriously affected by the questions at issue, and also that it is of great importance to Indian Companies generally that their rights should be precisely defined on this point. The value of the question at issue between the parties, in such a case, is one to which it is impossible to give a numerical expression.(1) No appeal lies from the judgment of one Judge of the High Court, or of one Judge of a Division Court, or of two or more Judges of the High Court, where they are equally divided in opinion (sect. 111). But in any such case an appeal should be made in the first instance to a Division Bench of the High Court under clause 15 of the Charter, before an appeal can be preferred to His Majesty in Council.(2) The question whether an applicant had established that substantial loss might result to him if execution was not stayed pending the hearing of the appeal presented to the High Court is not a question which would justify a special certificate of fitness under this clause.(3) Sections 47 and 48 of the Provincial Insolvency Act (III. of 1907) do not interfere with any right of appeal to the Privy Council.(4).

Conditions imposed on right of appeal (Sect. 110).—This section requires that in order to give a right of appeal there must be in dispute either directly or indirectly an amount of Rs.10,000. If the decree affirms the Court below, another condition is affirmed, namely that the appeal must involve some substantial question of law. The presence of such a question does not give a right of appeal, when the value is below the mark. The requirement of it restricts the right when the higher decree affirms the lower.(5) When it is laid down that the decree must involve, directly or indirectly, some claim or question to or respecting property of Rs.10,000 in value or upwards, the reference is to suits in existence and not to suits *in gremio futuri*.(6) The reason for fixing the minimum appealable value is based on the principle of not allowing the litigants, who have not succeeded in the High Courts, to be harassed by further appeals, when there is nothing at stake but small amounts of money.(7) But to meet special cases, not satisfying the conditions mentioned in sect. 110, such for instance as those in which the point in dispute is not measurable by money, though it may be of great public or private importance, an appeal may be granted under sect. 109, clause (*c*), when the High Court certifies that the case

(1) Bombay Burma Trading Corporation *v.* Dorabji, 5 Bom. L. R. 348 (1903), *per* Jenkins, C.J.; s. c., 27 B. 415.

(2) Sri Gridhariji Maharaj *v.* Purushotum, 10 C. 814, 817 (1884). For cases prior to sect. 6, Act VI. of 1874, see *In re* Court of Wards, 7 B. L. R. 730, 734 (1871); Surnomoyee *v.* Luchmiput, B. L. R. Sup. vol. 694 (1867); and Leelanund Singh *v.* Luchmessur Singh, 13 M. I. A. 490, 493, 496 (1870) [one Judge of High Court miscarrying in giving effect to decree of Privy Council].

(3) Srinivasa *v.* Kesho Prasad, 13 C. L. J. 681, 686 (1911).

(4) Chattraput Dugar *v.* Kharaj Singh, 17 C. W. N. 752 (1913); 17 C. L. J. 547.

(5) Banarsi Prasad *v.* Kashi Krishna, 28 I. A. 11, 13 (1900); s. c., 23 A. 227; 5 C. W. N. 193. See also Radha Krishna *v.* Rai Krishna Chand, 5 C. W. N. 689 (1901); s. c., 23 A. 415; 28 I. A. 182, 184. Husenbhoy *v.* Ahmedbhoy, 26 B. 319, 325 (1901).

(6) Hanuman Prasad *v.* Bhagwati Prosad, 24 A. 236, 238 (1902); Moofti Mohummud Ubdoolla *v.* Mootichand, 1 M. I. A. 363 (1837).

(7) Banarsi Prasad *v.* Kashi Krishna, 23 A. 227, 232 (1900); s. c., 28 I. A. 11; Clarke *v.* Brajendra, 13 C. W. N. 1127 (1909).

is fit for appeal "otherwise," that is when not meeting the conditions of sect. 100.(1) The mere assent of the respondent to an appeal cannot give to the appellant a right of appeal which the Code does not allow nor can it sustain a certificate which is obviously erroneous.(2) The defendant will not be allowed to make a new case based on grounds which were not urged in the Courts in India nor specified in the petition to the High Court for leave to appeal nor suggested in the reasons contained in the case for the appellant.(3)

"The amount or value."—The section incorporates the provisions of the Privy Council Appeals Act of 1874.(4) This does not mean the value as estimated for the payment of stamp duty, but the real or market value. The stamp duties imposed for fiscal purposes are calculated on a certain rule fixed by law, but the right of appeal depends on the value, which is a matter of fact.(5) The words "The value of the subject-matter in the Court of first instance" do not in any way affect the right of appeal when the real value of the subject-matter is Rs.10,000.(6) The Court has only to look at the value of the question at issue in the litigation.(7) As regards the Court of first instance the section speaks of the value of the subject-matter of the *suit*, and as regards the appeal to the Privy Council of the matter *in dispute*. There is a distinction between the two; (8) what is such matter depends on the facts of each case.(9) "*And*" in the first clause of sect. 110 means "and" and not "or." Thus where the value of the subject-matter of the suit in the Court of first instance was below Rs.10,000, held by the Privy Council that this section did not apply, for the case must comply with both conditions to justify the admission of an

(1) Banarsi Prasad *v.* Kashi Krishna, 23 A. 231 (1900); Moti Chand *v.* Ganga Prasad, 24 A. 174, 178 (1901); s. c., 29 I. A. 40.

(2) Banarsi Prasad *v.* Kashi Krishna, 28 I. A. 11, 14; s. c., 23 A. 127; 5 C. W. N. 193 (1900)

(3) Soni Ram *v.* Kanhaiya Lal, 17 C. W. N. 605 (1913); 17 C. L. J. 488 (P. C.).

(4) Pichayee *v.* Sivagami, 15 M. 237, 239 (1890).

(5) Mohun Lall Sookal *v.* Bibee Dass, 7 M. I. A. 128 (1860); Gourmony Debia *v.* Khaja Abdul Gunny, 8 M. I. A. 268 (1860); Babu Lekraj Roy *v.* Kanhya Singh, 1 I. A. 317, 320 (1874); see Manohar Ganesh *v.* Bewa Ram Charan Das, 2 B. 219, 229 (1877); Daya Chand *v.* Hem Chand, 4 B. 515, 527 (1880); Amanat Begam *v.* Bhajan Lall, 8 A. 438, 445 (1886), where the distinction between valuation for purpose of Court fees and jurisdiction respectively is pointed out]. See Harihar Prasad Singh *v.* Shyam Lal Singh, 40 C. 615 (1913) (case cannot be valued at different amounts for jurisdiction and Court fees); and Mohendra Sundar *v.* Dinabandhu, 19 C. L. J. 15 (1913); as to valuation for Court fees, see Harriett Toviot Kerr (in the goods of), 18 C. L. J. 308 (1913).

(6) Pechayee *v.* Sivagami, 15 M. 237, 239 (1890); Hari Mohun Misser *v.* Surendra Narain Singh, 31 C. 301 (1903) [suit for perpetual injunction; value fixed for Court fees may be shown to be under real value].

(7) Ajnas Kooer *v.* Mussamut Lutseefa, 18 W. R. 21 (1872) [right of irrigation].

(8) See Hikmat Ali *v.* Wali-un-nissa, 12 A. 506, 509 (1889); Lala Bhugwat Sahay *v.* Pashupati Nath Bose, 10 C. W. N. 564, 566 (1906). In Mussamut Ameena Khatoon *v.* Radhabenod Misser, 7 Moo. I. A. 761 (1859), the Privy Council appear to have held under the old order that the value of the matter of dispute in appeal related to the whole matter involved in the suit. Onoroop Chunder Mookherjee *v.* Pertab Chunder Paul, 6 W. R. Misc. 4 (1866).

(9) See Husenbhoy *v.* Ahmedbhoy, 26 B. 319, 325 (1901), where the income only and not the corpus was held to be in dispute.

appeal.(1) To determine the value the decree is to be looked at as it affects the interests of the party prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs.10,000, the amount of the matter in dispute in appeal is not of the prescribed value.(2) In suits for partition the value is that amount of the whole estate which it is sought to partition, and not merely of the particular share which one of the parties may claim.(3) The value of mesne profits subsequent to suit is to be taken into consideration in calculating the appealable value.(4) In actions of tort where the damages are at large it is not easy to define the value.(5) In a suit to enforce a mortgage-security the value is the amount claimed if such amount falls short of the value of the mortgaged property, but it is the value of the property if this is exceeded by the amount due under the mortgage.(6) Where the appeal is from the whole decree, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs.10,000, it is clear that the matter which is in dispute in the appeal must exceed the sum of Rs.10,000; for the question to be tried upon the appeal must be whether the decree is or is not right, *viz. whether the decree has or has not properly ordered payment of a sum exceeding Rs.10,000. Where, therefore, at the date of the judgment, the sum which is recoverable is an amount (including interest) exceeding Rs.10,000, there is* an appeal to the Privy Council. *But interest accruing subsequent to the date* of the decree cannot be added by the High Courts in estimating the appealable value, and it is a question for the discretion of the Judicial Committee, whether such interest should be added or not.(7) But the costs of a suit are no part of the subject-matter in dispute, and cannot be used for the purpose of estimating the appealable value; if they were allowed to be added to the principal sum claimed, it would be in the power of every litigant,

(1) Moti Chand *v.* Ganga Prasad, 29 I. A. 40, 41 (1901); s. c., 6 C. W. N. 362, 364; 24 A. 174; but cf. Ram Kirpal *v.* Rupkuar, 3 A. 633, 635 (1881).

(2) De Silva *v.* De Silva, 6 Bom. L. R. 403 (1904) [suit seeking declaration of title to property valued Rs.12,000; relief sought by establishment of title to undivided third share (value 4000) and a partition on that basis with mesne profits].

(3) Lala Bhugwat Sahay *v.* Pashupati Nath Bose, 10 C. W. N. 564 (1906); s. c., 3 C. L. J. 257; but see De Silva *v.* De Silva, 6 Bom. L. R. 403 (1904); Motibhai *v.* Hari Das, 22 B. 315 (1896), and Nobu Goundan *v.* Kumaravelu Goundan, 20 M. 289 (1896) [this last suit, however, did not involve a general partition].

(4) Dalgleish *v.* Damodar Narain Chowdhry, 33 C. 1286 (1906); Mohedeen Hadjear *v.* Pitchey A. C. 193 (1893); Gooroo Dass *v.* Gholam Mowlah, Marsh 24 (1862); see Ikramul Huq *v.* Wilkie, 33 C. 893 (1906), where damages claimed, but not ascertained, were considered in determining the appealable value.

(5) See Amrita Nath Mitter *v.* Abhoy Chunder Ghosh, 9 C. W. N. 370 (1905) [libel], where it was held that the plaintiff cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure.

(6) Benoy *v.* Kamalapoti, 13 C. L. J. 505 (1911).

(7) Gooroo Prosad Khoond *v.* Juggut Chandra (1860); s. c., 3 W. R. P. C. 14, 15; 8 M. I. A. 166, 168, 169; Durga Das *v.* Ramanath, 8 M. I. A. 262, 264 (1860); Mutusawmy Jagavera *v.* Venkataswara, 10 M. I. A. 313, 320 (1865); Brindabun Dutt *v.* Beharee, 24 W. R. 442 (1875); Nand Kishore *v.* Ram Golam, 16 C. W. N. 1089 (1912).

by swelling the costs, to bring any suit up to the appealable value.(1) If a certificate be granted or leave to appeal given by the proper Court in India in a matter in which they have no jurisdiction, the Judicial Committee will dismiss the appeal as incompetent. But if an appeal is competently made, and it appears to their Lordships after argument, or is admitted at the Bar, that the greater part of it must fail, it is the constant practice of their Lordships to give relief in respect of the portion in which the appellant succeeds, notwithstanding that the subject-matter of that portion of the appeal may be less than the prescribed limit. Thus where a certificate was given in the presence of the parties that the value of the matter in dispute on appeal exceeded Rs.10,000, but the appellant's counsel, being satisfied that the appeal could not succeed as to the whole demand, had by his printed case and at the Bar, confined his argument to the question of a sum below Rs.10,000; *held* by the Privy Council that the value of the subject-matter on appeal was not reduced below Rs.10,000.(2) It was held in the case of a large number of suits tried together and dealt with in one judgment that inasmuch as although, if each case were taken separately, the value was below Rs.10,000, yet if taken collectively the aggregate reached that amount, and the cases were all dependent upon the same judgment, leave to appeal should be given.(3)

Or the decree must involve "directly or indirectly."—It is not enough that the question decided by such decree is a question of title which may possibly affect the title of persons, not parties to the decree, to property not the subject-matter of the suit in which the decree was passed and concerning the title to which property there is no litigation pending.(4) In a recent case, however, where the value had been over Rs.10,000 in the Court of first instance, and less than that sum on appeal to the Privy Council, but the decision by the Privy Council would involve the validity of an award concerning larger sums, it was held that a certificate should be granted and that it was not necessary that a dispute respecting other property to a value of more than Rs.10,000 should be pending at the time of the application.(5) As to whether such a claim is or is not involved must depend on the circumstances of each case; (6) as to the consolidation of suits, see O. XLVI. r. 4.

'Affirms the decision."—The question has arisen whether these words in the last clause of sect. 110 are limited to a mere affirmance of the decree of

(1) Durga Dass *v.* Ramanath, 8 M. I. A. 262, 264 (1860); Nilmadhab *v.* Bishumber, 13 M. I. A. 85, 103 (1869); s. c., 3 B. L. R. 27.

(2) Kalka Singh *v.* Parasaram, 22 I. A. 68, 73, 74 (1894); s. c., 22 C. 434.

(3) Deonarain Singh *v.* Guni Singh, 34 C. 400 (1907).

(4) Hanuman Prasad *v.* Bhagwati Prasad, 24 A. 236, 238 (1902).

(5) Sri Kishan Lal *v.* Kashmiro, 35 A. 445 (1913); Macfarlane *v.* Leclaire, 15 Moo. P. C. 181 (1882); Mt. Aliman *v.* Mt. Hasiba, 1 C. W. N. 93 (1897); Ananda Chandra Bose *v.* Broughton, 9 B. L. R. 423 (1872).

(6) See Dalgleish *v.* Damodar Narain Chowdhry, 33 C. 1286, 1289 (1906); *In re* Khwaja Muhammad Yusuf, 18 A. 196 (1896); Bhagwat Sahai *v.* Pashupati Nath Bose, 1 C. W. N. 564, 566 (1906) [but see De Silva *v.* De Silva, 6 Bom. L. R. 403, 406 (1904); Aliman *v.* Hasiba, 1 C. W. N. LXXXIII. (1897).

the Court below. Can a "decision" be said to be affirmed when, although the "decree" is upheld, the High Court in its judgment disagrees with the findings of the fact of the Court below? There is no definition of the word "decision" in the Code, but this word means the decision of a suit by the Court, or the decree, and not the "judgment," *i.e.* the statement of the grounds on which the Court makes a decree. Thus, when a decision is affirmed it is not necessary that the Appellate Court should not only affirm the decree made by the Court below, but should also affirm the grounds of fact upon which that judgment was passed. Where an Appellate Court dismissed an appeal, but the reasons given by it in respect of some matters of fact were not the same as given by the lower Court, it was held by the Privy Council that the decree of the lower Court had been affirmed by the Appellate Court. The words "decision of the Court" in this section mean the decree and not the judgment.(1) A petitioner for leave to appeal claimed Rs.77,000 odd as the value of the land taken under land acquisition proceedings. The Collector assessed the value at Rs.28,287; the Judge upheld the Collector's award. On appeal to the High Court (valuing the appeal at Rs.49,000 and odd, *i.e.* the difference between the Collector's award and the amount claimed) the High Court allowed the petitioner an additional sum of Rs.7000. On an application for leave to appeal it was held that the decree was a decree of affirmance of the first Court's decree, and there being no substantial question of law, leave was refused. In giving judgment the Court said, "No doubt, in one sense it may be said that this Court did not affirm the decision of the Court below. But we must look to the substance of the case.' What is the decree from which the present applicant now desires to appeal to the Privy Council? He desires to appeal only against the decision of this Court so far as it affirmed the decision of the Court below; nothing else. This seems to be, in substance, as far as the subject-matter of appeal goes, a decree of affirmance. If the decree of this Court had been properly drawn, it would have dismissed the appeal except to the extent that the additional sum was given.(2)

"**Substantial question of law.**"—In the first place it must appear that the question is one of law.(3) It does not follow that because it would be such a question in England it is so here. Thus according to English law it is for the Judge and not for the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts;

(1) Tassaduq Rasul Khan *v.* Kashi Ram, 30 I. A. 35, 39 (1902); s. c., 25 A. 109, 114; 7 C. W. N. 177; 5 Bom. L. R. 100: practically overruling Ashghar Reza *v.* Hyder Reza, 16 C. 287, 299 (1889). See also Thompson *v.* Calcutta Tramways Co., 21 C. 523, 525 (1894); Beni Rai *v.* Ram Lakhan, 20 A. 367 (1898); *In re* Vishwambhar, 20 B. 699 (1895); Sundarbibi *v.* Bisheshar, 9 A. 93 (1886). In Banke Lall *v.* Jagat Narain, 23 A. 94, 97 (1900), this question was raised, but it was not necessary to decide it. Banga *v.* Pukai, 13 C. L. J. 501 (1910).

(2) Sree Nath Ray *v.* Secretary of State for India, 8 C. W. N. 294 (1904).

(3) See as to this limitation *In re* Feda Hossein, 1 C. 431 (1896), which was held not *ultra vires* of the Indian legislature as a curtailment of clause 39 of the Letters Patent.

the Judge draws the proper inference from the findings of the jury. In that sense the question is a question of law. But where the case is tried without a jury there is really nothing but a question of fact, and a question of fact to be determined by one and the same person. Where the Courts in India come to the same finding about the existence or non-existence of reasonable and probable cause there is a concurrent finding on a question of fact, and no certificate, under sect. 600 certifying that the appeal involves a substantial question of law, should be given.(1) Where no question of law, either as to construction of documents or any other point, arises on the judgment of the High Court, and there are concurrent findings on the oral and documentary evidence, no appeal will be entertained.(2) Where the order allowing leave to appeal ran, "There seems to be a point of law, which, however, does not appear to have been argued here," the appeal was dismissed as the leave was granted contrary to the provisions of the Code.(3) The question of law involved must be a "substantial" (4) one, which in the case cited was suggested to mean a question of great public or private importance.(5) Whether, however, the question is "substantial" or not must depend upon the circumstances of each case, and the reported decisions are of value only as illustrations of the application of the general principle. The construction of a deed of *Hebanama* was held to be such a question.(6) But the rejection of an application for admission of additional evidence in the Appellate Court is not.(7) The High Court has refused an appeal upon a mere question of practice, such as an order for inspection of documents.(8) Lastly, if there is a point of law, which is also "substantial," it must be "*involved*" in the appeal. The word "involve" implies a considerable degree of necessity. It does not mean that in certain contingencies a question of law might possibly arise. The practice of the Privy Council is not to interfere with concurrent findings of fact of the Courts below.(9) If the High Court is right in holding that there are concurrent findings of fact, the inference is that the Privy Council will decline to go behind those findings. No doubt it was held by Pontifex, J., (10) that the

(1) Pestonji Modi *v.* Queen Insurance Co., 25 B. 332, 336 (1900). See also Harish *v.* Nishikanta, 28 C. 591, 593 (1901); Ramayya *v.* Sivoyya, 24 M. 549, 553 (1900).

(2) Toolsey Persaud *v.* Benayek Misser, 23 I. A. 102, 105 (1896); s. c., 23 C. 918; In the matter of the Petition of Feda Hosscin, 1 C. 431, 434 (1876); Nirbhai Dass *v.* Rani Kuar, 16 A. 274 (1894); Sukalbutti Mandrani *v.* Babu Lal Mandar, 28 C. 190, 194 (1901); s. c., 5 C. W. N. 455. But concurrent findings that there is no evidence are decisions of law: Harendra Lal *v.* Hari Dasi Debi, P. C., 19 C. L. J. 484 (1914).

(3) Karuppanam *v.* Srinivas, 25 M. 215 (1901); s. c., 6 C. W. N. 24; 4 Bom. L. R. 248.

(4) *In re* Vishwambhar Pande, 20 B. 699, 703 (1895).

(5) Shuja Ali *v.* Ram Kuar, 20 A. 118 (1897); Hanuman Prasad *v.* Bhagwati Prasad, 24 A. 236, 238 (1902).

(6) Aliman *v.* Hosiba, 1 C. W. N. LXXXXIII. (1897).

(7) In the goods of Prem Chand Moonshee Upendra *v.* Gopal, 21 C. 484, 486 (1894), in which it was also held that the costs of a rejected application for leave to appeal to Privy Council should not be included in the costs of the appeal already dealt with.

(8) Sonbai *v.* Ahmedbhai, 9 Bom. H. C. R. 398, 401 (1872).

(9) Chiman Lal *v.* Hari Chand, P. C., 18 C. L. J. 71 (1913).

(10) In Moran *v.* Mittu Bibee, 2 C. 228 (1876).

questions of law referred to were not limited to questions arising out of the facts concurrently found by the Courts below. That view was subsequently accepted by Garth, C.J. and Prinsep, J.,(1) but it seems with some doubt. This view was accepted by Ranade, J., (2) though Jardine, J., refrained from expressing any opinion on the point. But when once it is borne in mind that the last paragraph of sect. 110 has reference to the practice of the Privy Council, it is impossible to say that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which never can arise so long as the Privy Council maintains those concurrent findings of fact, is a substantial question of law, which the appeal to the Privy Council "involves." (3) Where a discretion is vested in a Court the Privy Council will not allow an appeal against the exercise of that discretion, *e.g.* no appeal against a mere decree as to costs.(4)

(1) Gopinath Birbar *v.* Goluck Chunder Bhose, 16 C. 292, 295 (1884), note.

(2) *In re* Vishwambhar Pandit, 20 B. 699 (1895).

(3) Banke Lall *v.* Jagat Naram, 23 A. 94, 98 (1900). Further in Sukalbutti Mandrani *v.* Babulal Mandar, 28 C. 190, 193 (1900), it was held that Gopinath Birbar *v.* Goluck Chunder Bhose, *supra*, must be taken to have been overruled by the Privy Council in Tulsi Pershad Bhakt *v.* Benayek Misser, 23 C. 918 (1896); Meka Venkataramayya Apparow *v.* Shri Raja Parthasarathy Apparow, P. C., 17 C. W. N. 1222 (1913).

(4) Keemee Bace *v.* Luchman Das, 5 W. R. P. C. 59 (1837).

PART VIII.

REFERENCE, REVIEW AND REVISION.

113. *Subject to such conditions and limitations as may be prescribed, any* Court may *state a* case and refer *the same* for the *opinion* of the High Court, *and the High Court may make such order thereon as it thinks fit.* [s. 617.]

Reference to High Court.

Reference.—See notes to O. XLVI. r. 1.

114. *Subject as aforesaid,* any person considering himself aggrieved— [s. 623.]

Review.

(*a*) by a decree or order from which an appeal is allowed *by this Code,* but from which no appeal has been preferred,

(*b*) by a decree or order from which no appeal is allowed *by this Code,* or

(*c*) by a *decision* on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, *and the Court may make such order thereon as it thinks fit.*

Application for review of judgment.—Save for the words in italics this section corresponds with a portion of sect. 376 of Act VII. of 1859 as modified by a portion of sect. 623 of Act X. of 1877. In Act VIII. of 1859 the clauses (*a*), (*b*), and (*c*) ran "*by a decree of a Court of original jurisdiction from which no appeal shall have been preferred to a Supreme Court, or by a decree of a District Court in appeal from which no appeal shall have been admitted by the Sudder Court, or by a decree of the Sudder Court from which either no appeal may have been preferred to Her Majesty in Council, or an appeal having been preferred no proceedings in the suit have been transmitted to Her Majesty in Council.*" Their present form was given by the Code of 1877 save that by the present section the words "*by this Code*" have been substituted for "*hereby*" and "*decision*" for "*judgment.*" The remaining words in italics are new.

The terms of this section are repeated in O. XLVII. r. 1, where the remainder of sect. 623 of the Codes of 1877 and 1882 is given. Order XLVII. substantially contains the provisions of the Chapter on review of judgment in the Codes of 1877 and 1882. See notes to O. XLVII., *post*.

[s. 622.] **115.** The High Court may call for the record of any case *which has been decided by any Court subordinate to such High Court and* in which no appeal lies *thereto, and* if *such subordinate* Court appears—

Revision.

(*a*) to have exercised a jurisdiction not vested in it by law, or

(*b*) to have failed to exercise a jurisdiction so vested, or

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may *make* such order *in the case* as *it* thinks fit.

Revision.—The revisional power has been held to be not an inherent power, but one conferred by statute; and that while a power of superintendence is given to the High Courts over all Courts, the revisional power in the case of each branch of jurisdiction is the creation of separate and distinct legislation.(1) Jurisdiction has been generally divided into original (whether ordinary or extraordinary) and appellate jurisdiction. Differing views have been held upon the question whether the power of revision under this section, and of superintendence under clause 15 of the High Courts Act, 24 & 25 Vict. c. 104, comes or does not come under the head of appellate jurisdiction.(2) In the former view, the capital distinction is between jurisdiction which is original, and jurisdiction which is *not* original, irrespective of the circumstances and conditions in which the latter is to be exercised. Appellate jurisdiction may thus be exercised in a variety of forms—as in what is commonly known as appeal, revision, or superintendence.(3) In the latter view, appeal, revision, and superintendence, though distinct from original jurisdiction, come under different heads of jurisdictions—viz. appellate, revisional, and superintending.(4) The Code of 1859 gave the Courts no

(1) Salig Ram *v.* Ramji Lal, 28 A. 554, 556 (1906), and therefore, on the latter ground, it was held that the High Court could not, in the exercise of criminal revisional powers, interfere with a sanction to prosecute given by the Civil Court; Mazhar Hasan *v.* Said Hasan, 31 A. 38 (1908).

(2) See judgments of Full Bench in Chappan *v.* Moidin, 22 M. 68 (1898); and see Shew Prosad Bungshidhur *v.* Ram Chunder Haribux, 41 C. 323 (1913).

(3) Chappan *v.* Moidin, *supra*, *per* Subramania Ayyar, J., at pp. 80-83.

(4) Ib., *per* Davies, J., at p. 85; and see Sarat Chandra *v.* Brojo Lal, 30 C. 986, at p. 988 (1903). "Revisional jurisdiction of the Court is not necessarily a part of its appellate jurisdiction, for a Court which has no appellate jurisdiction over another Court may still exercise revisional jurisdiction over it," *per* Sale, J.; s. c., 7 C. W. N. 843. It has also been held that a power of revision is not an incident of appellate powers, but, on the contrary, can only be exercised where there is no appeal: Khoja Shivji *v.* Hasham Gulam, 20 B. 480 (1895). See *post*, note on "Appeal."

revisional powers. By clause 15 of the High Courts Act, 24 & 25 Vict. c. 104, which was passed on August 6, 1861, each of the High Courts which were thereafter to be established under that Act were given a power of superintendence over all Courts subject to their appellate jurisdictions. The Presidency High Courts were not established until the issue of their first Letters Patent in 1862; but before that date, Act XXIII. of 1861, which was passed on August 28th of that year, gave in sect. 35 powers of revision in a very restricted form to the Sudder Court. Under that Act, the Sudder Court might call for the record of any case *decided on appeal* in which no further appeal lay if the Subordinate Court, on hearing the appeal, appeared to have exercised a jurisdiction *not* vested in it by law. When, therefore, the High Courts were established, among the powers vested in it were those of revision given to the Sudder Court under sect. 35 of the Act of 1861, which is the basis of the present section.(1) The power of revision was thus limited to cases decided on appeal where the lower Court had exceeded its jurisdiction.(2)

The question then arose as to the nature of the jurisdiction given by clause 15 of the High Courts Act. It was held by a Full Bench of the Allahabad High Court that the Letters Patent conferred no powers of revision, that in such matters the High Court had only such powers as the Sudder Court had, and that the power of "superintendence" conferred by the High Courts Act gave the Court no revisional power, no power to interfere with or set aside the judicial proceedings of a Subordinate Court, but that clause 15 conferred on the High Court administrative authority and not judicial powers.(3) In a subsequent Full Bench of the same Court,(4) the Judges said that they would prefer not to use the terms "administrative authority" or "judicial powers," or "judicial superintendence," as without giving exhaustive definitions of the words which it might fail to do, the Court might by using them lead to future difficulty, and that each case must be considered as it arose. That the authority of the High Courts under this clause is not merely administrative, appears from a decision of the Privy Council approving the judgment of the Calcutta High Court, which, holding that it could interfere with orders passed without jurisdiction, stayed proceedings on one order and quashed another.(5) There has been, no doubt, a disinclination, and rightly, on the part of some Judges, to rigidly define what they can, or cannot, do by way of their powers of superintendence,

(1) See Chappan *v.* Moidin, 22 M. 68, at p. 98 (1898); and Shew Prosad Bungshidhur *v.* Ram Chunder Haribux, 41 C. 323 (1913); and Vasudevan *v.* Sankaran, 22 M. L. J. 60 (1911).

(2) Whilst the Act of 1861 dealt with excess of jurisdiction, the present Code extends equally to a refusal of jurisdiction by a Court through a misconception of its authority: Shiva Nathaji *v.* Joma Kashinath, 7 B. at p. 352.

(3) Tej Ram *v.* Harsukh, I. A. 101, 104 (1875), F. B.; see Chappan *v.* Moidin, 22 M. 68, at p. 99 (1898).

(4) Muhammad Sulaiman *v.* Fatima, 9 A. 104, 106 (1886).

(5) Nilmoni Singh *v.* Taranath Mookerjee, 9 C. 295, 297, 299 (1882), P. C.; and see cases cited *post*; and see Gobind *v.* Kunja, 10 C. L. J. 407, 413 (1909) (clause 15 of the High Courts Act authorizes the High Court to revise orders of subordinate Courts); Shew Prosad Bungshidhur *v.* Ram Chunder Haribux, *supra*.

which have been said to be very wide.(1) Certain limitations have, however, been laid down which will ordinarily govern the Courts, there being a residue of undefined jurisdiction to which the Court may have recourse in cases of an unusual character.(2)

Sect. 622 of the Code of 1877 was the same as that of the last Code, except that the words "*or to have acted in the exercise of its jurisdiction illegally, or with material irregularity,*" were not in it. It thus extended the power of revision, which was no longer limited to cases decided on appeal, and which might be exercised not only where the Court exceeded its jurisdiction but declined a jurisdiction which was vested in it. Lastly, by sect. 92 of Act XII. of 1879, the words italicised were added; since when the section retained the same form. As regards the amendments now effected, which are of an unimportant character, *vide post*.

As regards the Charter Act, it has been held that the High Court will interfere where the Court has wrongly declined jurisdiction,(3) or has exceeded its jurisdiction,(4) that is in the first two contingencies mentioned in this section. If, however, the Court has jurisdiction it will not (ordinarily at least) interfere merely because the order passed in such jurisdiction is erroneous either in law or fact.(5) An erroneous decision by a Court having jurisdiction can only properly be corrected by appeal, and if the right of appeal does not exist the same results which an appeal would give cannot be arrived at indirectly.(6) While these rules are of general application in cases of an ordinary character, there is a residue of jurisdiction which the Courts have left undefined. So where the Court had jurisdiction to entertain a suit, but passed a decree therein which was contrary to law and was incapable of

(1) *In re* Siddeshwar Boral, 4 C. W. N. 36, 38 (1899); *In re* Madho Ram, 21 A. 181, at p. 182 (1899); Mohunt Bhagwan *v.* Khetter Moni, 1 C. W. N. 617 (1896) [the law having advisedly and widely left this power unlimited, it is not desirable to limit it by any hard-and-fast rule, but a party's claim to interference is very much weakened when he has another remedy provided for him by law].

(2) *Vide post.*

(3) See cases collected in editor's note to Tej Ram *v.* Harsukh, 1 A. at p. 104. *In re* Gobind Koomar Chowdhry, B. L. R. (F. B.) 714 (1867); *In re* Mathra Parshad, 1 A. 296 (1876); *In re* Lukhykant Bose, 1 C. 180, at p. 182 (1875); Ram Lall *v.* Janki Mahatoon, 4 C. L. R. 14 (1879); Girdhari Singh *v.* Hurdeo Narain, 3 I. A. 230, 238 (1876) [refusal to confirm sale]. And see Mohendra Sundar *v.* Dinabandhu, 19 C. L. J. 15 (1913), jurisdiction refused by mistaken return of plaint.

(4) Nilmoni Singh *v.* Taranath Mookerjee, 9 C. 295, 297, 299 (1882), P. C.; *In re* Lukhykant Bose, 1 C. 180, at p. 182 (1875); Ram Lall *v.* Janki Mahatoon, 4 C. L. R. 14 (1879); in the case *In re* Siddeshwar Boral, 4 C. W. N. 36 (1899), the Court passed an order without any evidence and thus without jurisdiction; and see cases cited in editor's note to Tej Ram *v.* Harsukh, 1 A. at p. 104.

(5) Tej Ram *v.* Harsukh, 1 A. 101 (1875); *In re* Chunder Nath Sen, 2 C. 293 (1876); Muhammad Sulaiman *v.* Fatima, 9 A. 104 (1886); *In re* Lukhykant Bose, 1 C. 180 (1875) [the Court will not interfere where no question of jurisdiction is concerned]; Ram Lall *v.* Janki Mahatoon, 4 C. L. R. 14 (1879) [clause 15 applies where the Court disclaims or acts beyond its jurisdiction]; *In re* Madho Ram, 21 A. 181 (1899); Corporation of Calcutta *v.* Bhupati Roy, 26 C. 74, 76 (1898); and see cases cited in editor's note to Tej Ram *v.* Harsukh, 1 A. at p. 104.

(6) See Vonkubai *v.* Lakshman, 12 B. 617 (1887) [clause 15 does not give a right of appeal where none exists at law]; *In re* Da Costa, B. L. R. (F. B.) 432 (1866); *In re* Lukhykant Bose, 1 C. 180 (1875).

execution, the High Court interfered to set matters right.(1) Generally, the High Court will direct a Subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance.(2) It will direct it to do that which is legal; and correct that which is illegal in its proceedings,(3) and will correct abuse of powers by a Subordinate Court.(4)

From the above review of the case law it will appear that to a large extent clause 15 and this section cover common ground. In neither case will these extraordinary powers be exercised where matters can be corrected by appeal. In neither case (in that of the Charter ordinarily at least) will the Court interfere in such a way as to give a party the benefit of an appeal when the law says that he is not to have one. In both cases the Court will interfere where jurisdiction is concerned. The section applies also expressly to cases of illegal exercise of jurisdiction and material irregularity. It will therefore be, as regards judicial matters, only necessary to resort to the Charter Act in cases in which the revisional powers given by the Civil and Criminal Procedure Codes do not apply; (5) or where it is doubtful (6) whether they do apply by reason of the nature of the proceedings sought to be corrected; (7) or where the order, passed in proceedings which, considered apart from the matter complained of, are subject to the ordinary revisional powers, is of a very peculiar character; (8) or in cases where the administrative authority of the High Court is required to be invoked. Courts in the exercise of superintending powers will not ordinarily interfere, except in cases of grave and otherwise irreparable injustice.(9)

As regards other revisional jurisdictions, the Bombay High Court has interfered under Reg. II. of 1827 (Bom.).(10) Sect. 25 of the Provincial Small Cause Courts Act (IX. of 1887) provides that the High Court, for the purpose of satisfying itself that a decree or order made on any case decided by a Court of Small Causes was *according to law*,(11) may call for the case and pass such order with respect thereto as it thinks fit. In a recent case in the Calcutta High Court where an application (under sect. 41 of the Presidency Small Cause Courts Act) for the recovery of the possession of immoveable property had been refused on

(1) Abdullah *v.* Salaru, 18 A. 4 (1895), where the Court described the circumstances of the case as extraordinary.

(2) Tej Ram *v.* Harsukh, 1 A. 101 (1875); Muhammad Sulaiman *v.* Fatima, 9 A. 104 (1886).

(3) *In re* Gobind Koomar Chowdhry, B. L. R. (F. B.) 714 (1867).

(4) *In re* Siddeshwar Boral, 4 C. W. N. 36 (1899).

(5) See *In re* Madho Ram, 21 A. 181, at p. 182 (1899), where it was held that the case was not a criminal proceeding and did not fall under this section.

(6) *In re* Siddeshwar Boral, 4 C. W. N. 36 (1899), where it was left undecided whether this section applied.

(7) See *In re* Madho Ram, *supra*.

(8) See Abdullah *v.* Salaru, 18 A. 4 (1895).

(9) Ismalji *v.* Macleod, 31 B. 138 (1906); Amjad Ali *v.* Ali Hussain, 15 C. W. N. 356 (1910); Chandi *v.* Kripal, 15 C. W. N. 682 (1911).

(10) Girdharlal *v.* Lallu Jagjivan, 20 B. 50 (1894); but see repealing Act XII. of 1873.

(11) That is, to see whether there has been a material misapplication or misapprehension of law or material error in procedure: Muhammad Bakar *v.* Bahal Singh, 13 A. 277 (1890); but see *per* Fulton, J., in Bai Jasoda *v.* Bamansha, 23 B. 334 (1898), at p. 340. As to erroneous decision of fact, see Bai Jasoda *v.* Bamansha, 23 B. 334 (1898), at p. 338: Turner *v.* Jagmohan Singh, 2 A. L. J. 297 (1905), where the Court interfered.

the ground that the relationship of landlord and tenant had not been established, and it had been held by a single Judge sitting on the Original Side that (assuming that this refusal was erroneous) the High Court was not justified in interfering under this section, it was held on appeal that the High Court had a right of revision and that this order was a judgment.(1) It is generally agreed that this provision gives no *right* of appeal either on law or fact; (2) that the exercise of the power given is discretionary,(3) and that the High Court will be slow to interfere when substantial justice has been done, though technically the plaintiff or defendant may have a legitimate ground of attack or defence.(4) It is also established that there is no rule that a Court cannot act under sect. 25, except in cases in which it might act under the present section.(5) The High Court's power of interfering in revision conferred by the Provincial Small Cause Court Act is wider than the power conferred by the present section.(6) The Allahabad High Court has, however, in several cases considered that the discretion to be exercised under sect. 25 should be ordinarily guided by the same considerations as those which governed the application of this section,(7) though a Judge is not absolutely bound to refuse any application under sect. 25, which could not be admitted under the present section.(8) The Bombay High Court, however, has held that the provisions of the present section do not afford a safe guide for the exercise of jurisdiction under the Provincial Small Cause Court Act, since the wording of the two sections is wholly different, that of the Small Cause Court Act being of the widest description and conferring the most ample discretion on the High Court, whilst this section ought to be construed in a restricted and limited sense.(9) What the order should be where the Court determines to interfere must depend entirely on the circumstances of the case.(10) Sect. 48 of the Guardians and Wards Act is subject to the provisions of this section.(11)

As to analogous remedies in English law, see case noted below.(12)

(1) Shew Prosad Bungshidhur *v.* Ram Chunder Haribux, 41 C. 323 (1913).

(2) Muhammad Bakar *v.* Bahal Singh, 13 A. 277 (1890); Poona Municipality *v.* Ramji, 21 B. 250, 254 (1895).

(3) Muhammad Bakar *v.* Bahal Singh, *supra*; Poona Municipality *v.* Ramji, *supra*.

(4) Poona Municipality *v.* Ramji, *supra*, at p. 255; Muhammad Bakar *v.* Bahal Singh, *supra*.

(5) Sarman Lal *v.* Khuban, 16 A. 476 (1894).

(6) Turner *v.* Jagmohan Singh, 2 A. L. J. 297 (1905); McCarron *v.* Welti, 27 A. 192 (1904). See Shew Prosad Bungshidhur *v.* Ram Chunder Haribux, 41 C. 323 (1913).

(7) Sarman Lal *v.* Khuban, 16 A. 476 (1894) [the Court "added before the decision of the Privy Council in Amir Hassan *v.* Sheo Baksh," *supra*]; Raghu Nath *v.* Official Liquidator, 15 A. 139 (1893); Sarman Lal *v.* Khuban, 17 A. 422 (1895), in which last two cases, as in the next, the Court refused to interfere on the ground that the lower Court had erred upon the question of limitation.

(8) Vias Ram *v.* Ralla Ram, 21 A. 89 (1898).

(9) Poona Municipality *v.* Ramji, 21 B. 250 (1895); and see Bai Jasoda *v.* Bamansha, 23 B. 334 (1898).

(10) Bai Jasoda *v.* Bamansha, 23 B. 334 (1898), at p. 340, where the Court, instead of remitting the case for a new trial, reversed the decree dismissing the suit and passed a decree for the plaintiff: see Behram *v.* Ardeshir, 27 B. 563 (1903), at p. 574.

(11) Nagardas Vachraj *v.* Anandrao Bhai, 9 Bom. L. R. 495 (1907) [and an order made under that Act can be altered, rescinded, or set aside; s. c., 31 B. 590]; Seetharama Bhagavatar *v.* Venkatagiri, 17 M. L. J. 199 (1907).

(12) Shiva Nathaji *v.* Joma Kashinath, 7 B. 341 (1883), at p. 359.

High Court.—The power of revision under this section belongs to the High Court only, it being intended that it should be exercised in correction only of such errors as were not open to appeal, and within certain specified limits.(1) Under the Charter Act the Chief Justice determines what Judges shall constitute Benches to hear suits and applications.(2)

"May call for."—The section gives discretionary power to the High Court to interfere or not.(3) In the case cited below,(4) Sir Arnold White, C.J., stating that he "would be glad to find some mode of escape," yet considered that if he was satisfied that the Court of first instance or Court of Appeal had exercised a jurisdiction not vested in it by law, he was bound to interfere and exercise the powers conferred by the section. This, however, it is submitted, is not so. The word "*may*" governs the whole section, and indicates a discretion whether the ground upon which interference is sought is one of jurisdiction or illegality, or material irregularity, and the concluding words are, that the Court may pass such order as it thinks fit. So where an order was passed without jurisdiction, but no objection was taken before the District Court, the High Court declined to interfere, as if it were to set aside the order of the District Court it would have the effect of placing the opposite party in the position of being obliged to bring a suit to establish the right which he claimed, though the period within which he was entitled to bring that suit had elapsed; in other words, it would be placing him under an obligation to bring a suit that *primâ facie* would be barred under the Limitation Act.(5) So also in an earlier case the Calcutta High Court observed as follows:—"Now, as the order of the Judge in this matter, although passed without jurisdiction, was really a right order, and had merely the effect of getting rid of the decision of the first Court, which was wrong, we think we ought not to make any order in this case." (6)

A fortiori, the same freedom exists as regards illegalities and irregularities. So the High Court, in the under-mentioned case,(7) declined, under the circumstances, to interfere, even though the orders complained of were made irregularly. Thus a Munsif granted a review on a ground on which it was held it could not legally have been granted. His order in review, however, had the effect of making the decree a right, instead of a wrong, decree. The District Judge allowed an appeal from that order on grounds which, having regard to sect. 629

(1) Raghunath Das *v.* Raj Kumar, 7 A. 276, at p. 281 (1884).

(2) Ramadhin *v.* Sewbalak, 37 C. 714 (1910); but see Haladhar Maiti *v.* Choytonna Maiti, 30 C. 88 (1903) [revision of order of Presidency Small Cause Court]; and see R. *v.* Har Prasad Das, 40 C. 477 (F. B.) (1913).

(3) Muhammad Naim-ul-lah *v.* Ihsan-ullah Khan, 14 A. 226 (1892), at p. 232; Cooke *v.* Equitable Coal Co., 8 C. W. N. 621 (1904), at p. 624; Shiva Nathaji *v.* Joma Kashinath, 7 B. 341 (1883).

(4) Ramasamy Chettiar *v.* Orr, 26 M. 176, 178, 179 (1902); and see Sarnam Tewari *v.* Sakina Bibi, 3 A. 417 (1881), at p. 422, *per* Straight, J.

(5) Dayaram Jagjivan *v.* Govardhandas Dayaram, 28 B. 458 (1904). See also Natheka *v.* Abdul Alli, 18 B. 449 (1893), at p. 452, where, however, it was said that the applicant was not without his remedy by suit.

(6) Bhoyrub Chunder *v.* Wajedunnissa Khatoon, 6 C. L. R. 234, 236 (1880).

(7) *In re* Basharat Ali, 24 C. 133 (1896); and see Ramrao *v.* Balaji, 20 B. 630 (1895), where the Court declined to further the execution of an irregular decree.

of the last Code, were, it was held, not open to him. On application for revision of this Appellate order, it was held that the proper course was to set aside only the District Judge's order, and to leave standing the order of the Munsif granting a review, which order, though wrong in principle, was, it appeared, right in its results.(1) In an application under this section, the extraordinary jurisdiction is invoked, and the Court must be on its guard against its being abused, merely because the lower Court has fallen into formal error.(2) Again, the Court does not interfere if the result of any irregularity on the part of the lower Court has been to promote the justice of the case.(3) In short, it is this justice of the case and not any mere technicality which will influence the Court's interference. It has been held that the Court cannot interfere under this section on the ground that an order is inexpedient.(4) Assuming that the section applies, the Court is not bound to act under it in every case.(5)

As the power is a discretionary one, the Court may refuse to interfere where there has been laches or delay in moving the Court,(6) inasmuch as delay, unless explained, is evidence of absence of real injury and ground for complaint, and may, where it is considerable, prejudice the position of the opposing party, and if by his laches a party has failed to avail himself of other remedies open to him, he has no claim to invoke the extraordinary jurisdiction of the Court. The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretional, and subject to considerations of the importance of the particular case, or of the principle involved in it, of delay on the part of an applicant, and of his merits with respect to the case in which the interference of the Court is sought.(7)

The Court will not, as a rule, interfere in revision with an exercise of discretion, though it may not approve of it.(8) It was held that even if a party were not entitled to appeal to have a decree against him set aside, the error of the lower Court could be corrected under this section by a direction to exercise the discretionary powers given by sect. 554 of the last Code.(9)

(1) Abdul Sadiq *v.* Abdul Aziz, 21 A. 152 (1898).

(2) Nana Bayaji *v.* Pandurang Vasudev, 9 B. 97 (1884), at p. 99, *per* West, J. So also in execution-proceedings the Court will look at the substance of the transaction, and will not be disposed to set them aside upon mere technical grounds when they find them to be substantially right: Narayanasami *v.* Natesa, 16 M. 424 (1892), at p. 428.

(3) Cooke *v.* Equitable Coal Co., 8 C. W. N. 621, 624 (1904). But see Brajabala *v.* Gurudas, 3 C. L. J. 293 (1906); and Gopal *v.* Notobar, 16 C. W. N. 1029 (1912).

(4) Petition of Newal Singh, 34 A. 393 (1912).

(5) Ram Singh *v.* Salig Ram, 28 A. 84, at p. 86 (1905).

(6) Durga Prasad *v.* Sheo Charan, 4 A. 154 (1881) [in which the Court refused to interfere, there being a delay of nearly seventeen months]; Subbaya *v.* Yellamma, 9 M. 130 (1885), at p. 133 [where the petitioner had not taken the proper steps in the District Court]; Shiva Nathaji *v.* Joma Kashinath, 7 B. 341 (1883). In Balmakund *v.* Sheo Jatan, 6 A. 125 (1882), the petitioner was held not fairly chargeable with laches. Punna Lal *v.* Seth Cowsji, 25 P. R. 1914.

(7) Shiva Nathaji *v.* Joma Kashinath, 7 B. 341 (1883), F. B.; Maharajah of Burdwan *v.* Apurba Krishna Roy, 15 C. W. N. 872 (1911).

(8) Vasudeva *v.* Chinnasami, 7 M. 584, 586 (1884); Bai Devkori *v.* Lalchand Jivandas, 19 B. 790, 793 (1894); Rayachand Mayachand *v.* Sultan Rahimbai, 18 B. 347 (1893); *In re* Venkateswara, 10 M. 98 (1886); Lingammal *v.* Chinna Venkatammal, 6 M. 227 (1883); Ramanathan *v.* Ananthanarayana, 33 M. 412 (1909).

(9) Seshadri *v.* Krishnan, 8 M. 192 (1884).

The High Court can interfere under this section of its own motion, and without an application made to it by a party to the suit.(1) Revisional power has been exercised on the application of a pre-emptor in regard to a sale; (2) of a Collector in regard to an order under sect. 412 of the last Code; (3) and on the report of a District Judge.(4) But the High Court will not interfere on a reference by the Collector with a Mamlatdar's decision in a possessory suit. The aggrieved party can himself apply to the Court.(5)

"**Any case.**"—The matter must be a civil one, and also one in which there is no remedy by way of appeal. Mahmood, J., was of opinion that the word should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision.(6) It has, however, been a matter of dispute whether the section applies to interlocutory orders when there is an appeal from the final decree. The Calcutta High Court has held that there is nothing in this section which prevents the High Court from setting aside an interlocutory order, and that the word "*case*" is wide enough to include such an order, and the words "*records of any case*" include so much of the proceedings in any suit as relate to an interlocutory order.(7) The Bombay,(8) Allahabad,(9) and Madras (10) High Courts answer the question in the negative, and in a recent case in the Calcutta High Court the question has been considered doubtful.(11)

It may be that the word "*case*" is wide enough to include an interlocutory order, but it must be controlled by due regard to the purpose with which this section was framed, which was to enable the party to a suit to get a decision or order of a lower Court rectified where there would otherwise be no remedy. It is on this ground, therefore, that it has been held that an application under this section cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies, a remedy is supplied by sect.

(1) Andrew Anthony *v.* Dupont, 4 M. 217 (1881); Golam Mahammad *v.* Saroda Mohan, 4 C. W. N. 695 (1900) [dist., Mahomed Foyez *v.* Goluck Das, 7 C. L. R. 191 (1880)]; Puran Mal *v.* Janki Pershad, 28 C. 680 (1901); s. c., 6 C. W. N. 114; Secretary of State *v.* Jillo, 21 A. 133 (1898); Debi Das *v.* Ejaz Husain, 28 A. 72 (1905); Baikanta *v.* Satu, 38 C. 421 (1911).

(2) Bisheshar Kuar *v.* Hari Singh, 5 A. 42 (1882).

(3) Collector of Kanara *v.* Krishnappa Hedge, 15 B. 77, 78 (1890); diss. from, *In re* Secretary of State, 2 C. L. R. 461 (1876).

(4) Andrew Anthony *v.* Dupont, *supra.*

(5) Pandu *v.* Bhavdu, 21 B. 806 (1896); and see Vora Isaballi *v.* Dandbhai, 14 B. 371 (1889).

(6) Chattarpal Singh *v.* Raja Ram, 7 A. 661 (1885).

(7) Dhapi *v.* Ram Pershad, 14 C. 768 (1887); but see Omrao Mirza *v.* Mary Jones, 12 C. L. R. 148 (1882).

(8) Motilal Kashibai *v.* Nana, 18 B. 35 (1892); Damodar *v.* Raghunath, 26 B. 551 (1902).

(9) Harsaran *v.* Muhammad Raza, 4 A. 91 (1881) [rejection of application to appeal as pauper, and Muhammad Ayab *v.* Muhammad Mohmud, 32 A. 623 (1910); but see Chattarpal Singh *v.* Raja Ram, 7 A. 661 (1885)]; Chattar Singh *v.* Ganga Sahai, 5 A. 293 (1883) [order setting aside award]; Farid Ahmad *v.* Dulari Bibi, 6 A. 233 (1884) [order transferring suit]; see Raghunath Das *v.* Raj Kumar, 7 A. 276 (1884); Surta *v.* Ganga, 7 A. 411 (1885), *per* Oldfield, J. [order amending decree]; but see judgment of Mahmood, J., in Chattarpal Singh *v.* Raja Ram, 7 A. 661 (1885).

(10) *In re* Nizam of Hyderabad, 9 M. 256 (1886).

(11) Chandi *v.* Kripal, 15 C. W. N. 682 (1911).

591 (now 105), which provides that they may be made a ground of objection in the appeal against the final decree.(1)

The High Court has revised, under this section, proceedings under Reg. of 1806, relating to foreclosure; (2) adjudications under sect. 407 of the last Code; (3) an order under sect. 335 of the same Code, though provisionally final; (4) an order under the Bombay Hereditary Offices Act; (5) an order under sect. 5 of the Religious Endowments Act; (6) an order under sect. 195 of the Code of Criminal Procedure; (7) a lunacy matter.(8) Whether an order under the former sect. 310A was subject to appeal or revision depended on the circumstances of each particular case.(9) A decision under sect. 5 of the Court Fees Act is not a decision in a case within the meaning of this section.(10) The matter of amending a decree does not by itself constitute a "case," but forms part of the proceedings in the suit in which the decree is made.(11) On the same principle, viz. the order being of an interlocutory character only, the High Court has refused to deal with an order relating to an award,(12) though in other cases relating to awards it has interfered.(13) It has been held that an order passed under the Legal Practitioners Act is not a criminal proceeding, nor one within the powers of civil revision.(14) *Semble*, that it was the intention of the Legislature that the Court which originally heard a case should be the Court to decide whether an application to review its former judgment should, or should not, be granted, and where that Court rejects such an application, its decision should not be open either to appeal or to revision by a higher Court.(15) In a recent Full Bench decision of the Calcutta High Court, the case of an order passed by a Civil or Revenue Court under sect. 476 of the Criminal Procedure Code was considered, and it was held that sect. 439 of the Criminal Procedure Code did not apply, and that the High Court could exercise

(1) Motilal Kashibai *v.* Nana, 18 B. 35 (1892).

(2) Hazari Lal *v.* Khem Rai, 3 A. 576 (1881); foll. in Nand Ram *v.* Bhopal Singh, 34 A. 592 (1912).

(3) Chattarpal Singh *v.* Raja Ram, 7 A. 661 (1885); Muhammad Husain *v.* Ajudhia Prasad, 10 A. 467 (1888); Debo Das *v.* Mohunt Ram, 2 C. W. N. 474 (1898); Gopal Chandra *v.* Bigoo Mistry, 8 C. W. N. 70 (1903).

(4) Sheoraj Singh *v.* Banwari Das, 6 A. 172 (1884).

(5) Collector of Thana *v.* Bhaskai Mahadev, 8 B. 264 (1884).

(6) Gopala Ayyar *v.* Arunachellam Chetty, 26 M. 85 (1902).

(7) Beni *v.* Sarju, 33 A. 512 (1911); Ramadhin *v.* Sewbalak, 37 C. 714 (1910) (a Civil Court acting under sect. 165 of the Criminal Code is not exercising Criminal Jurisdiction).

(8) *In re* Basharat Ali, 24 C. 133 (1896) [on the merits the Court refused to interfere].

(9) Kedar Nath *v.* Uma Charan, 6 C. W. N. 57 (1900).

(10) Balkaran Rai *v.* Gobind Nath, 12 A. 129, 157 (1890), *per* Edge, C.J.

(11) Raghunath Das *v.* Raj Kumar, 7 A. 276 (1884); Surta *v.* Ganga, 7 A. 411 (1885), *per* Oldfield, J.; *contra*, Mahmood, J., who held the order to be a separate adjudication and so capable of revision.

(12) Chattar Singh *v.* Ganga Sahai, 5 A. 293 (1883); Damodar Trimbak *v.* Raghunath Hari, 26 B. 551 (1902).

(13) Pugardin *v.* Moidin, 6 M. 414 (1882); Dagdusa Tilakchand *v.* Bukhan Govind, 9 B. 82 (1884); Mana Vikrama *v.* Mallicherry Kristnan, 3 M. 68 (1880); Ganga Charan *v.* Sarti Mandal, 6 C. W. N. 614 (1901).

(14) *In re* Madho Ram, 21 A. 181 (1899). In *In re* Siddeshwar Boral, 4 C. W. N. 36 (1899), the point was left undecided.

(15) Ram Lal *v.* Ratan Lal, 26 A. 572 (1904).

the powers vested in it by this section and by sect. 15 of the High Courts Act, and that the Bench exercising Criminal Jurisdiction could not (as such) deal with the matter on revision, but could be specially authorized to do so by the Chief Justice under sect. 14 of the High Courts Act.(1) An application under this section to set aside an award is incompetent.(2) A decision of a Subordinate Court on a question of valuation determining the amount of a Court fee is, notwithstanding its declared finality, subject to revision under this section, and sect. 5, Reg. II. of 1827.(3) Proceedings under sect. 206 of the former Code terminated in an order, and could thus be dealt with in revision.(4) Sect. 153 of Act X. of 1859 does not preclude revision by the High Court of an order of a Collector, which is final within the meaning of that section.(5) An application to a Judge of a Presidency Small Cause Court for sanction to prosecute a plaintiff for making a false claim in a suit before him is a case within the meaning of this section.(6)

"**In which no appeal lies.**"—The Court cannot act under this section where there is an appeal,(7) even where the petitioner has to invoke the provisions of sect. 5 of the Limitation Act.(8) The reason of the rule is that there is another and more complete remedy. It is a matter of dispute whether in the case of interlocutory orders, against which there is no immediate appeal, the Court can interfere under this section, seeing that a remedy is supplied by sect. 105, which provides that such orders may be made a ground of objection in the appeal against the final decree. In such cases it is said the appeal is merely deferred.(9) In a recent case it has been doubted whether interlocutory orders come within the scope of this section.(10)

On the same principle it has been held that the Court will not exercise its revisional jurisdiction so long as there is any other remedy open to the petitioner, viz. by regular suit or otherwise.(11) Probably it is more correct to say that

(1) R. *v.* Har Prasad Das, 40 C. 477, F. B. (1913); Kali Prosad Chatterjee *v.* Bhuban Mohini, 8 C. W. N. 73 (1903); R. *v.* Gopal Barick, 34 C. 42 (1906).

(2) Ghulam Jilani *v.* Muhammad Ahmed, 6 C. W. N. 226 (1901).

(3) Vithal Krishna *v.* Balkrishna Janardass, 10 B. 610 (1886), F. B. But see Balkaran Rai *v.* Gobind Nath, 12 A. 129 (1890), F. B.; and see Omrao Mirza *v.* Mary Jones, 12 C. L. R. 148 (1882).

(4) Bai Shri Vaktuba *v.* Agarsangir, 9 Bom. L. R. 547 (1907).

(5) Mohant Gobind Ramanuja Das *v.* Lakhun Parida, 11 C. W. N. 112 (1906).

(6) Ramadhin *v.* Sewbalak, 37 C. 714 (1910).

(7) Raynor *v.* Mussoorie Bank, 7 A. 681 (1885); Ram Kristo *v.* Naik Tara, 12 C. L. R. 449 (1883), dist. in Mohant Gobind Ramanuja *v.* Lakhun Parida, 11 C. W. N. 112 (1906); Nazar Husain *v.* Kesri Mal, 12. A. 581 (1890); Sah Man *v.* Kanagasabapathi, 16 M. 20 (1892); Omrao Mirza *v.* Mary Jones, 12 C. L. R. 148 (1882); Gulab Rai *v.* Mangli Lal, 7 A. 42 (1884); Rahima *v.* Nopal Rai, 14 A. 520 (1892); Tirupati Raju *v.* Visram Raju, 20 M. 155 (1896); Baldeo Das *v.* Gobind Shankar, 7 A. 914 (1885), *per* Tyrrell, J. [the grounds upon which Petheram's, C. J., judgment proceeded do not appear]; Williams *v.* Brown, 8 A. 108 (1886); but see Nand Ram *v.* Bhopal, 34 A. 592 (1912); Hassan Ali Shah *v.* Salig Ram, 125 P. R. (1892).

(8) Visvanathan Chetti *v.* Ramanathan Chetti, 24 M. 646 (1901).

(9) See note to "Case," *supra*, p. 465.

(10) Chandi *v.* Kripal, 15 C. W. N. 682 (1911).

(11) Guise *v.* Jaisraj, 15 A. 405 (1893) [the headnote has been said to be misleading: see Debi Das *v.* Ejaz Husain, 28 A. 72 (1905)]; Kashinath Sakharam *v.* Nana, 21 B. 731 (1897); Sheo Prasad *v.* Kastura Kuar, 10 A. 119, 122 (1887) [in which proper remedy was held to be an application under s. 103, or a suit under s. 283 of the former Code];

there is no absolute rule in the matter such as exists in the prohibition relating to appealable cases; and that while the Court will in general discourage applications under this section when some other remedy has been provided, the exercise of the revisional powers is discretionary according to the circumstances of the particular case. In some cases justice, therefore, may require the Court's interference.(1)

Sect. 588 (now 104), by enacting that the orders passed under it shall be final, only bars appeals from these orders, but does not intend to bar any interference with them by revision.(2)

In some cases, where an appeal was preferred but no appeal lay, the Court has dealt with the case as though an application has been originally made to it under this section, and allowed the appeal to be treated as an application under it.(3) Conversely, a civil revisional petition has been treated as an appeal on the Court fee being paid.(4) It seems reasonable that appellants should be permitted to rely on the provisions of this section without putting them to the expense of making a separate application to get the benefit of it.(5) Some Judges, however, take a stricter and more formal view of the matter, and require a separate and distinct application to be made.(6) It is, as well, therefore, in cases of doubt whether an appeal lies, to file concurrently (7) both an appeal and an application under this section to be heard and disposed of together.

Court.—This must be understood in its ordinary legal sense as [illegible] place

Sunder Das *v.* Mansa Ram, 7 A. 407 (1884); Venkataraman *v.* Mahalingayyan, 9 M. 508 (1886); Raghu Nath *v.* Rai Chatraput, 1 C. W. N. 633 (1897); Subbaya *v.* Yellamma, 9 M. 130, 133 (1885); Ramrao *v.* Babaji, 20 B. 630 (1895); Ismalji *v.* Macleod, 31 B. 138, 140 (1906).

(1) Debi Das *v.* Ejaz Husain, 28 A. 272 (1905); Shiva Nathaji *v.* Joma Kashinath, 7 B. 341 (1883), F. B. [in which it was said that the question did not admit of a precise categorical reply]; Ghulam Shabbir *v.* Dwarka Prasad, 18 A. 163, 168 (1895) [in which the Court interfered under this section, it being doubtful whether a suit would lie]; Golam Mahammad *v.* Saroda Mohan, 4 C. W. N. 695, 698 (1900) [in which it was held that there was no reason, under the circumstances, why the petitioner should be driven to a regular suit]; Tiruchittambala Chetti *v.* Seshayyangar, 4 M. 383, at p. 384 (1881); Balmakund *v.* Jatan Lal, 6 A. 125 (1882), at p. 128, *per* Stuart, C.J.; Sree Krishna *v.* Chandook Chand, 32 M. 334 (1908).

(2) Mathura Nath *v.* Umesh Chandra, 1 C. W. N. 626 (1897), at p. 631.

(3) Annamalai Chetti *v.* Muthulinga Pillai, 6 M. H. C. R. 360 (1871) [in which the petition of special appeal was given effect to as a petition under s. 35 of Act XXIII. of 1861]; Bhoyrub Chunder *v.* Wajedun nissa Khatoon, 6 C. L. R. 234 (1880); Venkatamma *v.* Chengalrayappa, 7 M. 555, 556 (1884); Dayaram Jagjivan *v.* Govardhandas, 28 B. 458, at p. 460 (1904); Godu Ram *v.* Sumaj Mal, 27 A. 480 (1904); Seetharama Bhagavatar *v.* Venkatagiri, 17 M. L. J. 199 (1907); Merali Visram *v.* Sheriff Dewji, 36 B. 105, 107 (1911).

(4) Sridharan Somayajipad *v.* Puramathan Somayajipad, 23 M. 101 (1899); Venkatamma *v.* Chengalsayappa, 7 M. 555, 556 (1884) [where the application was presented as an appeal, then amended and received as an application under this section, and ultimately, it being held that an appeal lay, treated as an appeal].

(5) See Durga Narain *v.* Goburdhun Ghose, 9 C. L. R. 86, 89 (1881); s. c., 7 C. 330, at p. 333, in which case, however, the Court did not consider the case one for interference under this section.

(6) See Ganga Charan *v.* Sasti Mandal, 6 C. W. N. 614, 615 (1901).

(7) See Sudendhoo Narain *v.* Gobinda Nath, 9 C. W. N. 504, 509 (1905).

where justice is judicially ministered." A District Registrar is therefore not a Court, and the High Court cannot revise his proceedings.(1)

"**Subordinate.**"—The Court referred to in the words "If the *Court*" of the former section was a Court other than the High Court. The section therefore did not apply to a case where the order of which review was sought was made by the High Court.(2) It applies to subordinate Courts as the amended section now makes clear. The High Court has jurisdiction under this section over the Presidency Small Cause Courts, and applications can be dealt with by a specially constituted Bench,(3) or, according to the existing rule in the Calcutta High Court, by a single Judge sitting on the Original Side.(4) This section applies to a Mamlatdar's Court in Bombay; (5) and a Court acting under the Dekkan Agriculturists Relief Act; (6) and the Court of the Resident at Aden in the exercise of his civil jurisdiction under the Aden Act.(7)

A decision under sect. 5 of the Court Fees Act is not, it has been held,(8) the decision of a Court within the meaning of this section. A District Judge, acting under sect. 23 of the Bombay District Municipal Act Amendment Act (II. of 1884) is not a "Court" under this section, and the High Court has therefore no jurisdiction to revise his order refusing to set aside an election.(9) Neither is a Collector acting under sect. 11 of the Land Acquisition Act "a Court." (10) This section does not apply to a Revenue Court in Madras,(11) or in the North-West Provinces.(12) The High Court at Bombay under clause 29 of the Council Order relating to Zanzibar of the year 1897 has power of revision over all the Civil Courts of Zanzibar.(13)

Jurisdiction.—The word "jurisdiction" is used in two different senses: it may either mean what is ordinarily understood by the term "jurisdiction" —that is, jurisdiction local, pecuniary, personal, or with reference to the subject-matter of a suit; (14) or it may mean the legal authority of a Court to do certain things, to make a particular order in a case over which it has jurisdiction in the

(1) Manavala *v.* Kumarappa, 30 M. 326 (1907); 17 M. L. J. 313, S. C.

(2) *In re* Premji Trikumdas, 17 B. 514 (1893).

(3) Ramadhin *v.* Sewbalak, 37 C. 714 (1910); and see Rangiah Naidu *v.* Rungiah, 31 M. 490 (1908).

(4) Sarat Chandra *v.* Brojo Lal, 30 C. 986 (1903); s. c., 7 C. W. N. 843.

(5) See Nanabayaji *v.* Pandurang Vasudev, 9 B. 97 (1884); Purshottam *v.* Mahadu, 14 Bom. R. 947 (1912); 37 B. 14; Kashiram *v.* Rajaram, 35 B. 487 (1911).

(6) See Gurubasaya *v.* Chanmalappa, 19 B. 286 (1894); Lakshman Babaji *v.* Ramchandra, 23 B. 321 (1898); Rayachand Mayachand *v.* Sultan Rahimbai, 18 B. 347 (1893).

(7) Rhimbai *v.* Mariam, 34 B. 267 (1909).

(8) Balkaran Rai *v.* Gobind Nath, 12 A. 129, at p. 157, *per* Edge, C.J.

(9) Balaji Sakharam *v.* Menonji Nowroji, 21 B. 279 (1895).

(10) British India Steam Navigation Co. *v.* Secretary of State for India, 38 C. 230 (1910); 15 C. W. N. 87.

(11) Velli Perija *v.* Moidin Padsha, 9 M. 332 (1886); Appandai *v.* Suhari Joishi, 16 M. 451 (1892); Venkatanarasimha *v.* Suranna, 17 M. 298 (1893), having regard to the provisions of s. 4 of the Code.

(12) Ram Dayal *v.* Ramadhin, 12 A. 198 (1890).

(13) Merali Visram *v.* Sheriff Dewji, 36 B. 105 (1911). See *contra*, Khoja Shivji *v.* Hasham Gulam, 20 B. 480 (1895).

(14) Mohesh Chunder *v.* Jahiruddi Mollah, 5 C. W. N. 509, 512 (1901); Har Prasad *v.* Jafar Ali, 7 A. 345, 350 (1885); Dhan Singh *v.* Basant Singh, 8 A. 519, 529 (1886); Sheo Prasad *v.* Kastura Kuar, 10 A. 119, 121, 122 (1887); Amitrav Krishna *v.* Balkrishna Ganesh, 11 B. 488, at pp. 491, 492 (1887); and see Sukh Lal *v.* Tara Chand, 2 C. L. J. 241, 244 (1905).

sense stated. So if a Court has jurisdiction to deal with an appeal in the former sense, it is only in the latter sense that an erroneous order of remand by an Appellate Court can be treated as an order without jurisdiction.(1) It was held in the case first cited that the word "*jurisdiction*" is used in the former sense in sect. 578 of the former Code (now 99). In some cases it has been held that the term is used in both senses in the present section.(2) In other cases it has been said that the word "*jurisdiction*" is used in the first-mentioned sense and refers to the forum for the institution of a suit.(3) It would probably tend to clearness in the law if the word were used in the narrow and more ordinary sense,(4) though, as has been pointed out,(5) the extent to which the restraints attaching to the mode of exercise of jurisdiction should be included in the conception of the jurisdiction itself is a question of nicety upon which there has been considerable difference of judicial opinion. A Judge cannot assume as a matter of law that which in fact has no existence in law, and so give himself jurisdiction. He cannot, by wrongly determining a question, give himself jurisdiction, and the High Court may thus inquire whether such question is rightly or wrongly decided.(6)

On the principle *omnia rite acta*, the Court will not presume that a Judge has acted without jurisdiction.(7) Indeed, it has on the contrary been said, that unless the facts from which want of jurisdiction on the part of a Subordinate Court may be inferred are patent upon the face of the record, the High Court will not interfere in revision.(8) The High Court may interfere where the lower Court appears to have exercised a jurisdiction not vested in it by law,(9) or to have

(1) Mohesh Chunder *v.* Jahiruddi Mollah, 5 C. W. N. 509, 512 (1901); and see Har Prasad *v.* Jafar Ali, 7 A. 345, 350 (1885); Dhan Singh *v.* Basant Singh, 8 A. 519, 529 (1886); Amritrav Krishna *v.* Balkrishna Ganesh, 11 B. 488, at pp. 491, 492 (1887).

(2) Har Prasad *v.* Jafar Ali, 7 A. 345 (1885); Dhan Singh *v.* Basant Singh, 8 A. 519 (1886), *per* Mahmood, J.; see cases cited *post*; and Mohunt Bhagwan *v.* Khetter Moni, 1 C. W. N. 617 (1896), at p. 624, where it was said that excess of, and failure to exercise, jurisdiction included applying to a case a mode of procedure not applicable to it, or refusing to apply to it a mode of procedure applicable to it.

(3) Ross Alston *v.* Pitambar Das, 25 A. 509 (1903), at p. 526, *per* Banerjee, J.; Manisha Eradi *v.* Siyali Koya, 11 M. 220 (1887), at pp. 227, 229, *per* M. Aiyar, J.; p. 232, *per* Brandt, J.

(4) See Shew Prosad Bungshidhur *v.* Ram Chunder Haribux, 41 C. 323 (1913).

(5) Sukh Lal *v.* Tara Chand, 2 C. L. J. 238, 244 (1905).

(6) Manisha Eradi *v.* Siyali Koya, 11 M. 220 (1887), at pp. 222, 223, 234, and so where jurisdiction is declined; Vishvanath Govind *v.* Rambhat, 15 B. 148, 151 (1890) ["The Subordinate Judge has refused to exercise a jurisdiction which, if he is wrong, is by law vested in him, and we can examine his order to see if he is right in his refusal"].

(7) Sheo Prasad *v.* Kastura Kuar, 10 A. 119 (1887).

(8) Mihr Ali *v.* Muhammad Husen, 14 A. 413 (1892).

(9) *In re* Suljan Ostagar, B. L. R. (F. B.) 531 (1866) [*i.e.* where the Court exercises a jurisdiction when it has none, or exceeds it when it has jurisdiction]; Birj Mohun *v.* Rai Uma, 20 C. 8, 11 (1892) [order setting aside sale under Code]; Lakshmana *v.* Najmudin, 9 M. 145 (1884) [order setting aside execution sale, though no injury proved]; Bhoyrub Chunder *v.* Wajedunissa, 6 C. L. R. 234 (1880) [hearing appeal where none]; Kristo Inder *v.* Roopinee, 6 W. R., Act X., 56 (1866) [id.]; Bhowanee Pershad *v.* Dhurm Narain, 3 W. R. 24 (1865) [ib.]; Aunamalai *v.* Muthulinga, 6 M. H. C. R. 360 (1871) [id.]; Rahim Bux *v.* Nundo Lal, 14 C. 321 (1887) [Bengal Tenancy Act; power to set aside sale, s. 174]; Lal Mohun *v.* Jagendra Chunder, 14 C. 636 (1887) [id.]; Shields *v.* Wilkinson, 9 A. 398 (1887) [decree where no evidence]; Abdul Rahiman *v.* Kutti Ahmed, 10 M. 68 (1886) [order to take inventory under Act XIX. of

failed to exercise a jurisdiction so vested,(1) the Courts sometimes underrating

1841, after parties referred to regular suit]; Gossain Money *v.* Gour Pershad, 11 C. 146 (1884) [order restraining execution pending appeal]; Kunhamed *v.* Chathu, 9 M. 437 (1886) [no jurisdiction to order refund under s. 315]; Dagdusa Tilakchand *v.* Bukhan Govind, 9 B. 82 (1884) [order filing award; arbitrators without authority; deal with costs]; Dhapi *v.* Ram Pershad, 14 C. 768 (1887) [no jurisdiction under s. 136 unless s. 134 complied with]; Muhammad Husain *v.* Ajoodhia Prasad, 10 A. 467, 470 (1888) [order under s. 407]; Luis *v.* Luis, 12 M. 186 (1888) [order setting aside order under s. 494]; Sadasook *v.* Kannayya, 19 M. 96 (1895); Sassoon *v.* Hurry Das Bhukut, 24 C. 455 (1896); s. c., 1 C. W. N. 44 [Small Cause Court; new trial]; Giddayya *v.* Jagannatha, 21 M. 363 (1897) [reversal by District Munsif of decree of Village Munsif]; Manomohini Chaudhurani *v.* Nara Narain, 4 C. W. N. xxiii (1899) [setting aside decree which was not *ex parte*]; Mahomed Hamidulla *v.* Tohurennissa Bibi, 25 C. 155, 158 (1897) [id.]; Ningapa *v.* Dodapa, 21 B. 585 (1896) [decree passed by Karkun in possessory suit]; Luchmun Singh *v.* Shamshere Singh, 2 I. A. 58 (1874) [application for review]; Raja Har Narain *v.* Chaudhrain Bhagwant, 18 I. A. 55; s. c., 13 A. 300 (1891) [invalidity of award when not made within time fixed by Court]; Chinaya *v.* Gangava, 21 B. 775 (1896) [order in execution for ouster of person not party to suit]; Bhau *v.* Dade, 21 B. 777 (1896) [Mamlatdar; decree by; remedy as between joint owners]; Babaji Ramji *v.* Babaji Devji, 23 B. 47 (1897) [Mamlatdar no jurisdiction to determine questions between riparian proprietors]; Lakshman Babaji *v.* Ramchandra Parashram, 23 B. 321 (1898) [Dekkan Agriculturists Relief Act; jurisdiction of Special Judge]; Muhammad Yusuf *v.* Abdul Rahman, 16 I. A. 104 (1889) [setting aside non-appealable judgment]; Hazari Lal *v.* Kheru Rai, 3 A. 576, 579 (1881) [order dispossessing mortgagee]; Nalinakshya Ghosal *v.* Mafakshar Hossain, 28 C. 177 (1900); s. c., 5 C. W. N. 192 [order amending decree]; Puran Mal *v.* Janki Pershad, 28 C. 680, 683 (1901) [order of Court taking over management of properties]; s. c., 6 C. W. N. 114; Golam Mahammad *v.* Saroda Mohan, 4 C. W. N. 695, 697 (1900) [issue of successive [illegible] without inquiry]; Haldhar Maiti *v.* Choytonna Maiti, 30 C. 588 (1903) [jurisdiction of Registrar Small Cause Court]; Diwalibai *v.* Sadashivdas, 24 B. 310 (1899); s. c., 1 Bom. L. R. 836 [incompetent reference under s. 646A]; Krishnasami Pannikondar *v.* Muthu Krishna Pannikondar, 24 M. 364 (1900) [appointment of curator; omission to take evidence before making order]; Ramasamy Chettiar *v.* Orr, 26 M. 176 (1902) [suit brought on ordinary side of Court, though maintainable on Small Cause side]; Amrita Lal Kolay *v.* Nibaran Chandra, 31 C. 340 (1904); s. c., 8 C. W. N. 246 [Jurisdiction S. C. C.; title to immoveable property]; Dayaram *v.* Govardhandas, 28 B. 458 (1904) [order passed without jurisdiction in execution]; Ramanadhan Chetty *v.* Narayanan Chetty, 27 M. 602, 607 (1904) [decision of review petition during pendency of appeal]; Ganga Charan *v.* Sasti Mandal, 6 C. W. N. 614 (1901); Corporation of Calcutta *v.* Cohen, 6 C. W. N. 480 (1901) [Jurisdiction of Small Cause Court to declare old valuations to be still in force]; Monomohini Chaudhurani *v.* Nara Narayan, 4 C. W. N. 456 (1899) [no jurisdiction to set aside *ex parte* decree of Superior Court]; Shankarbhai Khojabhai *v.* Somabhai Ranchhodbhai, 3 Bom. L. R. 129 (1900) [Judge deciding Small Cause Court suit under ordinary jurisdiction]; Peary Mohun Ghosaul *v.* Harran Chunder, 11 C. 261 (1885) [S. C. C., trespass to immoveable property; Court held to have jurisdiction]; Sarnam Tewari *v.* Sakina Bibi, 3 A. 417 (1881) [decisions of both Courts without jurisdiction]; Yule & Co. *v.* Mahomed Hossain, 24 C. 129 (1896) [reference by P. S. S. C. under s. 69 of its Act, and s. 617 of Code; liberty given to withdraw suit after disposal of reference instead of entering judgment for defendants]; Horananda Banerjee *v.* Ananta Dasi, 9 C. W. N. 492 (1904) [s. 153, Bengal Tenancy Act]; Menat Ali *v.* Amdar Ali, 9 C. W. N. 605, 607 (1905) [amended decree]; Janokey Nath Guha *v.* Brojolal Guha, 33 C. 757, 770 (1906) [no appeal, no jurisdiction to refuse filing of award]; Bai Shri Vaktuba *v.* Agarsangji, 9 Bom. L. R. 547 (1907); s. c., 31 B. 447 [order passed under s. 206 making additions to the decree]; Baikanta *v.* Sita, 38 C. 421 (1911).

(1) Gobin Prasad *v.* Chandar Sekhar, 9 A. [illegible] (1887) [declining to hear suit on merits];

their powers; and the High Court is called upon to enlarge their too narrow views.(1) If a Court allows an application or decrees a suit which is in fact time-barred, without considering whether it was so or not, it can be said to have failed to exercise a jurisdiction vested in it by law, so as to bring the matter within the scope of this section. But this cannot be said of a Court merely because it has omitted to consider *ex proprio motu* the question whether a litigant was entitled to proceed out of time by reason of some special provision of law, when such a question had not been raised by him or on his behalf.(2) The High Court can interfere under this section when the Court below refused to exercise the jurisdiction vested in it by reason of an erroneous interpretation of a provision of the Code.(3)

Ramjiwan Mal *v.* Chand Mal, 7 A. 227 (1884) [refusing jurisdiction on ground suit triable by District Court]; Badami Kuar *v.* Dinu Rai, 8 A. 111 (1886) [erroneous view of his jurisdiction taken by Munsif; return of plaint]; Mohendra Sundar *v.* Dinabandhu, 19 C. L. J. 15 (1913) (return of plaint); Vishvanath Govind *v.* Rambhat, 15 B. 148 (1890) [return of plaint on ground suit governed by s. 539]; Mana Vikrama *v.* Mallichury, 3 M. 68 (1880) [refusal to file award]; Birj Mohun *v.* Rai Uma, 20 C. 8, 11 (1892); s. c., 19 I. A. 154 [refusal to confirm execution sale]; followed in Radhasyam Kar *v.* Dinobundhoo Biswas, 18 C. L. J. 533 (1913); Navalchand Nemchand *v.* Amichand Talakchand, 18 B. 734 (1893) [rejection of application for execution]; Amarchand *v.* Javalya, 21 B. 738 (1886) [Mamlatdar erroneously holding he could not receive a suit against heirs]; Kammathi *v.* Mangappa, 16 M. 454 (1892) [Judge declining to entertain application for leave to sue in *formâ pauperis*, erroneously supposing a succession certificate was necessary]; Shamrav Pandoji *v.* Niloji Ramaji, 10 B. 200 (1885) [refusal to entertain application for execution]; Benode Mohini *v.* Sharat Chunder, 8 C. 837, 841 (1882) [application for revival of suit]; Rama *v.* Kunji, 9 M. 375 (1886) [jurisdiction held to be declined, the Legal Practitioners Act being no bar to suit]; Subbaji Rau *v.* Srinivasa Rau, 2 M. 264 (1880) [jurisdiction to refuse to confirm execution sale declined]; Seshadri *v.* Krishnan, 8 M. 192 (1884) [direction to exercise power given by s. 544]; Mussamut Jameela *v.* Luchmun Panday, 4 C. L. R. 74 (1879) [refusal to investigate claim made in execution]; Jogodanund Singh *v.* Amrith Lal, 22 C. 767 (F. B.) (1895) [refusal to set aside sale under s. 310A]; Nathubhai *v.* Mulchand *v.* Nana Balu, 19 B. 544 (1894) [refusal to grant execution]; Collector of Vizagapatam *v.* Abdul Kharim, 21 M. 113 (1897) [failure to exercise jurisdiction in consequence of misconstruction of s. 412]; Mahabir Singh *v.* Behari Lal, 13 A. 320, 323 (1891) [refusal to hear and determine appeal]; Gerindra Kumar *v.* Rajeswari Roy, 27 C. 5 (1899) [order refusing to amend probate]; Raghunath Charan *v.* Shamo Koeri, 31 C. 344 (1903) [refusal to hear appeal]; Gobind Prasad *v.* Chandar Sekhar, 9 A. 486 (1887), at p. 492 ["The Judge failed to exercise his jurisdiction, and probably acted with material irregularity in dismissing this suit on the ground that the representatives of M. C. had not been made a party," *per* Edge, C.J.]; Vishvanath Govind *v.* Rambhat, 15 B. 148 (1890) [returning plaint upon erroneous construction of s. 539]; Vishnu *v.* Ramchandra, 9 Bom. L. R. 936 (1907) [rejecting complaint under s. 328]; Zamiran *v.* Fateh Ali, 32 C. 146 (1904) [refusing to accept plaint]; Ganesh Singh *v.* Kashi Singh, 28 A. 621 (1906) [arbitration: failure of Court to decide as to validity of reference]; Willis *v.* Jawad Husain, 29 A. 468 (1907) [refusal to hear application for review]; Akbar Khan *v.* Muhammad Ali Khan, 31 A. 610 (1909); Ramdoyal *v.* Upendra Nath, 17 C. W. N. (1912) [Specific Relief Act; refusal to grant relief to plaintiff found to be in possession within six months]; Kartic *v.* Gorachand, 17 C. L. J. 593 (1912) [omitting to deal with merits of an appeal].

(1) Shiva Nathaji *v.* Joma Kashinath, 7 B. at p. 352 (1883) [the section now extends to refusal of jurisdiction by a Court through a misconception of its authority].

(2) Panchu Mandal *v.* Sheikh Isaf, 17 C. W. N. 667 (1913).

(3) Maharaja of Burdwan *v.* Apurba, 14 C. L. J. 50 (1911).

Illegality.—The first part of the section down to the words "*so vested*" deals with jurisdiction. The remainder assumes the existence of jurisdiction, but deals with the mode in which such jurisdiction is exercised. A question may arise whether a Court in the exercise of the jurisdiction it possesses has acted according to law. Such a question relates not to the existence of jurisdiction, but to the exercise of it in either an illegal or irregular manner.(1) This distinction has not always been preserved, it being in some earlier cases considered erroneously that the Privy Council had decided (2) that only questions relating to the jurisdiction of the Court can be entertained under this section.(3) This opinion, however, is not tenable, since it practically treats the additional words added to the section in 1879 as superfluous or unnecessarily introduced.(4) All that the Privy Council case really decides is that this section does not give a right of appeal on questions of law or fact, and that where the Subordinate Court has jurisdiction, the High Court can only interfere where that Court has acted illegally and with material irregularity in the exercise of such jurisdiction.(5)

A Court cannot interfere under this section simply upon the ground that there has been an erroneous decision upon a question of law or fact.(6) A Court that has decided a suit over which it had jurisdiction cannot, only on the ground that it has arrived at a wrong decision, be said to have exercised its jurisdiction illegally or with material irregularity.(7) Any other view would impose on the

(1) See Sukh Lal *v.* Tara Chand, 2 C. L. J. 241, 245 (1905).

(2) In Amir Hassan *v.* Sheo Baksh, 11 C. 6 (1884).

(3) Magni Ram *v.* Jiwa Lall, 7 A. 336, at 338 (1885), F. B.; Badami Kuar *v.* Dina Rai, 8 A. 11, at p. 113, *per* Petheram, C.J., "the questions to which s. 622 applies, are questions of jurisdiction only;" Narayanasami *v.* Natesa, 16 M. 424, at p. 428 (1892) ["the error of procedure must be such as to have led to the assumption of a jurisdiction, etc.," *per* M. Aiyar, J.]; Manisha Eradi *v.* Siyali Koya, 11 M. 220, at pp. 229, 230 (1887), *per* M. Aiyar J., "the words 'act illegally,' etc., apply to those cases only in which there is an error in the procedure by reason of which the Subordinate Court concludes that it has, or has not, jurisdiction." This dictum was, however, subsequently withdrawn by the learned judge in Kristnamma Naidu *v.* Chapa Naidu, 17 M. 410, at p. 414 (1893).

(4) Kristnamma Naidu *v.* Chapa Naidu, 17 M. 410, 414 (1893), and cases *post;* Mohunt Bhagwan *v.* Khetter Moni, 1 C. W. N. 617 (1896), at p. 625; Enat Mondul *v.* Baloram Dey, 3 C. W. N. at p. 585 (1899).

(5) Sew Bux *v.* Shib Chunder, 13 C. (1886), at p. 230; and see Mohunt Bhagwan *v.* Khetter Moni, 1 C. W. N. 617 (1896), at p. 624.

(6) It has, however, recently been held by the Madras High Court that when an Appellate Court erroneously (that is, by an error of Law) decided that the Court of the first instance had or had not jurisdiction to entertain a suit, the High Court could set aside the order under this section on the double ground of exercise of jurisdiction and illegality: Vuppuluri *v.* Sectaramachandra, 24 M. L. J. 112 (1912) [Aiyar, J., dissenting].

(7) Amir Hassan *v.* Sheo Baksh, 11 I. A. 237; s. c., 11 C. 6 (1884); dist. in Port Canning Improvement Co., Ltd. *v.* Roson Ali, 17 C. W. N. 160 (1912); Magni Ram *v.* Jiwa Lal, 7 A. 336 (1885); Sunder Das *v.* Mansa Ram, 7 A. 407 (1884); Chattarpal Singh *v.* Raja Ram, 7 A. 661 (1885); Badami Kuar *v.* Dina Rai, 8 A. 111 (1886); Muhammad Husain *v.* Ajudhia Prasad, 10 A. 467, 471 (1888); Hari Bhikaji *v.* Naro Vishvanath, 9 B. 432 (1885); Jivraji *v.* Pragji, 10 M. 51 (1886); Venkubai *v.* Lakshman Venkoba, 12 B. 617 (1887); Krishna Mohini *v.* Kedarnath Chuckerbutty, 15 C. 446 (1888); Narayanasami *v.* Natesa, 16 M. 424, 426 (1892); Enat Mondul *v.* Baloram Dey, 3 C. W. N. 581, 583, 585 (1899); Corporation of Calcutta *v.* Bhupati Roy, 26 C. 74 (1898); Mathura Nath *v.* Umes Chandra, 1 C. W. N. 626 (1897);

Court the duties of a Court of Appeal. Mere errors of law and fact can only be corrected by appeal. Such as a wrong decision on a question of *res judicata* (1) or limitation,(2) or a merely erroneous construction of the provisions of an Act,(3) or a decision as to the inadmissibility of a document in evidence,(4) or the misconstruction of a document,(5) or a decision that a person was not a legal representative within the meaning of sect. 47, *ante*.(6) Where a Judge having both Small Cause and ordinary jurisdiction transferred to his file as ordinary Judge a suit filed in his Court as a Small Cause Court suit, it was held that there was not a material irregularity, and that as his decree decided a question of title to immoveable property, the High Court could not interfere under its extraordinary jurisdiction, for since this decree could not have been passed in a Small Cause Court, it was not final.(7)

The mere fact of a Court having come to a wrong decision even on a point of law is not sufficient to constitute an illegality or irregularity; (8) that is, an erroneous decision is not *by itself* any ground for revision. The Privy Council have thus excluded one class of cases, but it is still left open to consider in what

Raghu Nath *v.* Rai Chatraput, 1 C. W. N. 633 (1897); Sotish Chunder Lahiry *v.* Nilcomul Lahiry, 11 C. 45 (1884); Gopi Koeri *v.* Gopi Lal, 21 C. 799 (1894); Corporation of Calcutta *v.* Cohen, 6 C. W. N. 480 (1901); Cooke *v.* Equitable Coal Co., 8 C. W. N. 621, 624 (1904); Ross Alston *v.* Pitambar Das, 25 A. 509, 525 (1903), *per* Banerjee, J.; Parasurama Ayyar *v.* Seshier, 27 M. 504 (1903); Kali Charan *v.* Sarat Chunder, 30 C. 397 (1903); s. c., 7 C. W. N. 545; Ram Lal *v.* Ratan Lal, 26 A. 572 (1904); Joseph *v.* Salt Company, 17 M. 371 (1892) [mistake concerning principles of valuation]; *Quære* whether following cases did not raise points of law only: Kirparam *v.* Modia, 19 B. 135 (1894); Court of Wards *v.* Darmalingu, 8 M. 2 (1884); Pitambar Das *v.* Jambusar Municipality, 17 B. 510 (1892); Ross Alston *v.* Pitambar, 25 A. 509 (1903); Patel Kilabhai *v.* Hargovan Mansukh, 19 B. 133 (1894); Maulvi Muhammad *v.* Syed Husain, 3 A. 203 (1880); Ram Lal *v.* Ratan Lal, 26 A. 572 (1904) [order rejecting application for review], dist., Willis *v.* Jawad Husain, 29 A. 468 (1907); Ram Singh *v.* Salig Ram, 28 A. 84 (1905).

(1) Hari Bhikaji *v.* Naro Vishvanath, 9 B. 432 (1885); Amritrav Krishna *v.* Balkrishna Ganesh, 11 B. 488, 492 (1887).

(2) Sundar Singh *v.* Doru Shankar, 20 A. 78 (1897); Amritrav Krishna *v.* Balkrishna Ganesh, 11 B. 488, 492 (1887); Anunda Lall *v.* Debendra Lall, 2 C. W. N. ccexxxiv. (1898); Ramgopal *v.* Joharmall, 39 C. 473 (1912); but see Kailash *v.* Bissonath, 1 C. W. N. 67 (1896); Har Prasad *v.* Jafar Ali, 7 A. 345 (1885); Pitambar Das *v.* Jambusar Municipality, 17 B. 510 (1892).

(3) Rabbaba Khanum *v.* Noorjehan Begum, 13 C. 90 (1886); but where it was held that the case did not fall within a section at all, it was held that the Court had declined jurisdiction in consequence of a misconstruction: Collector of Vizagapatam *v.* Abdul Kharim, 21 M. 113 (1897); and see Rama *v.* Kunji, 9 M. 375 (1886); and as to construction of decree, Maulvi Muhammad *v.* Syed Husain, 3 A. 203 (1880).

(4) Madhavrav Ganeshpant *v.* Gulabbhai Lallubhai, 23 B. 177 (1898); but see Fatehchand Harchand *v.* Kisan, 18 B. 614 (1893), where there was revision of an order excluding a document for want of stamp; and Gurunath Shrinivas *v.* Chenbasappa, 18 B. 745 (1893), admitting a document though unregistered. But see Benod *v.* Ram Sarup, 16 C. W. N. 1015 (1912).

(5) Dasruth Rai *v.* Shcodin Rai, 16 A 39 (1893).

(6) Ganga Charan Bhuttacharjee *v.* Soshi Bhushan Roy, 32 C. 572 (1905).

(7) Hari Balu Gackawad *v.* Ganpatrao Lakhurjirao Gackawad, 38 B. 190 (1913).

(8) Kristnamma Naidu *v.* Chapa Naidu, 17 M. 410 (1893), at p. 412; Shibh Narain Mookerjee *v.* Baikuntha Nath Isar, 11 C. W. N. 857 (1907); Narayan *v.* Nagindas, 30 B. 113, 115 (1905). See Enat Mondul *v.* Baloram Dey, 3 C. W. N. 581 (1899).

other cases the clause may be applicable.(1) This is a question of difficulty, upon which there has been considerable conflict of opinion. There may be a decision which is erroneous, but not illegal or materially irregular.(2) It is not always easy to draw a clear line between an illegal exercise of jurisdiction and a mistake of law.(3) A distinction has been drawn between an irregular act and an erroneous decision,(4) but the distinction is, ordinarily at least, of little use, as the illegal or irregular act is generally preceded by, and based upon, an erroneous decision.

It is not difficult to give examples of extreme cases. The difficulty exists as to those falling within these limits. Thus, a wrong decision based upon an erroneous construction of sect. 11 that a suit is not barred by *res judicata* is no ground for revision,(5) but a Judge would act illegally who, while admitting that a case fell within the section, held that as the former decision was erroneous, he would on this ground determine the point again; (6) or if he directed, contrary to the provisions of sect. 60, that in execution of a decree the tools of a judgment debtor be sold.(7) So it has been held that this part of the section contemplates a perverse decision on a question of law or procedure—that is, a decision involving a conscious departure from some rules of law or procedure.(8)

The Calcutta High Court has gone further, and held that while acting with "*material irregularity*" implies only the committing of an error of procedure, acting "*illegally*" does not mean the same thing, for Courts may commit gross and palpable errors other than those of procedure which would justify it being said that they had acted "*illegally;*" and that this part of the section was intended to authorize the High Courts to interfere and correct gross and palpable errors of Subordinate Courts, so as to prevent gross injustice in non-appealable cases; and that it was advisedly expressed in indefinite language from the difficulty of defining exactly the classes of cases which may stand in need of such extraordinary interference. In this view, the question whether any case comes under the clause has to be determined with reference to the grossness and palpableness of the error complained of, and to the gravity of the injustice resulting from it.(9)

Coming to the particular application of the section, the following cases have been expressly held, or may perhaps be considered to have been held, to come under the heading of acting "*illegally:*"—the rule of adjudication being that a Judge shall decide, *secundum allegata et probata*, a Judge was held

(1) Kristnamma Naidu *v.* Chapa Naidu, at p. 418; and see Mohunt Bhagwan *v.* Khetter Moni, 1 C. W. N. 617 (1896), at p. 626.

(2) Har Prasad *v.* Jafar Ali, 7 A. 345 (1885), at p. 351.

(3) Sew Dax *v.* Shib Chunder, 13 C. at 230 (1886); Debo Das *v.* Mohunt Ram, 2 C. W. N. 474 (1898), at p. 477.

(4) Enat Mondul *v.* Baloram Dey, 3 C. W. N. 581 (1899), at p. 585, *per* Banerjee, J.

(5) *Vide ante*, p. 474.

(6) Har Prasad *v.* Jafar Ali, 7 A. 345 (1885), at p. 351. *Vide post;* and see Rabbaba Khanum *v.* Noorjehan Begum, 13 C. 90, at p. 93 (1886), where it was said that if the Subordinate Judge had held that s. 32 had no application to interpleader suits there would have been a failure to exercise jurisdiction; but what he in fact did was to put an erroneous construction on that section.

(7) Badami Kuar *v.* Dinu Rai, 8 A. 111 (1886), at p. 115, *vide post.*

(8) Kristnamma Naidu *v.* Chapa Naidu, 17 M. 410 (1893), F. B.; but see as to this case, Mohunt Bhagwan *v.* Khetter Moni, 1 C. W. N. 617 (1896), at p. 625.

(9) Mohunt Bhagwan *v.* Khetter Moni, 1 C. W. N. 617 (1896), at p. 626 (Bannerjee and Gordon, JJ.); Mathura Nath *v.* Umes Chandra, 1 C. W. N. 626 (1897), *per* Banerjee, J.; Raghu Nath *v.* Rai Chatraput, 1 C. W. N. 633 (1897), *per* Banerjee, J.; *contra, per* Maclean, C.J., in Enat Mondul *v.* Baloram Dey, 3 C. W. N. 581 (1899), at p. 583.

to have acted illegally in raising a question of the execution of an instrument when execution was admitted; (1) the appointment of arbitrators against consent of one of the parties, the order of reference to them, their award, and the decree passed thereon; (2) entertaining an application to set aside an *ex parte* decree after the time allowed by the law of limitation; (3) or setting aside an *ex parte* decree without notice to the plaintiff; (4) admitting that a matter was litigated under the circumstances described in sect. 11, *ante*, but holding that the former decision was erroneous, and on this ground determining it again; (5) admitting that a claim could have been made part of a suit formerly tried, but holding that the circumstances were such as rendered it inequitable to apply the provisions of O. II. r. 2, *post*, and allowing a plaintiff to sue; (6) a Judge, professing to act under sect. 206 of the last Code, saying that "dismissed" means "decreed," and thus altering the whole nature of the decree under the colour of amending it; (7) a Judge reviewing, in disregard of the provisions of sect. 624 of the same Code, a judgment of his predecessor; (8) a Judge, before whom witnesses are produced, dismissing the claim without hearing them, on the ground that the plaintiff's story is obviously untrue; (9) Judge refusing to give effect by amending decree to his predecessor's decretal order;(10) refusing summonses;(11) passing a decree where there is no evidence at all or admission to support it;(12) the Judge addressing himself to matters entirely foreign to the inquiry he had to make;(13) erroneously holding that a particular Act or section of it is applicable to the case, and that by reason of that Act or section the suit does not at all lie; (14) not permitting a plaintiff in a suit brought upon two hundis to adduce evidence of payment otherwise than by the hundis; (15) excluding from evidence a document because not stamped; (16) admitting a document in evidence though unregistered; (17) allowing a tenant to dispute his landlord's title; (18)

(1) Gorakh Babaji *v.* Vithal Narayan, 11 B. 435 (1887).

(2) Pugardin *v.* Moidin, 6 M. 414 (1882), held also to constitute a case of material irregularity.

(3) Har Prasad *v.* Jafar Ali, 7 A. 345 (1885) [*sed qu.* whether in this case there was not merely an error of law in construing art. 164 of the Limitation Act, and whether same criticism does not apply to Davies, J., judgment in Kristnamma Naidu *v.* Chapa Naidu, 17 M. at p. 421 (1893)].

(4) Subbiah *v.* Dilawar Khan, 24 M. L. J. 482 (1913).

(5) Har Prasad *v.* Jafar Ali, 7 A. 345 (1885), at p. 351, *per* Mahmood, J., who held it, as well as the next four cases, to be cases both of illegality and material irregularity.

(6) Ib.

(7) Ib., at p. 352 [the case referred to is Surta *v.* Ganga, 7 A. 411 (1885)].

(8) Ib. (9) Ib.

(10) Balmakund *v.* Jatan Lall, 6 A. 125,219 (1882), held also to be material irregularity.

(11) Kaji Ahmad *v.* Kaji Mahamad, 9 B. 308 (1884).

(12) Shields *v.* Wilkinson, 9 A. 398, 409, *per* Broadhurst, J.; Edge, C.J., considered the case to be one of absence of jurisdiction; and see Manisha Eradi *v.* Siyali Koya, 11 M. at p. 232 (1887); Bissessur Das *v.* Johann Smidt, 10 C. W. N. 14 (1905).

(13) Debo Das *v.* Mohunt Ram, 2 C. W. N. 474, 478, 479 (1898); foll., Gopal Chandra *v.* Bigoo Mistry, 8 C. W. N. 70 (1903) [pauper application].

(14) Jugobundhu Pattuck *v.* Jadu Ghose, 15 C. 47, 50 (1887), held also to be material irregularity; foll. in Shri Vishvambhar *v.* Shri Vasudev, 16 B. 708 (1892), in which conversely the Judge erroneously held himself bound to make the order complained of.

(15) Chenbasapa *v.* Lakshman Ramchandra, 18 B. 369, 372 (1893).

(16) Fatehchand Harchand *v.* Kisan, 18 B. 614 (1893), *sed qu.*, see p. 474, n. (4), *ante*.

(17) Gurunath Shrinivas *v.* Chenbasappa, 18 B. 745 (1893); *sed qu.*, see last note.

(18) Patel Kilabhai *v.* Hargovan Mansukh, 19 B. 133 (1894); *sed qu.*, whether this was not merely a mistake of law.

directing, contrary to the provisions of sect. 266 of the last Code, that in execution of a decree the tools of a judgment debtor be sold; (1) making an order without hearing the party's pleader; (2) A suing B for some property and the Court giving a decree to C, who was not a party to the suit; (3) the adoption of a procedure different from that provided by law, and such as to cause material injury to the suitor; the application of a section of the Code to a case to which it does not apply; (4) holding wrongly, and contrary to authority, that there is a cause of action; (5) refusing to make a person a party to a proceeding; (6) a Judge or assessor hearing a case who has an interest in it; (7) Appellate Court questioning, contrary to the express provisions of the Statute, the admissibility of document improperly stamped, but admitted in evidence by Court of first instance; (8) attaching under a personal decree trust property; (9) non-suiting a plaintiff, such a procedure not being permitted by the Code; (10) decree in pauper suit omitting to order plaintiff to pay Court fees when suit dismissed; (11) omitting to state a case under sect. 69 of the Presidency Small Court Act; (12) a District Judge revoking a sanction granted by a Subordinate Court on the ground that "a sanction could not be granted to a third party."(13)

Irregularity.—Just as in the reported cases, questions of illegality are mixed up with those of jurisdiction, so it is not easy always to distinguish "*illegality*" from "material *irregularity*." In fact, as will have been seen from the notes to the last paragraph, the Courts have often spoken of the same act as being both an illegality and irregularity. A distinction has been drawn between cases in which a Judge omits to do something which a Statute enacts shall be done, and cases in which a Judge does something which a Statute says shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of the prohibited thing is *ultra vires* and illegal, and without jurisdiction,(14) using the latter term in its broadest sense. It has been said also that material "*irregularity*" implies only the committing of an error of procedure, whilst acting "*illegally*" means something more.(15) One thing is clear, namely, that an irregularity is something less than an illegality, and before the Court will interfere

(1) Badami Kuar *v.* Dinu Rai, 8 A. 111 (1886), at p. 115, *per* Straight, J.; and *per* Mahmood, J., in Dhan Singh *v.* Basant Singh, 8 A. 519 (1886), at p. 529; and *per* Trevelyan, J., in Sew Bux *v.* Shib Chunder, 13 C. 225 (1886), at p. 231 [the word "costs" should be "tools"].

(2) Chakrapani *v.* Varahalamma, 18 M. 227 (1891).

(3) Sew Bux *v.* Shib Chunder, 13 C. 225, 230 (1886).

(4) Ib.; considered also apparently to be a material irregularity.

(5) Ross Alston *v.* Pitambar Das, 25 A. 509, 524 (1903); *sed qu.*, whether as held by Banerjee, J., *contra*, there was not merely an error of law.

(6) Khettramoni Dasi *v.* Shyama Churn, 21 C. 539 (1894), held also to be material irregularity; followed in Sri Prosad Narain *v.* Dulhin Gĕnda, 18 C. L. J. 612 (1913); but see Rabbaba Khanum *v.* Noorjehan Begum, 13 C. 90 (1886).

(7) Kashinath Khasgivala *v.* Collector of Poona, 8 B. 553 (1884); Swamirao *v.* Collector of Dharwar, 17 B. 299 (1892).

(8) Shidappa *v.* Irava, 18 B. 737 (1893).

(9) *In re* Shard, 28 C. 574 (1901).

(10) Vasudeva *v.* Chinnasami, 7 M. 584, at p. 586 (1884).

(11) Collector of Kanara *v.* Rambhat, 18 B. 454 (1893).

(12) Seshammal *v.* Munusami, 20 M. 358 (1896).

(13) Ram Prasad Malla (*in re*), 37 C. 13 (1909).

(14) Rameshur Singh *v.* Sheodin Singh, 12 A. 510 (1889), F. B.

(15) Mohunt Bhagwan *v.* Khetter Moni, 1 C. W. N. 617 (1896), *vide ante*, p. 455.

it must be shown to be material—that is, an irregularity which has prejudicially affected the merits of the case.

Certain cases of what has been held to be material irregularity will be found noted in the commentary on "acting illegally." Other reported cases are:—determining an issue which does not really arise in the case, and basing the decision on such determination; (1) omissions or errors of procedure in the investigation of a matter, such as the omission to comply with the procedure prescribed by sect. 3 of Act XIX. of 1841, relative to curators; (2) entertaining and granting an application under sect. 108 of the last Code, without notice to the other side, in contravention of the directions of sect. 109 of the same Code; (3) determining a suit upon an issue which was not one on which the dispute between the parties could be properly adjudicated upon; (4) treating delivery of summons by post to a person who was not shown to have been the defendant as good service; (5) Judge and Assessors sitting to determine amount of compensation to be awarded under Land Acquisition Act, and refusing to take into consideration any of the matters prescribed by sect. 24 of that Act, or improperly taking into consideration any of the matters prohibited by sect. 25 thereof; (6) Appellate Court disposing of a suit on a point taken by itself in appeal without affording the parties an opportunity of proving what was necessary to meet that point, or deciding the suit without hearing the parties at all; (7) where evidence has been improperly taken; (8) appointment of a curator under Act XIX. of 1841 without holding inquiry under sect. 3 of that Act; (9) grant of leave under sect. 18 of the Religious Endowments Act on an unverified petition not presented in Court; (10) in contravention of sect. 629, now O. XLVII. r. 7, entertaining an appeal from an order admitting a review; (11) going into a fresh point on a new trial, the materials necessary for its decision not being before the Court; (12) wrongly holding as regards service, and thereupon passing *ex parte* decree; (13) refusing to draw up a preliminary decree in

(1) Venkubai *v.* Venkaji Anaji, 12 B. 617 (1887).

(2) Papamma *v.* Collector of Godavari, 12 M. 341, 344, 347 (1889).

(3) Badami Kuar *v.* Dinu Rai, 8 A. 111 (1886), at p. 115, *per* Straight, J.; and *per* Mahmood, J., in Dhan Singh *v.* Basant Singh, 8 A. 519, at p. 529 (1886).

(4) Rudrappa *v.* Narsingrao, 29 B. 213 (1904).

(5) Jagannath Brakhbhau *v.* Sassoon, 18 B. 606 (1893).

(6) Joseph *v.* Salt Company, 371 (1892); but as to a mistake concerning the principles of valuation, ib.

(7) Kristnamma Naidu *v.* Chapa Naidu, 17 M. 410 (1893), at p. 421, *per* Davies, J. [the rest of the Bench, however, agreed in dismissing the petition]; as to the last point, see Chakra Pani *v.* Varahalamma, 18 M. 227 (1894), where the Court interfered, an order having been passed without hearing the party's pleader. So also where a party has not been permitted to adduce evidence: Chenbasappa *v.* Lakshman Ramchandra, 18 B. 369, at p. 372 (1893).

(8) Shiva Nathaji *v.* Joma Kashinath, 7 B. 341 (1883), at p. 357.

(9) Krishnasami Pannikondar *v.* Muthukrishna Pannikondar, 24 M. 364 (1900), *per* Shephard, J., Arnold White, C.J., holding that the Judge acted without jurisdiction or with material irregularity.

(10) Amdoo Mujan *v.* Muhammad Davud, 24 M. 685 (1901).

(11) Abdul Sadiq *v.* Abdul Aziz, 21 A. 152, 154 (1898); as, however, it was held that the District Judge had no power to set aside the order, *qu.* whether the question was not one of jurisdiction.

(12) Ralli *v.* Parmanand Jewraj, 13 B. 642 (1889).

(13) Abraham Pillai *v.* Donald Smith, 29 M. 324 (1906).

accordance with the findings; (1) ordering the amount deposited to be returned to the transferee of a non-transferable occupancy-holding; (2) failing to decide an issue which became necessary by the reversal of the decision of other issues by the first Court; (3) an order for consolidation of suits which is erroneous in principle and will lead to irremediable mischief; (4) allowing withdrawal of suit under O. XXIII. r. 1, with leave to file a fresh suit on the same cause of action after the defendant had obtained a decree in his favour; (5) interference by a Collector, under sect. 23 of the Mamlatdar's Court Act, with the findings on fact of a Mamlatdar which are on their face legal and regular.(6) It has been held that failure of a lower Appellate Court to frame and try the requisite issue under O. XLI. r. 25 may, under certain circumstances, be a material irregularity.(7) But the mere fact that a lower Court erroneously refused to allow amendment of a plaint is not ground for interference.(8)

"**May pass such order.**"—The words employed indicate very wide powers, and the Court may do or direct anything to be done which it considers called for under the circumstances. The actual order will, however, be controlled by these latter.(9) Where the decision of a Court of first instance, or of both such Court and the Appellate Court, are without jurisdiction, the Court has set aside both decisions and returned the plaint for presentation in the proper Court.(10) In such a case there has been no trial, and the High Court will not undertake the functions of a Court before which the case should have, but has never, gone. Where want of jurisdiction is alleged as regards the Appellate Court only, if the latter Court exceeds its jurisdiction, the High Court may set aside that portion of the order which was in excess of jurisdiction; and if the Appellate Court had not jurisdiction at all, it may set aside the decision altogether, and may refer the appeal to the Court which had jurisdiction, even if it were too late to prefer a fresh appeal to that Court.(11) But if the original order was non-appealable, the Court, in setting aside the decision on appeal of a Court not possessed of jurisdiction, will not enter into the question of the merits in order to determine if the first order was correct or not.(12) It has been held that the Court may at least pass any order which it might be authorized to pass on second appeal.(13) The question, however, whether the High Court, in dealing with a case under this section, can examine the evidence and itself investigate the facts is the object of conflict. In some cases it has done so;(14) in others not.(15)

(1) Sidhanath *v.* Ganesh, 14 Bom. L. R. 916 (1912); 37 B. 60.

(2) Nalani *v.* Fulmani, 15 C. L. J. 388 (1912).

(3) Sibu Sant *v.* Nitai, 15 C. L. J. 114 (1911).

(4) Kali [illegible]ran *v.* Surja Kumar, 17 C. W. N. 526 (1913).

(5) Eknath *v.* Ranoji, 35 B. 261 (1911).

(6) Kashiram *v.* Rajiram, 35 B. 487 (1911).

(7) Ramjas *v.* India General Navigation Railway Co., 16 C. W. N. 424 (1911).

(8) Venkatasubbiah *v.* Seshachellum, 22 M. L. J. 136 (1911).

(9) See Sarnam Tewari *v.* Sakina Bibi, 3 A. 417 (1881), at p. 420.

(10) Ib.

(11) *In re* Subjan Ostagar, B. L. R. (F. B.) 351 (1866).

(12) *In re* Docowri Kazi, B. L. R. (F. B.) 517 (1866).

(13) Maulvi Muhammad *v.* Syed Husain, 3 A. 203 (1880), F. B.; Har Prasad *v.* Jafar Ali, 7 A. 345 (1885), at p. 349.

(14) Kailash Chandra *v.* Bissonath Paramanic, 1 C. W. N. 67 (1896); Shields *v.* Wilkinson, 9 A. 398 (1887); and see Maulvi Muhammad *v.* Syed Husain, 3 A. 203 (1880), at p. 204, *per* Stuart, C.J.; Sarnam Tewari *v.* Sakina Bibi, 3 A. 417 (1881), at p. 419, *per* Stuart, C.J.

(15) Ramrao *v.* Babaji, 20 B. 630, at p. 632

Execution of orders passed in revision.—The same procedure which applies to High Court decrees in appellate jurisdiction must be applied under sect. 141 to orders in revisional jurisdiction. Application for execution of such orders must be made to the Court whose decree is revised, and that Court must execute the decree or order passed in revision according to the rules prescribed for the execution of its own decrees.(1)

Appeal from orders passed in revision.—The Bombay and Allahabad High Courts have held that the Letters Patent provide for an appeal only from a judgment passed in the original or appellate jurisdiction of the High Court, and that therefore no appeal lies from an order of a single Judge dismissing an application for the exercise of its revisional jurisdiction.(2) The same view was at first taken by the Madras High Court.(3) It was, however, subsequently held, by a Full Bench (proceeding, as regards some opinions of the Judges, on the ground that the revisional is part of the Court's appellate jurisdiction), that an appeal lies against an order made by a single Judge of the High Court under this section, when such order amounts to a judgment.(4) And this case has been recently followed in the Calcutta High Court where it was held on appeal that an order made by a single Judge sitting on the original side interfering with a judgment of the Presidency Small Cause Court is a judgment within the meaning of sect. 15 of the Letters Patent and is appealable. In this case one of the Judges was of opinion that a comparison of the Charter Act, the Letters Patent and the Presidency Small Cause Courts Act leads to the result that the High Court has a right to interfere by way of revision; and another Judge expressed the view that the revisional is a form of the appellate jurisdiction.(5) An order passed under this section, deciding that a certain person should be allowed to sue as a pauper, was held not to be a final decree in an appeal within the meaning of sect. 595 of the last Code, nor a final judgment made on appeal within the meaning of sect. 39 of the Letters Patent; and it was *held*, on an application for leave to appeal to the Privy Council against such an order, that the High Court had no power to grant a certificate. (6)

(1895); Ralli *v.* Parmanand Jewraj, 13 B. 642 (1889), at pp. 647, 649 [where the High Court, reversing the decision of the Small Cause Court, remitted the case to be disposed of according to law; and see Seshammal *v.* Munusami, 20 M. 358 (1896)]; cf. Seshadri *v.* Krishnan, 8 M. 192, 195 (1884); and see Manisha Eradi *v.* Siyali Koya, 11 M. 220 (1887), at p. 230 ["In revision we are no doubt bound to accept the facts as found by the Subordinate Court, provided that they are so found upon legal evidence and there is no material irregularity in their procedure," *per* Kernan, J.].

(1) Gold *v.* Goldenberg, 16 B. 550 (1891).

(2) Nisar Ali *v.* Ali Ali, 28 A. 133 (1905); Hiralal *v.* Bai Asi, 22 B. 891 (1897) [application under s. 25, Provincial Small Cause Court Act]; and see *per* Edge, C.J., in Muhammad Naim-ul-lah *v.* Ihsan-ullah Khan, 14 A. 226 (1892), at p. 232.

(3) Sriramulu *v.* Ramasam, 22 M. 109 (1898) [revisional application under this section].

(4) Chappan *v.* Moidin Kutti, 22 M. 68 (1898.)

(5) Shew Prosad Bungshidhur *v.* Ram Chunder Hari Bux; Kalooram Sitaram *v.* Ram Chunder Hari Bux, 41 C. 323 (1913); distinguishing Hiralal *v.* Bai Asi, *supra*; and see Gobind *v.* Kunja, 10 C. L. J. 407 (1909).

(6) Babu Sakan *v.* Gopal Chandra, 8 C. W. N. 296 (1904).

PART IX.

SPECIAL *PROVISIONS* RELATING TO THE CHARTERED HIGH COURTS.

116. This *Part* applies only to High Courts which are or may hereafter be established under the *Indian High Courts Act, 1861.*

Part to apply only to certain High Courts.

117. *Save* as provided in this *Part or in Part X. or in rules,* the provisions of this Code *shall* apply to such High Courts.

Application of Code to High Courts.

High Courts.—It was held that neither under this section nor sect. 638 of the last Code was an appeal under clause 15 of the Letters Patent affected by sect. 588 of that Code.(1) It has been held that sect. 629 (now O. XLVII. r. 7) applied to the High Court.(2)

118. *Where any such* High Court considers it necessary that a decree *passed* in the exercise of its original civil jurisdiction should be *executed* before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

Execution of decree before ascertainment of costs.

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

119. Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil

Unauthorized persons not to address Court.

(1) Toolsey Money *v.* Sudevi Dossee, 26 C. 361 (1899); dissenting from the decisions of the Madras and Allahabad High Courts there cited and following the decision of the Privy Council in Hurrish Chunder *v.* Kali Sunderi, 9 C. 482 (1882).

(2) Achaya *v.* Ratnavelu, 9 M. 253 (1885), considered in the first case in last note.

jurisdiction, or to examine witnesses, except *where* the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

Who may address Court.—This section corresponds with that in the former Codes.(1)

[s. 638.] **120.** (*1*) The following *provisions* shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections *16*, *17* *and* *20*.

Provisions not applicable to High Court in original civil or insolvent jurisdiction.

[s. 639.] (*2*) Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court.

Original jurisdiction.—See note to sect. 117, *ante*, and to Preamble. It has been held that in this section the word "ordinary" has been omitted before "original civil jurisdiction." (2)

Insolvency.—The words in the Code of 1877 were slightly different, but their meaning was the same.(3) The Insolvency Court has nothing to do with the procedure to be followed in the execution of a judgment entered up under sect. 86 of the Insolvent Act. The execution itself is a proceeding of the High Court, and sect. 649 of the last Code applied.(4)

(1) See *In re* Pleaders of the High Court, 8 B. 105, at p. 134 (1883). *In re* A Vakil's Application, 37 C. 853 (1910).

(2) *In re* A Vakil's Application, 37 C. 853 (1910).

(3) *In re* Bhugwandas Hurjivan, 8 B. 511, at p. 520 (1884).

(4) Ib.

PART X.

RULES.

121. *The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.*

Effect of rules in First Schedule.

122. *High Courts established under the Indian High Courts Act, 1861, and the Chief Courts of the Punjab and Lower Burma, may, from time to time after previous publication, make rules regulating their own procedure and the procedure of Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.*

[cf. s. 65 firstpara

Power of certain High Courts to make rules.

123. (*1*) *A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon.*

Constitution of Rule Committees in certain Provinces.

(*2*) *Each such Committee shall consist of the following persons, namely :—*

(*a*) *three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years,*

(*b*) *a barrister practising in that Court,*

(*c*) *an advocate (not being a barrister) or vakil or pleader enrolled in that Court,*

(*d*) *a Judge of a Civil Court subordinate to the High Court, and*

(*e*) *in the towns of Calcutta, Madras and Bombay, an attorney.*

(3) *The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president:*

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) *Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.*

(5) *There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor General in Council or by the Local Government, as the case may be.*

Committee to report to High Court.

124. *Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.*

Power of other High Courts to make rules.

125. *High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Governor General in Council may determine:*

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

Rules subject to sanction.

126. *Rules made under the foregoing provisions shall be subject to the previous sanction of the following authorities, namely:—*

(a) *if the rule is made by a High Court established under the Indian High Courts Act, 1861, to the sanction of the authority prescribed by section 15 of that Act for rules made under that section;*

(b) *if the rule is made by any other High Court, to the sanction of the Local Government.*

127. *Rules so made and sanctioned shall be published in the Gazette of India or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.*

Publication of rules.

The following amendments have been made by Act XXIV of 1917 :—

In Section 127, for the word *Sanctioned* the word *Approved* shall be substituted.

In Section 130, for the word *Sanction* the word *Approval* shall be substituted.

post or in any other manner either generally or in any specified areas, and the proof of such service ;

(*b*) *the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property and the proceeds of such sale ;*

(*c*) *procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction ;*

(*d*) *procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts ;*

(*e*) *procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not ;*

(*f*) *summary procedure—*

(*i*) *in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—*

on a contract express or implied ; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or

on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only ; or

on a trust ; or

(*ii*) *in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a*

landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;

(*g*) *procedure by way of originating summons;*

(*h*) *consolidation of suits, appeals and other proceedings;*

(*i*) *delegation to any Registrar Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and*

(*j*) *all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.*

It has been held that in this section we have legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in this country.(1)

[s. 652, third para.]

Power of Chartered High Courts to make rules as to their original civil procedure.

129. Notwithstanding anything in this Code, any High Court established under the *Indian High Courts Act, 1861*, may make such rules *not inconsistent* with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, *and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.*

[s. 652, second para.]

Power of other High Courts to make rules as to matters other than procedure.

130. A High Court not established under the *Indian High Courts Act, 1861*, may with the previous sanction of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 of that *Act* make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

[s. 652, fourth para.]

Publication of rules.

131. Rules *made in accordance with section 129 or section 130* shall be published *in the Gazette of India or* in the local official Gazette, *as the case may be*, and shall *from the date of publication or from such other date as may be specified* have the force of law.

Rules.—These sections effect the most important difference between the present and the last Code. Under the law as it formerly stood High Courts

(1) P. R. and Co. *v.* Bhagwandas, 34 B. 192 (1909).

had power to make rules to regulate the procedure of the original side of the Court, and High Courts and Chief Courts had power to make rules to regulate the procedure of Courts subordinate to them; but neither High Courts nor Chief Courts could make rules to regulate any matters which were dealt with by the Code of Civil Procedure, nor could they in any way affect the provisions of that Code. The power which is given to the High Court in England and other countries was denied to the High Courts in India, with the result that there could be no elasticity in matters of procedure which fell within the ambit of the Code, and that defects in the existing practice could only be remedied, when discovered, by the dilatory process of legislation.

This may have been proper at the time the Code was first enacted, but it has been rightly considered that there is no reason nowadays for denying to the High Courts the power to regulate these minor matters of procedure, a power which they are far more competent to exercise than the Legislature. In the present Code, therefore, the Legislature has enlarged the rule-making powers of the High Courts and Chief Courts, and vested in them the authority to make changes in minor matters of procedure. This is done by placing the sections of the Code relating to these matters in the first Schedule, and giving to the High Courts and Chief Courts power to vary or amend the rules in the Schedule, or to make additional rules on matters which are specified in the Code. The result follows, that the rules in the Schedule provide a procedure for the present, but that that procedure can be altered at any time, and from time to time as seems fit to the Courts. It has been thought desirable that in exercising these wider powers the Courts should have the advice of representatives of the two branches of the legal profession, and accordingly it has been provided that rules should only be made after taking the opinion of a Rule Committee composed of three Judges of the High Court, a Judge of a subordinate Civil Court, and of three other members appointed by the respective Chief Justices or Chief Judges, one representing the Bar, the other the Vakils or Pleaders, and the third the attorneys. It was believed that a Standing Committee of this kind would be of great value. Provision has been made for the appointment of a permanent Secretary to conduct the routine work of the Committee, and, as is hoped, to assist in drafting rules for them.

The division between matters which should be dealt with in the Act and matters which should be left to rules is not easy to determine on any logical basis.

Matters which affect more than one province, and matters in which it is essential that there should be uniformity in all provinces, have been kept in the Act: minor matters have been relegated to the Schedule. But between these two classes there are many matters as to which opinions may differ whether they are proper subjects for rules or not. It is probably impossible to devise an arrangement which would disarm all criticism; but that adopted in the Code is the best that presented itself at present. It may be said against this innovation that it will create divergence of practice between the various provinces and that this will cause confusion. The answer which has been given is that the divergence will be only in minor matters: and that even in this divergence there may be advantages. The conditions and requirements of

provinces differ greatly. A rule of procedure which may be proper in Calcutta may be entirely inappropriate in the Punjab. It is desirable that the general principles of procedure should be uniform all over India, but no harm can result from a divergence in the practice in Judges' Chambers, or in the particular form of plaints or interrogatories.

It may also be objected that the plan of putting some of the provisions relating to any particular subject in the Act and others in rules will lead to confusion. This is an objection which applies to all rules made under statutory authority: but it is one which it is hoped will have little force in this particular case as soon as practitioners have become familiar with the altered system.

The rules suggested in the Schedule to the draft will be found to depart to no very considerable extent from the last Code, though important amendments have been made. The subjects of counterclaim and garnishee orders, which were included in the earlier Bill, have been omitted from the Schedule. They raise questions on which there was a great divergence of opinion, and on which the requirements of different provinces appeared to vary. It has therefore been thought better not to make these procedures compulsory all over India, but to leave it to the Courts of each province to introduce them by rules if thought advisable. Power is given in the rule-making section for these purposes. With sect. 122, compare first paragraph of sect. 652 of last Code, with sect. 128, O. III. r. 6, and with sects. 129–131, the second, third, and fourth paragraphs respectively of sect. 652 of the last Code. New rules published since the date of the last edition are collected in the Appendix.

High Court rules.—These sections correspond with certain modifications with the second, third, and fourth paragraphs of sect. 652 of the last Code. The second paragraph of that section was added by sect. 63, Act VII. of 1888, and the last two paragraphs by sect. 2, Act XIII. of 1895. Rules made and published under this section have the force of law. Hence, it was held that where an application for execution was not accompanied by a copy of the decree of which execution was sought, the application could not be treated as a step in aid of execution within the meaning of the Limitation Act.(1) The rule must not, however, be *ultra vires*,(2) and no rule, it was held, could add to or modify the conditions and limitations of the law laid down in the Limitation Act.(3) It has been recently said by a Full Bench of the Madras High Court that, until such new Rules are made, it is probable that the Rules made under the last Code should be considered as in force.(4) As regards paragraph (1) of sect. 652 and the High Courts, see sect. 122, *ante*.

(1) Sadashiva *v.* Ramchandra, 5 Bom. L. R. 394 (1903).

(2) Rajam Chetti *v.* Seshayya, 18 M. 236 (1895). See Lalitishwar Singh *v.* Rameshwar Singh, 34 C. 619, 624 (1907). For an instance of a High Court Rule differing from the Code, see Behram Jung Nawab *v.* Haji Sultan Ali Shustry, 37 B. 572 (1912) (O. XLI. r. 10 does not apply in Bombay).

(3) Chunilal Jethabhai *v.* Dahyabhai Amulakh, 9 Bom. L. R. 1138 (1907).

(4) *In re* District Munsif of Tiruvallur, F. B., 37 M. 17 (1914).

PART XI.

MISCELLANEOUS.

132. (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court. [s. 640.]

Exemption of certain women from personal appearance.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

Women.—This is the only section which deals with the exemption of women (1) from personal appearance in Court. The privilege is limited to the class of persons described in the section, and cannot be claimed by all women of rank.(2) It has been designed for the protection of *purdanashin*. The words "*who according to*," etc., were held not to apply to a case of a Parsi widow, who alleged that according to Parsi customs she could not leave her house for two years after her husband's death, the custom being of a varying and uncertain character.(3) But a Court, independently of the section, would always have regard to such circumstances as were put forward in that case (viz. the alleged custom, age, and health of the applicant, and her desire to leave the jurisdiction) as an excuse for non-attendance.(4) See notes to O. XVIII. r. 4 and O. XXVI. r. 1.

133. (*1*) The Local Government may, by notification in the *local* official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption. [s. 641.]

Exemption of other **persons.**

(1) An unmarried girl of twelve years was held to be too advanced in age to allow of any of the immunities of childhood: Mainath *v.* Moorta, 24 W. R. 375 (1875). As to examination in house, see ib., and Suit 29 of 1903, C. H. C.; Dhara Sundari *v.* Suruti Bala, 28th July, 1904.

(2) Davis *v.* Middleton, 8 W. R. 282 (1867).

(3) Rustomji *v.* Banoobai, 14 B. 584 (1889).

(4) Ib.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) *Where* any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

Exemption from appearance.—Act VIII. of 1859, sects. 22, 23. The exemption is absolute, and not limited to cases in which the party claiming it has been summoned by the opposite party. A Rajah instituted a suit under Act X. of 1859 through an agent appointed in that behalf. The Deputy-Collector, not being satisfied with the information which the agent could give, adjourned the hearing to a subsequent day, and required the personal appearance of the Rajah. The Rajah claimed to be exempted; but the Deputy-Collector refused the application, and dismissed the case. It was held that the Rajah was not bound to attend, and the suit was wrongly dismissed.(1)

Arrest other than in execution of decree.

134. *The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.*

[s. 642.]

Exemption **from arrest under civil process.**

135. (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process *other than process issued by such tribunal for contempt of Court* while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) *Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.*

(1) Juggut Inder v. Soorjcoomar Chowdhree, Marsh. 627 (1864).

Exemption from arrest.—The privilege is not that of the person mentioned and for his personal benefit, but of the Court, and is conferred for the purpose of ensuring the due administration of justice.(1) A case not governed by this section must be determined upon the principles of English law, on which this section rests.(2) The validity of a commitment by a Court of inferior jurisdiction can be inquired into, and if it be found that a person was, when committed by such Court, entitled to privilege from arrest he will be released.(3) Where plaintiff, a resident of Bengal, went to Madras on the 24th October to attend a case which, however, was adjourned for seven weeks on the 27th October, and while waiting in Madras for the suit to come on was arrested on the 10th November, he was directed to be released.(4) In a suit under Chapter XXXIX. of the last Code (see now Order XXXVII.), when the defendant is not allowed to defend without leave, a defendant appearing in Court for that purpose is privileged.(5) If there is no *bona fides* on the part of that person that his attendance is required he has no privilege.(6) The privilege being that of the Court, he cannot, when arrested for contempt, claim privilege.(7) The privilege attaches only when going to, or attending, or returning from a tribunal. Therefore, where an insolvent who was wrongly imprisoned was arrested on his release from jail, it was held that he could not claim privilege.(8)

"*Tribunal*" is a comprehensive term intended to cover Criminal as well as Revenue and Civil Courts; (9) Insolvency Courts; (10) and arbitrators.(11) The words of the section are now as under the last Code not "*from arrest under the Code*," but from arrest "*under civil process*." (12)

Procedure where person to be arrested or property to be attached is outside district.

136. (*1*) Where *an application is made* that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or *such* property is situate outside the local limits of *the* jurisdiction *of the Court to which the application is made*, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send [s. 648.]

(1) John *v.* Carter, 4 B. L. R., O. C. J. 90, 91 (1870); Wooma Churn *v.* Teil, 14 B. L. R. App. 13 (1875); Samarapuri *v.* Parry, 13 M. 150, 158 (1889); Ardeshirji Framji *v.* Kalyan Das, 32 A. 3 (1909).

(2) *In re* Soorendra Nath, 5 C. 106, 108 (1879).

(3) *In re* Omrito Lall Dey, 1 C. 78 (1875). *In re* Juggessur Roy, 5 C. L. R. 170 (1879).

(4) *In re* Siva Bux, 4 M. 317 (1881).

(5) *In re* Soorendra Nath, 5 C. 106 (1879).

(6) Wooma Churn *v.* Teil, 14 B. L. R. App. 13 (1875).

(7) John *v.* Carter, 4 B. L. R., O. C. J. 90 (1870).

(8) Samarapuri *v.* Parry, 13 M. 150 (1889).

(9) R. *v.* Harakh Nath, 4 A. 27, 29 (1881). *In re* Oboy Churn Mookerjee, 2 Tayl. & Bell, 234 (1851), a person was held privileged who was arrested immediately after his acquittal on a charge of misdemeanour.

(10) Samarapuri *v.* Parry, 13 M. 150, 158 (1889).

(11) *In re* Juggessur Roy, 5 C. L. R. 170 (1879).

(12) See R. *v.* Harakh Nath, 4 A. 27 (1881). The section was modified by s. 7, Act VI. of 1888.

to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or *at* Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

Under any provision of this Code.—It was held that this section did not authorize the Court to attach any property which it was not authorized to attach by other sections of the Code.(1) It has, however, been held by the Calcutta High Court that under this section of the last Code, read with sect. 483 of the same Code, the Court could attach property outside the jurisdiction; in other words, that this section was intended to extend the operation of attachments before judgments to property beyond the jurisdiction.(2)

Resides.—The intent of this special provision must be regarded. Bare residence is sufficient under this section. So where an officer, whose regiment was in Burmah, proceeding on leave to England, resided a few days at Madras, it was held that he was liable to arrest under this section.(3)

(1) Krishnasami *v.* Engels, 8 M. 20 (1884); Raja Goculdas *v.* Jankibai, 5 Bom. L. R. 570 (1903).

(2) Ram Pertab *v.* Madho Rai, 7 C. W. N. 216 (1902); and see observations of Russell, J., in Raja Goculdas *v.* Jankibai, 5 Bom. L. R. at p. 574 (1903).

(3) Everet *v.* Frere, 8 M. 205 (1885).

137. (*1*) The language which, *on the commencement of* this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Local Government otherwise *directs*. [s. 645.]

Language of subordinate Courts.

(*2*) The Local Government *may* declare what shall be the language of *any* such Court *and in what character applications to and proceedings in such Court shall be written.*

(*3*) *Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.*

138. (1) The Local Government may, by notification in the *local* official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language *and in manner prescribed.* [s. 185A.]

Power for Local Government to require evidence to be recorded in English.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (*1*), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

Evidence in English.—The section corresponding with this rule in the last Code, was inserted by Act VII. of 1888, sect. 17. As to Oudh, see Act XVIII. of 1876, sect. 19. Clause (3) is now O. XVIII. r. 7. Clause (4) of the corresponding section in the last Code has not been re-enacted.

139. In the case of any affidavit under this Code— [s. 197.]

Oath on affidavit by whom to be administered.

(*a*) any Court or Magistrate, or

(*b*) any officer *or other person* whom a High Court may appoint in this behalf, or

(*c*) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath to *the deponent.*

140. (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either [s. 645A.]

Assessors in causes of salvage, etc.

party to such cause, summon to its assistance, in such manner as *it* may direct *or as may be prescribed*, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, *to* be paid by such of the parties as the Court may direct *or as may be prescribed.*

[s. 647.] **141.** The procedure *provided in this Code in regard to suits* shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Miscellaneous proceedings.

Procedure for miscellaneous proceedings.—The object of this section, which corresponds with sect. 38, Act XXIII. of 1861, is to make applicable to proceedings other than suits and appeals, the procedure, so far as it is applicable, which is adopted in suits and appeals. An appeal, however, is a substantive right and not a mere matter of procedure. This section, therefore, does not confer any right of appeal where it does not exist under the Code or any other law.(1) The right of appeal must be given by statute conferring that right.(2) If, however, a right of appeal is given by law, then the procedure in such appeal will be that laid down by the Code.(3)

Proceedings other than suits.—The procedure applicable during the hearing of the suit until decree is provided for by the Code; as also that applicable in execution of or appeal from the decree. This section in the last Code did not on its true construction apply to execution of the decree, and was inapplicable to petitions for execution, before, and independently of, the passing of sect. 4, Act VI. of 1892, which amended it, by expressly declaring that it was not applicable to such cases.(4) Prior, however, to the Amending Act it had been held, in a number of cases, that all execution proceedings should, for the purposes of this section, be treated as miscellaneous proceedings.(5)

(1) Hurcenath Koondoo *v.* Modhoo Soodun, 19 W. R. 122 (1873); Ningappa *v.* Gangawa, 10 B. 433 (1885) [foll., Jung Bahadur *v.* Mahadeo Prosad, 31 C. 207, 209 (1903)]; *contra* (apparently), Paresh Nath *v.* Secretary of State, 16 C. 31 (1888), *sed qu.*; neither does it empower any Court to invoke the jurisdiction of another Court: Damodara *v.* Kittappa, 36 M. 16 (1911).

(2) Minakshi *v.* Subramanya, 11 M. 26 (1887); s. c., 14 I. A. 160.

(3) See Tara Chand *v.* Anund Chunder, 10 W. R. 450 (1868).

(4) Thakur Prasad *v.* Fakirullah, 17 A. 106 (1894); s. c., 22 I. A. 44.

(5) *In re* Harshankar Prasad, I. A. 178 (1876) [stay of execution]; Gaya Parshad *v.* Bhup Singh, 1 A. 180 (1876) [District Court transferring to itself execution proceedings in Subordinate Court]; Rajpal *v.* Chooramun, 4 A. H. C. 10 (1872) [applicability of s. 110 of Code of 1859]; Seetul Pershad *v.* Mahomed Kureem, 5 A. H. C. 164 (1873) [and of s. 119 of same Code]; Syud Deshan *v.* Musst Khodija, 8 W. R. 64 (1867) [and of s. 170 of same Code]; Balaji Ranchoddas *v.* Mohanlal Dalsakhram, 5 B. 680 (1881) [and of s. 25 of Code of 1877]; Sithalakshmi *v.* Vythilinga, 8 M. 548 (1884) [transfer of claim registered under s. 331]; Lakhmi Chand *v.* Gatto Bai, 7 A. 542 (1885) [applicability of ss. 98 and 99 to a case where a petition asking for security for costs was struck off]; Ningappa *v.* Gangawa, 10 B. 433 (1886) [applicability of ss.

All such cases, in so far as they proceed upon the ground that this section of the last Code was applicable to execution proceedings, must be considered both as overruled by the Privy Council and superseded by the Amendment of 1892 introducing the Explanation. Under the Code, as it stood after the introduction of the Explanation to s. 407 of the last Code, this section does not apply to execution proceedings.(1) The Amending Act, VI. of 1892, by making this section inapplicable in proceedings for the execution of decrees, deprived the Civil Courts of the power to apply by analogy to proceedings for the execution of decrees, the procedure specifically prescribed for proceedings in suits at a stage prior to decree, and limited the procedure which could be applied under the Code in proceedings for execution to the procedure which is expressly, as in Chapter XIX. of the last Code, or by implication, prescribed for proceedings for execution, or at the execution stage of a suit.(2) The explanation has now been omitted, but presumably the law remains the same.(3) It has recently been held by the Calcutta High Court that the explanation was only omitted because it had been rendered superfluous by the decision of the Privy Council in Thakur Prasad *v.* Fakir-ullah.(4)

Chapter XIX. of the last Code did not, however, contain a complete procedure for proceedings in execution,(5) and where this was the case the matter might have been disposed of under the inherent power of the Court.(6) Thus it was held that a Court had inherent power, if not conferred by statute, to dismiss an application for execution when the applicant fails through his own laches to put the Court in a position to proceed with his application; as also to proceed forthwith to decide an application for execution of a decree on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application, and that

102 and 103 to proceeding taken under s. 311]; Kefayat Ali *v.* Ram Singh, 7 A. 359 (1885) [s. 374 held applicable to application for execution; but see now s. 375A]; Fakaruddin *v.* Official Trustee, 10 C. 538 (1884) [s. 623 held applicable to a decision under s. 244]; Gaur Mohan *v.* Tarachand, 3 B. L. R. App. 17 (1869); Rajpal *v.* Chooramun, 4 A. H. C. R. 10 (1872) [applicability of s. 110 of the Code of 1859 (98 of present Code) to execution proceedings]; Bissessur Bhugut *v.* Murli Sahu, 9 C. 163 (1882) [applicability of s. 97, *ante*]; Sheo Prasad *v.* Kastura Kuar, 10 A. 119 (1887) [applicability of s. 103, *ante*]; Kalee Kristo *v.* Mahomed Kader, 12 W. R. 428 (1869) [s. 119 of Code of 1859; order for rehearing]; Sarju Prasad *v.* Sita Ram, 10 A. 71 (1887) [s. 647 makes ss. 373, 374 applicable to proceedings in execution of a decree].

(1) Thakur Prasad *v.* Fakirullah, 17 A. 106 (1894); s. c., 22 I. A. 44; Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893); Bunko Behary *v.* Nil Madhub, 18 C. 635 (1891); Hajrat Akramnissa *v.* Valiulnissa, 18 B. 429 (1893); Rura Mal *v.* Kuria, 1894, P. R. No. 62. The case of Tukaram *v.* Khandu, 20 B. 541 (1895), is not against this view as the decision proceeds upon the ground of the Courts' inherent power in a matter of this kind. A similar view of the section was taken in an early case: *In re* Jodoo Monee Dossee, 11 W. R. 494 (1869).

(2) Dhonkal Singh *v.* Phakkar Singh, 15 A. 84, at p. 93 (1893), *per* Sir John Edge, C.J.

(3) See Asim *v.* Raj Mohan, 13 C. L. J. 532 (1910), the procedure laid down for suits is not applicable in its entirety to execution-proceedings.

(4) Hari Charan Ghose *v.* Manmatha Nath Sen, 41 C. 1 (1913).

(5) Dhonka Singh *v.* Phakkar Singh, 15 A. 84 (1893), at p. 94.

(6) Ib., at p. 95.

act has not been done.(1) So again, if a Judge makes an *ex parte* order in execution proceedings, except in cases in which he is expressly empowered to make such an order, the party who has not been heard has a right to apply to the Judge to set it aside, and if the Judge finds that such order was wrong, he is at liberty, after hearing both parties, to recall the same.(2) Applications for execution are, of course, proceedings in the suits in which the decrees were made.(3)

The miscellaneous provisions to which this section was intended to apply are, it has been said, "matters, such as application for probate,(4) certificates of guardianship,(5) or to collect debts, which, especially when contested, partake of the nature of suits and to which the procedure laid down in the Code is clearly more or less applicable." (6) It has also been held applicable to proceedings under the Divorce Act; (7) to matters of procedure in the revenue Courts not specially provided for; (8) to proceedings before the Judge under the Registration Act; (9) a preliminary inquiry into the conduct of a Civil Court Ameen; (10) applications to the High Court for the exercise of its extraordinary jurisdiction under Reg. II. of 1827; (11) proceedings under sect. 158 of the Bengal Tenancy Act; (12) matters relating to companies; (13) applications under sect. 18 of the Religious Endowments Act,(14) and other similar matters other than suits and appeals. It has also been held that the provisions of sect. 100 of the last Code were applicable to proceedings for the restoration to the file of a case dismissed for default.(15) It does not, however, appear why these proceedings which were in a suit were treated as miscellaneous.

[s. 94.] **142.** All orders and notices served on or given to any person *under the provisions of* this Code shall be in writing.

Orders and notices *to be* in writing.

(1) Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893), at p. 95.

(2) Sheo Prosunno *v.* Buldharee Lall, 13 W. R. 232 (1870).

(3) Shyama Charan *v.* Debendra Nath, 27 C. 484, 487 (1900).

(4) Thakur Prasad *v.* Fakirullah, 17 A 106, 111 (1894); *In re* Dintarini Debi, 8 C. 880, 882 (1882); In the matter of the will of Dawubai, 18 B. 237 (1893); Amir Hasan *v.* Ahmad Ali, 9 A. 36, 41 (1886).

(5) Thakur Prasad *v.* Fakirullah, 17 A. 106, 111 (1894); Amir Hasan *v.* Ahmad Ali, 9 A. 36, 41 (1886); Bai Jamna Bai, 36 B. 20 (1911).

(6) Bunko Behary *v.* Nil Madhub, 18 C. 635, 638 (1891).

(7) Amir Hasan *v.* Ahmad Ali, 9 A. 36, 41 (1886). See King *v.* King, 6 B. 416 (1882) [ref., Stephen *v.* Stephen, 17 C. 570 1890)].

(8) Amir Hasan *v.* Ahmad Ali, 9 A. 36, 41 (1886); Madho Prakash *v.* Murli Manohar 5 A. 406 (1883); dist., Fahim-un nissa *v.* Ajadhia Prasad, 6 A. 170 (1884).

(9) Reasut Hossein *v.* Hadjee Abdoollah, 2 C. 131 (1877); s. c., 3 I. A. 221.

(10) *In re* Collector of Tirhoot, 14 W. R. 390 (1870).

(11) *In re* Nagappa, 5 B. H. C. R. 215 (1868).

(12) Dijendra Nath *v.* Soylindra Nath, 24 C. 197, 206 (1896); s. c., 1 C. W. N. 236.

(13) *In re* West Hopetown Tea Company, 9 A. 180 (1886); Bombay Burmah Trading Corporation *v.* Dorabji Cursetji, 27 B. 415 (1903).

(14) Amdoo Miyan *v.* Muhammad Davud, 24 M. 685, 689 (1901).

(15) Lallubhai Vajeram *v.* Bai Magangavri, 18 B. 59 (1893).

143. Postage, where chargeable on *a* notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is *made:* [s. 95.]

Postage.

Provided that the Local Government, with the previous sanction of the Governor-General in Council, may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

144. (*1*) *Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.* [s. 583.]

Application for restitution.

(*2*) *No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section* (*1*).

Restitution on reversal or variance of decree.—It is the legal effect of a decree that it is to be executed. It is no less the effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. On the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost, and it is not merely in the power of the Courts but it is a duty cast upon them to enforce that obligation. It is not a mere matter of discretion with the Court which reverses a decree whether the party against whom it was given is or is not to be restored to what he has been deprived of under it.(1)

The Code of 1859 did not expressly provide for restitution.(2) The Privy Council, however, held that the Courts had an inherent power in this respect, and that property taken under an erroneous decree was on its reversal recoverable

(1) Hukum Chand v. Kamalanand, 33 C. 927, 934, 942 (1905); Hurro Chunder v. Shooroodhonee, 9 W. R. 402 (1868); s. c., B. L. R., F. B. Rul. 985; Dorasami v. Annasami, 23 M. 306 (1899). See also Shib Narain v. Kishore Narain, 10 W. R. 131, 132 (1868); Ununt Ram v. Kuralee Pershad, 23 W. R. 441 (1875); Lati Kooer v. Sobadra Kooer, 3 C. 720, 723 (1878); Raja Singh v. Kooldip Singh, 21 C. 989, 992 (1894); Coffin v. Karbari Rawat, 22 C. 501 (1895); Radhey Singh v. Mangni Ram, 6 C. W. N. 710, 712 (1902); Parbhu Dayal v. Ali Ahmad, 32 A. 79 (1909); Sasirama v. Moherban, 13 C. L. J. 243 (1911).

(2) Radhey Singh v. Mangni Ram, 6 C. W N. 710, 711 (1902).

either by summary process of execution of the appellate decree of reversal or by a new suit.(1)

The Court has, independently of the statutory power conferred on it, an inherent (2) power in this respect. It is both its right and duty to prevent its proceedings being made the cause of injustice and therefore to order the restitution of the thing improperly taken, and generally to restore the party to the position he would have occupied but for its erroneous order since reversed. The Codes, subsequent to that of 1859, provided for restitution, and the cases under them extended the operation of the words of the Statute as defined in the present amended section. The first clause of the section has been re-cast, so as to bring it into closer conformity with the existing practice, and the second clause has been added.

It is immaterial whether the erroneous action of the Court was due to carrying into effect a wrong decree or whether it was due to execution proceedings wrongly conceived for the purpose of carrying out a right decree. In either case the Court, upon the error being ascertained, is bound, so far as it can, to place the aggrieved party back in his original position, and to take means not merely to restore to him the property of which he had been wrongly deprived, but also to give him compensation for such loss as he had thereby sustained. It is competent to the Court in the course of the execution proceedings to afford the aggrieved party this remedy in full.(3) Where a claimant under the former section elected to put forward his claim to mesne profits in execution proceedings, and the claim was dismissed and he acquiesced in the dismissal and did not appeal, the order of dismissal was held a bar to further proceedings in respect of the same claim, so long as it remained unreversed.(4)

The High Court of Calcutta has power under clause 15 of the Charter to order the Court of first instance to enforce restitution of the amount realized from the defendant in excess of the amount allowed by the Court of Appeal, and also to execute that part of the decree which awarded costs to the defendant.(5)

The High Court made an order dismissing an application for leave to appeal to the Privy Council with costs:—Held, that though there was no section in the Code directly applicable to the case, yet by analogy to this

(1) Cases cited *post*.

(2) Rodger *v.* Comptoir d'Escompte, 7 Moo. P. C. N. S. 314 (1871); Shama Pershad *v.* Hurro Pershad, 10 M. I. A. 203, 211, 212 (1865); Mookoond Lal *v.* Mahomed Jaun, 14 C. 484, 486 (1887); Vasudev *v.* Narayan, 24 M. 341, 344 (1900); Balvantrao *v.* Sadruddin, 13 B. 485, 488 (1887); *in re* Raj Kissen, B. L. R., F. B. Rul. 605, 607 (1866); Rohini Singh *v.* Hadding, 21 C. 340, 343 (1893); Sham Sundar *v.* Kaisar, 29 A. 143 (1906); Dinesh *v.* Sankar, 2 C. L. J. 537 (1904); Raja Singh *v.* Kooldip, 21 C. 989, 994 (1894); Coffin *v.* Karbari Rawat, 22 C. 501, 504 (1895); Kedar *v.* Doya Moyee, 20 W. R. 49 (1873); Hamida *v.* Bhudan, 20 W. R. 238 (1873); Hurro Chunder *v.* Shooroodhonee, 9 W. R. 402 (1868); Dorasami *v.* Annasami, 23 M. 306 (1899); Lati Kooer *v.* Sobadra, 2 C. L. R. 75 (1878); Venkatesh *v.* Govindrao, 21 B. 55 (1895); Hukum Chand *v.* Kamalanand, 33 C. 927, 941, 942 (1905); Dinesh Prasad *v.* Sankar Chaudhury, 2 C. L. J. 537 (1904); Shiam Sundar Lal *v.* Kaisar Zamani Begam, 29 A. 143 (1906); Beni Madho *v.* Pran Singh, 15 C. L. J. 187 (1911).

(3) Duljeet Gosain *v.* Rewat Gosain, 22 W. R. 435 (1874); Ayya Vayyar *v.* Shastram Ayyar, 9 M. 506 (1886).

(4) Srinath *v.* Ram Rattan, 24 A. 361, 363 (1902).

(5) *Re* petition of Govind Koomar, B. L. R., F. B. Rul. 714 (1867).

section the proper Court to execute the order as to costs was the lower Court.(1)

The section was held applicable by analogy to proceedings before Courts of Revenue.(2) It has been held that the principle of this section cannot be extended to the case of a decree which has been set aside under sect. 108 of the last Code (now represented by O. IX. r. 13), for such a decree cannot be revived by any subsequent proceeding.(3)

"**Decree.**"—The former section provided for restitution to which a party was entitled *under a decree passed in appeal under Chapter XLI.* of the last Code. It was held therefore not to apply where the benefit claimed was not granted in an appeal, but in a review setting aside the decree of the Appellate Court itself.(4) But in such a case the Court might, in the exercise of its inherent power, or treating the application as one for execution of the decree passed on review, order restitution.(5) Nor on the same grounds did the section apply where the decree under which the benefit was sought was an order of the Privy Council,(6) though the principle embodied in it did.(7) The qualifying words "*passed in an appeal under this Chapter*" have been now omitted. But it has been held that this section only applies to a case where a party is entitled to a benefit by way of restitution or otherwise under a decree passed in an appeal.(8) The decree to be executed is the final decree whether that decree reverses, modifies, or affirms the decree of the lower Court.(9)

"**Varied or reversed.**"—As to the legal effect of such variance or reversal, see first paragraph.

Money recovered under a decree or judgment cannot be recovered back whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded the money recovered under it ought certainly to be refunded. The true question in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or suspended.(10) The supersession to which their Lordships of the Privy Council were referring in this case must be a superseding by a decree of a Court which had competent jurisdiction to reverse the decree under which the money had been paid, if it had been

(1) Jogendra Chunder Sen *v.* Wazidunnissa Khatun, 34 C. 860 (1907); 11 C. W. N. 856.

(2) Masih-ullah Khan *v.* Majid-un-nissa, 26 A. 119 (1903).

(3) Raghu N[illegible]dan *v.* Jagdis, 14 C. W. N. 182 (1909).

(4) Collector of M[illegible]rut *v.* Kalka Prasad, 28 A. 665, 667 (1906).

(5) Ib.

(6) Sadiq Husain *v.* Lalta Prosad, 20 A. 139, 142 (1897).

(7) Bibee Hamida *v.* Bibee Bhudhun, 20 W. R. 238 (1873); but see Gopal *v.* Ooday, 12 W. R. 411, 412 (1869); as to execution of Privy Council decrees, see O. XLIV. r. 15.

(8) Girdhari Lal *v.* Khushali Ram, 31 A. 364 (1909); Prag Narain *v.* Kamakhia Singh, 31 A. 551 (P. C.) (1909).

(9) Kristo *v.* Barrada Caunt, 14 M. I. A. 465, 489, 490 (1872); Mahommad Sulaiman *v.* Muhammad Yar Khan, 11 A. 267, 273 (1888); Nanchand *v.* Vethu, 19 B. 258 (1894); Abdul Rahiman *v.* Saiba, 22 B. 500, 506 (1896); Mánari Kriman *v.* Unmappan, 15 M. 170, 171 (1891); Naurang Rai *v.* Latif, 13 A. 394 (1891); Mulchand *v.* Ram Ratan, 20 A. 493 (1898).

(10) Shama Pershad *v.* Hurro Pershad, 10 M. I. A. 203, 211, 212; s. c., 3 W. R. P. C. 11.

brought before it. Thus, if there had been no order made at all for commutation of rent in kind into a fixed money rent, but a Court of Revenue had erroneously made a decree for money rent, and that decree had been executed and was not reversed in appeal or superseded by a Court competent to reverse it (though set aside by the Board of Revenue, but as the appeal lay to the Judge and not to the Board of Revenue, the Board of Revenue was not a competent Court), a tenant, whose goods had been sold in execution of such decree for rent, or who had satisfied that decree by payment, could not, it was held, recover so long as the decree for rent was not reversed or superseded by a Court competent in that respect.(1) When a main decree, which is the basis of subsequent decrees, is reversed, these latter, being subordinate and dependent decrees, are superseded, although they remain unreversed.(2) As to the effect of reversal on third party purchasers, *vide post*.

"**The Court of first instance.**"—Where an order of a District Judge was set aside or modified by the High Court on appeal, application under the former section should, it was held, be made to him and not to the Subordinate Judge (Court of first instance), whose order was modified by the District Judge.(3) The jurisdiction of such a Court continues in all matters in execution, and is not ousted by the circumstance that the value of the question in execution exceeds the limits of suits within the Court's original cognizance.(4) The ground of the former decision, however, was that under the last Code application had to be made to the Court which passed the decree against which the appeal was preferred. But now apparently in all cases application must be made to the first Court.

"**Shall.**"—There is no discretion. See notes in first paragraph and cases there cited. Under the terms of the last Code upon an application for restitution, the Court which passed the decree had to proceed to execute the appellate decree "*according to the rules heretofore prescribed for the execution of decrees in suits.*" It was held that such applications were proceedings in execution of the decree, and as regards limitation were governed by Art. 179 of the Limitation Act.(5) Though the Calcutta High Court took the view that the Code made no provision for transfer of execution proceedings from one Court to another,(6) the other High Courts did not follow it.(7) Though the words italicized do not occur, presumably their substance is still in force.

(1) Kishen Sahai *v.* Bukhtawar Singh, 20 A. 237, 241 (1898).

(2) Jogesh *v.* Kali Churn, 3 C. 30, 39, F. B. (1877). In this case Garth, C.J., and Jackson, J., held that the subsequent decrees were not superseded, and the money paid under those decrees could not be recovered so long as they remained unreversed, and that the case in 10 M. I. A. 203 was not applicable. See also Mohamed Elahee *v.* Kally Mohun, 5 C. 589 (1879); Raja Singh *v.* Kooldip, 21 C. 989 (1894); Narayan *v.* Narayan, 13 M. 137 (1889); Vasudeo *v.* Narayan, 24 M. 311 (1900); Ram Nath *v.* Basanta Naram, 18 C. L. J. 20.) (1913); Abdul Jahl *v.* Amar Chand, 18 C. L. J. 223 (1913).

(3) Khem Narain *v.* Ganesho Kuar, 5 C. W. N. 287, 289 (1899).

(4) Balvantrao *v.* Sadruddin, 13 B. 485, 488 (1887).

(5) Venkayya *v.* Ragavacharlu, 20 M. 448 (1897); Nand Ram *v.* Sita Ram, 8 A. 545 (1886); Harish *v.* Chandra, 28 C. 113, 115 (1900).

(6) Kishori Mohun Sett *v.* Gul Mahomed, 15 C. 177 (1887); for earlier cases, see Nil Comol *v.* Nobin, 9 W. R. 463 (1868); Palakdhari *v.* Rahda Pershad, 8 I. A. 165, 171 (1881); Biroja *v.* Uma Moyee, 7 W. R. 124, 125 (1867).

(7) Nassarvanji *v.* Kharsedji, 22 B. 778, 782 (1897), and cases there cited.

"**Any party.**"—The Allahabad High Court held that the former section applied only to parties to the proceedings in the suit, and in the appeal, and not to assignees of interests of the parties to the suit when these assignees had not been made parties to the suit or the appeal,(1) and that the assignee could not be compelled by separate suits to repay the money he had received.(2) It has, however, been recently ruled that the section must be read with sect. 244 (now 47) of the former Code, and therefore the assignee of the decree of the Appellate Court which reversed the decree appealed against, being the representative of the party in whose favour the appellate decree is passed, is entitled to apply for restitution.(3)

"**Entitled.**"—The procedure laid down is not confined to cases in which the restitution desired is provided for in the decree itself.(4) This was held, notwithstanding the words "*under a decree*" which have been now omitted.

It has, however, been held that no one is entitled (5) to restitution if there is no decree in his favour. Thus when a certain sum claimed as rent was paid into Court by the defendant and made over to the plaintiff after he got a decree from the lower Appellate Court, but the lower Appellate Court's judgment was set aside on second appeal by the second defendant, it was held that the first defendant was not entitled to restitution.(6) But a person entitled to restitution cannot, after getting back his property, retain any amount of money, which formed a portion of the sale proceeds of the property which had been restored, and which had been withdrawn by him before the setting aside of the erroneous decree under which the property was sold. The auction-purchaser may bring a suit for the recovery of the money retained by the party to whom the property has been restored.(7)

"**Cause such restitution to be made as will.**"—"*So far as may be place the parties in the position which they would have occupied* (8) *but for such decree or such part thereof as has been varied or reversed:*" these words as also the following:—"*and for this purpose may make any orders* (9) *including orders*

(1) Sadiq Husain *v.* Lalta Prasad, 20 A. 139, 142 (1897), followed in Frizoni *v.* Ram Narain Singh, 5 C. W. N. 426 (1901), in which execution was sought against a person not a party to the decree in appeal and who had not derived any interest subsequent to such decree.

(2) Lalta Prasad *v.* Sadiq Husain, 24 A. 288 (1902).

(3) Jamini Nath Ray *v* Dharma Das Sur, 33 C. 857 (1906).

(4) Balvantrao *v.* Sadruddin, 13 A. 485, 488 (1887); Raja Singh *v.* Kooldip Singh, 21 C. 989, 996, 997 (1894); Kassim *v.* Luis, 17 M. 82, 84 (1893); Rohini Singh *v.* Hadding, 21 C. 340, 343 (1893); Kassim Saib *v.* Luis, 17 M. 82, 84 (1893).

(5) See Nand Ram *v.* Silaram, 8 A. 542, 548 (1886).

(6) Kassim *v.* Luis, 17 M. 82 (1893).

(7) Hira Lal *v.* Gour Moni, 13 C. 326, 330 (1886).

(8) See Shiam Sundar *v.* Kaisar, 29 A. 143 (1906); Dinesh *v.* Sankar, 2 C. L. J. 537 (1904); Radhey Singh *v.* Mangni Ram, 6 C. W. N. 710, 712 (1902); Bibee Hamida *v.* Bibee Bhudhun, 20 W. R. 238 (1873).

(9) See Radhey Singh *v.* Mangni Ram, 6 C. W. N. 710 (1902) [adjustment of account allowed though decree did not expressly direct it]; Vasudev *v.* Vishnu, 11 B. 724, 726 (1887) [refund of payment whether certified to Court or not]; Wooma Soondaree *v.* Gooroo Pershad, 15 W. R. 74 (1871) [refund of excess payment]; Masih-ulla *v.* Majid-un-nissa, 26 A. 149, 151 (1903) [refund on reversal of decree of Court of Revenue].

for the refund of costs (1) *and for the payment of interest,*(2) *damages, compensation,*(3) *and mesne-profits,*(4) *which are properly consequential on such variation or reversal,*" summarize the effect of the preceding case law which is noted below. The Court, however, is not restricted to the specific orders mentioned, but may make *any* which are properly consequential on variation or reversal, that is, such orders as are necessary to place the party in the position which he would have occupied but for the decree or such part thereof as has been varied or reversed.

This power is subject to the following limitations. When a decree is reversed on appeal the person entitled to restitution is entitled to the restoration of his property (if the judgment-creditor himself was the purchaser), and not merely to the proceeds of the sale thereof.(5) For when a decree-holder purchases under his own decree, and that decree is afterwards reversed on appeal, he is not entitled to the benefits of the execution proceeding and the sale thereunder.(6) But in order not to lessen the inducement to purchase at execution sales the rule is that a sale in execution at which a third party becomes the purchaser is upheld notwithstanding the subsequent reversal of the decree.(7) A third party, however, is not protected merely because he is a stranger when grounds for setting aside a sale under sects. 244 or 311 of the last Code (now

(1) Kedarnath *v.* Daya Moyee, 20 W. R. 49 (1893) [if decree under which costs are recovered is reversed, no express order is needed for refund of costs].

(2) Rodger *v.* Comptoir d'Escompte, 7 Moo. P. C. N. S. 314, 329, 330 (1871); Hamida *v.* Bhudhun, 20 W. R. 238 (1873); Hardat *v.* Izzat-un-nissa, 21 A. 1, 3 (1898); Jay Kurun *v.* Asmudh Kooer, 5 W. R. 125 (1866) [interest on mesne profits]; Bhagwan Singh *v.* Ummat-ul-Husnain, 18 A. 262, 264 (1896); Arunachellam *v.* Arunachellam, 15 M. 203, 212, 213 (1891); Watkins *v.* Shahzada, 1 C. W. N. CXCVII. (1897); Wooma Soondaree *v.* Gooroo Pershad, 15 W. R. 74 (1871) [interest on refund of excess payment in execution]; Kedarnath *v.* Doya Moyee, 20 W. R. 49 (1873) [interest on costs]; Ayya Vayyar *v.* Shastram Ayyar, 9 M. 506 (1886); Phul Chand *v.* Shankar, 20 A. 430, 432 (1898) [interest on amount levied in execution]; Collector of Ahmedabad *v.* Lavji, 35 B. 255 (1911).

(3) Duljeet Gosain *v.* Rewat Gosain, 22 W. R. 435 (1874); Ayya Vayyar *v.* Shastram Ayyar, 9 M. 506 (1886).

(4) Radhey Singh *v.* Mangni Ram, 6 C. W. N. 710 (1902); Hamida *v.* Bhudhun, 20 W. R. 238 (1873); Hardat *v.* Izzat-un-nissa, 21 A. 1, 3 (1898); Kaliana Sundram *v.* Egna Vedeswara, 11 M. 261 (1887); Arunachellam *v.* Arunachellam, 15 M. 203 (1891); Mookoond Lal *v.* Mahomed Sami, 14 C. 484, 486 (1887); Raja Singh *v.* Kooldip, 21 C. 989, 993 (1894) [mesne profits given though decree silent]; but see Ram Ghulam *v.* Dwarka, 7 A. 170 (1884); though see Gannu Lal *v.* Ram Sahai, 7 A. 197 (1884); Azizuddin *v.* Ram Anugra, 14 C. 605 (1887); Coffin *v.* Karbari Rawat, 22 C. 501 (1895); Juswant *v.* Dip Singh, 7 A. 432 (1885)]; Shiam Sunder *v.* Kaiser, 29 A. 143 (1906); Joy Kurun *v.* Asmudh Kooer, 5 W. R. 125 (1866) [interest on mesne profits]; Prasunno *v.* Mathoora, 17 W. R. 233 (1872) [where respondent has received *Wasilat* to which he is not entitled he can not as against appellant set up that a third party is entitled to it].

(5) Sadaswayyar *v.* Muttu Sabapathi, 5 M. 106 (1881).

(6) Zain-ul-abdin *v.* Mahomed Asghar, 10 A. 160, 172 (1887); Chandan *v.* Ram Deni, 31 C. 499, 501 (1904); See Umedmal *v.* Sreenath Roy, 27 C. 810 (1900). See also Raghunath *v.* Kaniz Rasul, 24 A. 467, 471 (1902); Nathadu *v.* Nallu, 27 M. 98, 100, 101 (1903); Banki Lal *v.* Jagut Narain, 22 A. 168, 175 (1900).

(7) Rewa Mahton *v.* Ram Kishore, 14 C. 18, 25; s. c., 13 I. A. 106 (1886); Mukhoda *v.* Gopal, 26 C. 734, 737 (1899); Zain-ul-abdin Khan *v.* Muhammad Asghar, 10 A. 166, 172; s. c., 15 I. A. 12 (1887); Dorosami *v.* Annasami, 23 M. 306, 311, 312 (1899).

represented by sect. 47 and O. XXI. r. 90) are established.(1) There is no real distinction between an auction-purchaser at a sale in execution of a money decree and an auction-purchaser at a sale in execution of a mortgage decree in this respect.(2)

When an application for probate of a will is refused by the District Court, but granted by the High Court on the ground that the will was proved, it is the duty of the Lower Court to prepare and issue a probate or copy of the will under the seal of the Court under the section.(3)

"No suit shall be instituted" (clause (2)).—There has never been any question but that restitution can be obtained in execution of the final decree of the Appellate Court.(4) Prior, however, to this Code it was a matter of conflict whether an alternative remedy lay also by way of a separate suit. In some cases this was considered to be so,(5) in others it was held that such a suit was prohibited (6) by sect. 244 of the last Code. The second clause now expressly prohibits a suit.

Security for restitution.—When the Appellate Court has seizin of the appeal, it has an inherent power over the subject of litigation, the nature of which is indicated and implied by this section, and can in the exercise of that power, and notwithstanding that the decree has been executed, call upon the respondent to furnish security for the due performance of any decree which may be made.(7) Where any person had become surety for the restitution of any property taken in execution of a decree it was held by the Bombay,(8) Madras,(9) and Allahabad (10) High Courts that the security bond could be enforced in execution of that decree. The Calcutta High Court,(11) however, held that a separate suit was necessary. The former view has now been adopted in sect. 145, as that amended section (which replaces sect. 253 of the last Code) now makes special provision in clause (*b*) for the case.

145. *Where any* person has become liable as surety— [s. 253.]

Enforcement of liability of **surety.**

(*a*) for the performance of *any decree* or any part thereof, *or*

(1) Levina Ashton *v.* Madhabmoni, 14 C. W. N. 560, 568 (1910).

(2) Mukhoda *v.* Gopal, 26 C. 734, 735, 736 (1899).

(3) Bayabai *v.* Sarasvatibai, 17 B. 686 (1892).

(4) Radhey Singh *v.* Mangni Ram, 6 C. W. N. 710, 712 (1902), Saran *v.* Bhagwan, 25 A. 441 (1903); Dhan Kunwar *v.* Mahtab Singh, 22 A. 79 (1899); Jamini Nath Roy *v.* Dharma Das Sur, 33 C. 857 (1906); Kaliana Sundram *v.* Egna Vedeswara, 11 M. 261 (1887); Arunachellam *v.* Arunachellam, 15 M. 203 (1891).

(5) Vasudev *v.* Narayana, 24 M. 341, 345; Shama Pershad *v.* Hurro Pershad, 10 M. I. A. 203, 211 (1865). See Coffin *v.* Karbari Rawat, 22 C. 501 (1895).

(6) Sheodihal Sahu *v.* Bhawani, 29 A. 348 (1907); Masih-ullah Khan *v.* Majid-un-nissa, 26 A. 149 (1903) [in this case a suit was held allowable, as sect. 244 did not apply to proceedings before Revenue Courts]; Prag Narain *v.* Kamakhia, 36 I. A. 197 (1909); 14 C. W. N. 55.

(7) Hukum Chand *v.* Kamalanand, 33 C. 927, 934, 942 (1905).

(8) Venkapa *v.* Baslingapa, 12 B. 411, 415 (1887); Kusaji *v.* Vinayak, 23 B. 478, 482, 483 (1898); Jamsedji *v.* Bawabhai, 25 B. 409, 413, 414 (1900).

(9) Thirumalai *v.* Ramayyar, 13 M. I, 5 (1889); Arunachellam *v.* Arunachellam, 15 M. 203, 211, 212 (1891).

(10) Janki Kuar *v.* Sarup Rani, 17 A. 99, 102 (1895).

(11) Surjoo *v.* Balmukund, 23 C. 212, 216 (1895).

(*b*) *for the restitution of any property taken in execution of a decree*, or

(*c*) *for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon*,

the decree *or order* may be executed against him, to the extent to which he has rendered himself *personally* liable, in the manner *herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47 :*

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.

Execution against surety.—This section corresponds with sect. 204 of Act VIII. of 1859, save that the portions in italics were added by the present Code and the last clause added by sect. 253 of Act X. of 1877. By the latter Act the section was limited to sureties who had become liable "before the passing of a decree in an original suit." That limitation has been removed by the present Code.

The section applies to sureties in respect of applications for arrest and attachment before judgment under sects. 479 [O. XXXVIII. r. 2] and 484 [O. XXXVIII. r. 6].(1) It does not prevent a surety being sued on his bond, but gives an additional remedy against him.(2) A surety objecting to his liability being enforced under this section on the ground that he became liable after the decree, should object under sect. 278 [O. XXI. r. 58], and not under sect. 311 [O. XXI. r. 90].(3) Under the Codes of 1877 and 1882, by which the operation of this section only affected sureties who had become liable before the passing of a decree in an original suit, it was held that this provision did not apply to persons becoming sureties after decree; (4) such as where, after decree, its terms were varied and provision made for its payment by instalments, and for the payment of a portion of which a surety became liable under sect. 244 of Act VIII. of 1859,(5) but that it did apply to a decree of the P.C. and sureties for the costs of appeal; (6) as also sureties for the performance of any appellate decree that might be passed; (7) and that it only referred to cases where security has been given before the decree (in this particular case an appellate decree),(8) and given during the pendency of a suit or appeal, and not where security was given after the first appeal was decided and before the

(1) Baboo Ram Kissen *v.* Hurkhoo, 7 W. R. 329 (1867).

(2) Abdul Kadir *v.* Hurree Mohun, 6 N. W. P. H. C. 261 (1874).

(3) HubLal *v.* Kanhia Lal, 7 A. 365 (1885).

(4) Ram Kissen *v.* Hurkhoo Singh, 7 W. R. 329 (1867); Lakshman *v.* Gopal, 30 B. 506 (1906); 8 B. L. R. 367; Gujendro *v.* Hemanginee, 13 W. R. 35 (1870); 4 B. L. R. App. 27; Chandan Kar *v.* Tirkha, 3 A. 809 (1881); Behari Lal *v.* Jagnandan, 19 A. 247 (1897); Lakhsman *v.* Gopal Annaji, 30 B. 506 (1906).

(5) Chundee Deen *v.* Hussun Ali, 3 N. W. P. H. C. R. 88 (1871).

(6) Bans Bahadur *v.* Mughla, 2 A. 604 (1880).

(7) Venkapa *v.* Baslingapa, 12 B. 411 (1887); Thirumalai *v.* Ramayyar, 13 M. 1 (1889); Janki *v.* Sarup, 17 A. 99 (1895).

(8) Balaji *v.* Ramasami, 7 M. 284 (1883).

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"No suit shall be instituted" (clause (2)).—There has never been any question but that restitution can be obtained in execution of the final decree of the Appellate Court.(4) Prior, however, to this Code it was a matter of conflict whether an alternative remedy lay also by way of a separate suit. In some cases this was considered to be so,(5) in others it was held that such a suit was prohibited (6) by sect. 244 of the last Code. The second clause now expressly prohibits a suit.

Security for restitution.—When the Appellate Court has seizin of the appeal, it has an inherent power over the subject of litigation, the nature of which is indicated and implied by this section, and can in the exercise of that power, and notwithstanding that the decree has been executed, call upon the respondent to furnish security for the due performance of any decree which may be made.(7) Where any person had become surety for the restitution of any property taken in execution of a decree it was held by the Bombay,(8) Madras,(9) and Allahabad (10) High Courts that the security bond could be enforced in execution of that decree. The Calcutta High Court,(11) however, held that a separate suit was necessary. The former view has now been adopted in sect. 145, as that amended section (which replaces sect. 253 of the last Code) now makes special provision in clause (*b*) for the case.

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(2) Mukhoda *v.* Gopal, 26 C. 734, 735, 736 (1899).

(3) Bayabai *v.* Sarasvatibai, 17 B. 686 (1892).

(4) Radhey Singh *v.* Mangni Ram, 6 C. W. N. 710, 712 (1902), Saran *v.* Bhagwan, 25 A. 441 (1903); Dhan Kunwar *v.* Mahtab Singh, 22 A. 79 (1899); Jamini Nath Roy *v.* Dharma Das Sur, 33 C. 857 (1906); Kaliana Sundram *v.* Egna Vedeswara, 11 M. 261 (1887); Arunachellam *v.* Arunachellam, 15 M. 203 (1891).

(5) Vasudev *v.* Narayana, 24 M. 341, 345; Shama Pershad *v.* Hurro Pershad, 10 M. I. A. 203, 211 (1865). See Coffin *v.* Karbari Rawat, 22 C. 501 (1895).

(6) Sheodihal Sahu *v.* Bhawani, 29 A. 348 (1907); Masih-ullah Khan *v.* Majid-un-nissa, 26 A. 149 (1903) [in this case a suit was held allowable, as sect. 244 did not apply to proceedings before Revenue Courts]; Prag Narain *v.* Kamakhia, 36 I. A. 197 (1909); 14 C. W. N. 55.

(7) Hukum Chand *v.* Kamalanand, 33 C. 927, 934, 942 (1905).

(8) Venkapa *v.* Baslingapa, 12 B. 411, 415 (1887); Kusaji *v.* Vinayak, 23 B. 478, 482, 483 (1898); Jamsedji *v.* Bawabhai, 25 B. 409, 413, 414 (1900).

(9) Thirumalai *v.* Ramayyar, 13 M. I, 5 (1889); Arunachellam *v.* Arunachellam, 15 M. 203, 211, 212 (1891).

(10) Janki Kuar *v.* Sarup Rani, 17 A. 99, 102 (1895).

(11) Surjoo *v.* Balmukund, 23 C. 212, 216 (1895).

Limitation.—Previous applications for execution against the judgment-debtor will not take an application against the surety out of limitation, Art. 179 of Shed. II. of the Limitation Act not being applicable.(1)

Appeal.—An appeal, it has been held, lay from an order enforcing a claim against a surety under the former section.(2)

146. *Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.*

Proceedings by or against representatives.

Representatives.—It ought to have been hardly necessary to enact this section. But it appears to be necessary to meet cases such as that which held that because sect. 108 of the last Code did not expressly refer to a legal representative he could not take the benefit of that section.(3)

147. *In all suits to which any person under disability is a party any consent or agreement as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.*

Consent or agreement by persons under disability.

148. *Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.*

Enlargement of time.

Enlargement of time.—In examining the provisions of the Bill, the attention of the Select Committee was directed to a number of clauses in which power was given to the Court to fix a period or to give or allow time for the performance of any act by a party. On the strength of the facts underlying reported decisions, the clauses were expanded to make it clear, in some cases that the period or time may be extended, and in others that this power of extension may be exercised even though the original period of time has expired. The Committee were of opinion that uniformity in this matter was of importance, because it might not impossibly be argued that the express conferment of these powers in certain cases negatives them by necessary implication in others. This difficulty has been sought to be removed by the general enactment contained in

(1) Narayan Ganpatbhat *v.* Timmaya, 8 Bom. L. R. 807 (1906); 31 B. 50.

(2) Ghoree Lal Jha *v.* Sheo Narain, 8 W. R. 24 (1867); Akhoot Ramanah *v.* Ahmed Eusoofjee, 15 W. R. 538 (1871); 7 B. L. R. 81; Suleman *v.* Shivram, 12 B. 71 (1887).

(3) Janki Prasad *v.* Sukhrani, 21 A. 274 (1899); diss. from in Ganada Prasad Roy *v.* Shib Narain Mukerjee, 29 C. 33 (1901).

represented by sect. 47 and O. XXI. r. 90) are established.(1) There is no real distinction between an auction-purchaser at a sale in execution of a money decree and an auction-purchaser at a sale in execution of a mortgage decree in this respect.(2)

When an application for probate of a will is refused by the District Court, but granted by the High Court on the ground that the will was proved, it is the duty of the Lower Court to prepare and issue a probate or copy of the will under the seal of the Court under the section.(3)

"No suit shall be instituted" (clause (2)).—There has never been any question but that restitution can be obtained in execution of the final decree of the Appellate Court.(4) Prior, however, to this Code it was a matter of conflict whether an alternative remedy lay also by way of a separate suit. In some cases this was considered to be so,(5) in others it was held that such a suit was prohibited (6) by sect. 244 of the last Code. The second clause now expressly prohibits a suit.

Security for restitution.—When the Appellate Court has seizin of the appeal, it has an inherent power over the subject of litigation, the nature of which is indicated and implied by this section, and can in the exercise of that power, and notwithstanding that the decree has been executed, call upon the respondent to furnish security for the due performance of any decree which may be made.(7) Where any person had become surety for the restitution of any property taken in execution of a decree it was held by the Bombay,(8) Madras,(9) and Allahabad (10) High Courts that the security bond could be enforced in execution of that decree. The Calcutta High Court,(11) however, held that a separate suit was necessary. The former view has now been adopted in sect. 145, as that amended section (which replaces sect. 253 of the last Code) now makes special provision in clause (*b*) for the case.

145. *Where any* person has become liable as surety— [s. 253.]

Enforcement of liability of **surety.**

(*a*) for the performance of *any decree* or any part thereof, *or*

(1) Levina Ashton *v.* Madhabmoni, 14 C. W. N. 560, 568 (1910).

(2) Mukhoda *v.* Gopal, 26 C. 734, 735, 736 (1899).

(3) Bayabai *v.* Sarasvatibai, 17 B. 686 (1892).

(4) Radhey Singh *v.* Mangni Ram, 6 C. W. N. 710, 712 (1902), Saran *v.* Bhagwan, 25 A. 441 (1903); Dhan Kunwar *v.* Mahtab Singh, 22 A. 79 (1899); Jamini Nath Roy *v.* Dharma Das Sur, 33 C. 857 (1906); Kaliana Sundram *v.* Egna Vedeswara, 11 M. 261 (1887); Arunachellam *v.* Arunachellam, 15 M. 203 (1891).

(5) Vasudev *v.* Narayana, 24 M. 341, 345; Shama Pershad *v.* Hurro Pershad, 10 M. I. A. 203, 211 (1865). See Coffin *v.* Karbari Rawat, 22 C. 501 (1895).

(6) Sheodihal Sahu *v.* Bhawani, 29 A. 348 (1907); Masih-ullah Khan *v.* Majid-un-nissa, 26 A. 149 (1903) [in this case a suit was held allowable, as sect. 244 did not apply to proceedings before Revenue Courts]; Prag Narain *v.* Kamakhia, 36 I. A. 197 (1909); 14 C. W. N. 55.

(7) Hukum Chand *v.* Kamalanand, 33 C. 927, 934, 942 (1905).

(8) Venkapa *v.* Baslingapa, 12 B. 411, 415 (1887); Kusaji *v.* Vinayak, 23 B. 478, 482, 483 (1898); Jamsedji *v.* Bawabhai, 25 B. 409, 413, 414 (1900).

(9) Thirumalai *v.* Ramayyar, 13 M. I, 5 (1889); Arunachellam *v.* Arunachellam, 15 M. 203, 211, 212 (1891).

(10) Janki Kuar *v.* Sarup Rani, 17 A. 99, 102 (1895).

(11) Surjoo *v.* Balmukund, 23 C. 212, 216 (1895).

[t was held not applicable to pauper appeals.(1) Though that section dealt expressly with insufficiently stamped memoranda of appeals it was held that a defective plaint could be subsequently validated.(2) If the deficiency is not paid by the date fixed by the Court, this section will not assist the plaintiff.(3) When a party asks for this indulgence, the record should indicate that all the circumstances have been brought to the notice of the Court.(4) As a general rule the Court's discretion under this section is unshackled; but where the document is a plaint the discretion must be exercised in accordance with O. VII. r. 11 (c).(5)

Transfer of business.

150. *Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.*

Saving of inherent powers of Court.

151. *Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*

Inherent jurisdiction.—This is an extremely important section, expressly recognizing as it does the inherent jurisdiction of the Courts, a matter which is fully dealt with in the notes to the Preamble. In addition to the cases there cited it may be noted that it has again been quite recently held that the Code is not exhaustive, and that when the Court has jurisdiction to make an order it has (although there may be no section of the Code applicable) inherent power to have that order carried into effect.(6) It has been held that the Courts in India have an inherent power to amend or vary decrees so as to bring them in accordance with the judgments after they are signed by the Judges, even if they do not fall within this section.(7) Where, owing to the death of the plaintiff before the date fixed for the hearing, there was no appearance, and the suit was dismissed for default, it was held that the mistake inadvertently made in so dismissing it could be rectified under this section and (apart from it) under the inherent power.(8) But where, according to established principles, certain questions have been removed from the jurisdiction of a Court, they cannot be brought within it on the plea that the Court has inherent power to do what justice requires for the parties before it.(9) An order for consolidation of suits can be made under this section.(10)

(1) Bai Ful *v.* Desai Manorbhai, 22 B. 849, 857 (1897).

(2) Valambal *v.* Vythilinga, 25 M. 380, 382: 24 M. 331, 333 (1900).

(3) Budhan *v.* Sitanath, 13 C. L. J. 78 (1910). (4) Ib.

(5) Achut Ramchandra Pai *v.* Nagappa Bab Balgya, 38 B. 41 (1913).

(6) *Per* Maclean, C.J., in Jogendra Chandra Sen *v.* Bibee Wazid-un-nissa, 34 C. 860; 11 C. W. N. 856 (1907) [order as to costs on dismissal of application for leave to appeal to the Privy Council].

(7) Brijratan *v.* Jaynarain, 37 C. 649, 657 (1910); Langat *v.* Janki, 14 C.L.J. 481 (1911).

(8) Debi Baksh *v.* Habib Shah, 17 C. W. N. 829 (P. C.) (1913); 40 I. A. 151; 35 A. 331; 18 C. L. J. 9.

(9) Jethabhai *v.* Chapsey, 34 B. 467, 483 (1909).

(10) Kalicharan *v.* Suraj Kumar, 17 C. W. N. 526 (1912).

152. *Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.*

Amendment of judgments, decrees or orders.

Decrees or orders.—See notes to O. XX., *post.*

153. *The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.*

General power to amend.

Amendment.—This is O. 28, r. 12 of the English rules under which amendments have been made in legal documents of every kind, such as interrogatories, notices of motion, particulars of objection, petitions, and the like. It is not open to a Court to convert a suit for declaration into one for possession of its own accord.(1)

154. Nothing *in this Code* shall affect any *present right of* appeal *which shall have accrued to any party at its commencement.* [s. 3, third para.]

Saving of present right of appeal.

The words "any present right of appeal" mean a right existing on January 1st, 1909, to appeal against a particular order passed under the last Code and subsisting at that date.(2)

155. *The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.*

Amendment of certain Acts.

156. The enactments *mentioned* in the *Fifth* Schedule are hereby repealed to the extent *specified* in the *fourth* column thereof. [s. 3, first sentence.]

Repeals.

157. Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, *appointments made and powers conferred under Act VIII. of 1859 or under any Code of Civil Procedure or any Act amending the* [s. 3, second sentence.]

Continuance of orders under **repealed enactments.**

(1) Venkatachella *v.* Narayana, 24 M. L. J. 455 (1913).

(2) Benod *v.* Ram Sarup, 16 C. W. N. 1015 (1912); Bisheshwar *v.* Jasoda, 17 C. W. N. 622 (1913); and as to inherent power to stay execution pending appeal to Privy Council, see Nanda Kishore Singh *v.* Ram Golam Sahu, 10 C. 955 (1912).

same or under any *other* enactment *hereby repealed* shall, so far as they are consistent with this Code, *have the same force and effect as if they had been* respectively published, made, appointed, filed, prescribed, framed *and conferred under this Code and by the authority empowered thereby in such behalf.*(1)

Reference to Code of Civil Procedure and other repealed enactments.

158. In *every enactment* or notification passed or issued *before the commencement of* this Code *in which* reference is made to *or to any Chapter or section of* Act VIII. of 1859 or *any* Code of Civil Procedure or any Act *amending the same or any other enactment* hereby repealed, such reference shall, so far as may be practicable, be *taken to be made* to this Code or *to its* corresponding Part, *Order, section or rule.*

Repeal.—The ordinary rule of construction of Statutes gives them a future operation only, unless the legislative intent appears clear from their terms that they are to have a retrospective operation. This presumption against retrospective operation does not, however, exist in the case of enactments relating to procedure, including pleadings, practice, and evidence. In fact, the general principle is that alterations in procedure are always retrospective in effect, and apply to pending proceedings unless there be a declared intention to the contrary or good reason against it. When the effect of an enactment is to take away a *right*, then it does not *primâ facie* apply to existing rights; but when it deals with *procedure* only, *primâ facie*, it applies to all actions pending as well as future.(2) There is, however, a distinction between "relief" and the mode or procedure for obtaining such relief. The "relief" remains unaffected by a change of procedure.(3) The intention to take away a vested right (including a right of suit) is not to be imputed to the Legislature unless it is expressed in unequivocal terms.(4)

(1) It was pointed out in District Munsif of Tiruvallur (*in re*) (F. B.), 37 M. 17 (1914), that this is an enabling (and not a repealing) section.

(2) *In re* Bhagwandas Hurjivan, 8 B. 511, 518, 523 (1884); Hajrat Akrannissa *v.* Valiulnissa, 18 B. 429 (1893); Gungaram *v.* Punamchand, 21 B. 822 (1896); Vedavalli Nasariah *v.* Mangamma, 27 M. 538 (1903); S. C., 14 M. L. J. 340; Bhobo Sundari *v.* Rakhal Chunder, 12 C. 583 (1886). The rule was concisely stated by Holloway, J., in Morris *v.* Sambamurthi, 6 M. H. C. R. 126 (1871), as follows: "Rights already acquired shall not be affected by the retroaction of a new law. Rules as to procedure are an exception. The law as to the acquisition of rights is that prevailing at the period of the arising of the matters of fact which generate them. Their enforcement must be according to the rules of process at the period of suit." But, as there pointed out, the practical difficulty lies in the application of the principle and in distinguishing between material and processual laws. See also Hukm Chand, 41.

(3) *Per* Trevelyan, J., in Bhobo Sundari *v.* Rakhal Chunder, 12 C. 583 (1886).

(4) Gopeswar Pal *v.* Jiban Chandra Chandra, S. B., 19 C. L. J. 549 (1914); following Commissioner of Public Works *v.* Logan, A. C. 355 (1903); distinguishing Lala Soni Ram *v.* Kanhaiya Lal, 40 I. A. 74 (1913); 35 A. 227; and Munjhoori Bibi *v.* Akel Mahmud, 17 C. L. J. 316 (1913).

THE SCHEDULES.

THE FIRST SCHEDULE.

ORDER I.

Parties to Suits.

1. All persons may be joined *in one suit* as plaintiffs in whom *any* right to relief in *respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist*, whether jointly, severally or in the alternative, *where, if such persons brought separate suits, any common question of law or fact would arise.* [s. 26.]

Who may be joined as plaintiffs.

2. *Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.*

Power of Court to order separate trials.

3. All persons may be joined as defendants against whom *any* right to relief in respect of *or arising out of the* same act *or transaction or series of acts or transactions* is alleged to exist, whether jointly, severally or in the alternative, *where if separate suits were brought against such persons any common question of law or fact would arise.* [s. 28.]

Who may be joined as defendants.

Scope of the English and Indian rules.—Sects. 26–32 of the last Code were first incorporated in Act X. of 1877 from the various rules of Order XVI., framed under the Supreme Court of Judicature Act, 1873. Sect. 26 was substantially the same with Rule 1 of the Order, as it stood at the time of the enactment of the Code, with the exception that that rule did not contain the words "*in respect of the same cause of action.*" The rule was construed very broadly in the earlier cases, and held to justify a joinder of plaintiffs having distinct

causes of action,(1) and seeking wholly distinct reliefs, and not to import any limitation on the power of joinder.(2) It was gradually narrowed in its application, and in Hannay *v.* Smurthwaite,(3) Lord Bowen observed that it was not "the intention of this rule to allow writs to be issued under which any number of plaintiffs might join any number of causes of action, or that a writ should be like an omnibus travelling on a certain route into which any number of persons may get as passengers for the journey." It was thus first restricted to cases in which relief was claimed in respect of the same subject-matter, "as Order XVI. dealing with parties, assumes an ascertained subject-matter," (4) a principle recognized here in Haramoni Dassi *v.* Hari Churn Chowdhry.(5) In accordance with this view, it was held in a number of cases that where the causes of action were separate and distinct they could not be joined in one action.(6)

The English rule (7) was then altered in October, 1896, the alteration restricting it to cases in which the right to relief, alleged to exist, was "*in respect of or arising out of the same transaction or series of transactions,*" and where, if the persons joined brought separate actions, "*any common question of law or fact would arise.*" Power also was expressly given in it to the Courts to "order separate trials, or make such other order as may be expedient," "if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action."

The present English rule was therefore in widely different terms from sect. 26 of the last Code. A limited liberty of joining plaintiffs with separate causes of action is given. The nature of the limitation is plain upon the face of the rule. It was not thereby intended to allow any number of

(1) Booth *v.* Briscoe, 2 Q. B. D. 496; Hukm Chand, C. P. C. 369.

(2) Gort *v.* Rowney, 17 Q. B. D. 633, *per* Esher, M.R.

(3) 2 Q. B. 422 (1893).

(4) Smith *v.* Richardson, 4 C. P. D. 113.

(5) 22 C. 833 (1895); Hukm Chand, C. P. C. 369, 370.

(6) Smurthwaite *v.* Hannay, A. C. 494 (1894) [sixteen persons, nine shippers, and seven consignees, under various bills of lading, sued shipowners for short delivery]; Carter *v.* Rigby, 2 Q. B. 113 (1896) [fifty persons, relatives of as many miners drowned by flooding of a mine, brought action for negligence]; P. & O. S. N. Co. *v.* Tsune Kyima, A. C. 661 (1895) [sixty-two persons, or groups of persons, sued for damages by reason of collision between two ships]; Peddie *v.* Kyle, 2 I. R. 265 (1900) [libel in same words and in same document, but of different persons]. In these cases the suits were held not maintainable under O. 16, r. 1, as it stood prior to its amendment. The last case was decided after the amendment, but was under the Irish rule, which is in the same terms as the old English rule.

(7) Is in the following terms:—"All persons may be joined in one *action* as plaintiffs in whom any right to relief in respect of, or arising out of, the same transaction, or series of transactions, is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that if upon the application of any defendant it shall appear that such joinder may delay or embarrass the trial of the action, the Court or a Judge may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief unless the Court or a Judge in disposing of the costs shall otherwise direct."

different plaintiffs to join in one action any number of separate and different causes of action, but it was intended merely to effect a modification of the old rule by which a limited liberty of joining plaintiffs with separate causes of action should be conferred. The conditions are, firstly, that the right to relief alleged to exist in each plaintiff should be in respect of, or arise out of, the same transaction; and secondly, that there should be a common question of fact or law.(1) Where, however, there were in effect two plaintiffs and two causes of action not arising out of the same transaction, the case was held not to be within the present rule.(2)

From the foregoing it will appear that the English rule was wider than that laid down in sect. 26 of the Code of 1882, which might generally be said to have represented the views commonly entertained by the English Courts in the middle period between the first promulgation of the rule and its amendment in 1896. While it is sufficient under the English rule that the right to relief should arise out of the same transaction, the Court being given a control over the exercise of such right, the right of joinder given by that section was only in respect of the *same cause of action*, a right which was still further limited by certain decisions owing to the interpretation placed upon the terms "*cause of action*," as to which, see *post*. The use of the term "*cause of action*" in the last Code gave rise to difficulty (*vide post*); the phrase therefore has been omitted and r. 1 has been made to correspond with the present English rule as regards plaintiffs. It is in substantially the same terms as O. XVI. r. 1 down to the words "*would arise*." The portion in the English rule from "*provided that*" to "*expedient*" has been substantially embodied in r. 2 and in O. II. r. 6, *post*, and the portion as to judgment being given is embodied in O. I. r. 4. The second paragraph of sect. 26 of the last Code has not been re-enacted, as to which see notes to O. I. r. 4. Rule 3 dealing with defendants corresponding with sect. 28 of the last Code has been modified to bring it in conformity with r. 1. The result is an extension of the right of joinder in conformity with the English law, the decisions under which will be applicable to this rule. The Select Committee said, "It is hoped that the multiplicity of suits will be further curtailed by the new provisions we have inserted to remove limitations which we regard as needless on the comprehensiveness of a suit, and by the wider powers of amendment vested in the Courts." An adequate check (see r. 2) is provided by the power of a Court to interfere where embarrassment is likely to result.

"**Persons.**"—This and the following rules deal only with the joinder of parties, and have no reference to the joinder of causes of action. Sect. 31 of the last Code, which provided that nothing in the section should be deemed

(1) Universities of Oxford and Cambridge *v.* Gill, L. R. (1899) Ch. D. 55, at pp. 59, 60. The Editors of the Annual Practice, 1905, in their notes to this rule consider that the cases cited at p. 489, n. 1, though not within the old rule, would be held probably to be within the new rule, subject to the control of the Court. Other cases cited in the A. P. decided before the rule was altered must now be considered with reference to the alteration. The rule has been held to leave untouched the practice in Admiralty of allowing joinder of parties in collision, salvage, and wages actions: The Maréchal Suchet, 1896, P. 238.

(2) Stroud *v.* Lawson, L. R. 2 Q. B. 44 (1898).

to enable plaintiffs to join in respect of distinct causes of action, has been omitted all reference to cause of action being omitted from this section, and O. II. deal with the joinder of causes of action.

Generally, as to parties, whether plaintiffs or defendants, every person can sue and be liable to be sued, and may thus be a party. The Code, which presupposes this rule, does not contain any provisions as to who may be parties. The portions of the Code which contain special provisions enacted on grounds of general interest, public convenience or policy, and, in the case of the incompetent, for their protection, refer generally only to the mode of suing or being sued in such cases. Every person who has a primary right or interest which has been violated in such a manner as to give him a secondary right to relief, may bring a suit as plaintiff against any person as defendant against whom an order for enforcement of that right is asked.(1)

Subject to a few exceptions, the Common Law Courts were rigidly tied down to disposing of claims arising between exactly the same parties upon each side and in the same rights. They could give a judgment for A against C or against C, D, and E, but they could not give relief of one sort against C and of another sort against D and E. Nor could they give relief of one kind to A and of another kind to B, or of one kind to A and B jointly and another to A separately. All the plaintiffs, if more than one, had to be jointly entitled, and all the defendants jointly liable, with respect to every single matter upon which the Court was asked to adjudicate. In Chancery, on the other hand, the course was to deal with the controversy or transaction forming the subject-matter of the action, as a whole, and endeavour to do complete justice to it; and for that object the Court insisted on all the parties interested in the subject-matter being brought before it.(2) The Chancery Rule has now been adopted as a general one by both English and Indian Courts. See r. 10, clause (2), *post*. The same person cannot, however, be both plaintiff and defendant in a suit unless he appears upon the record in different capacities.(3)

In order to enable a person to sue, the right must be a real and existing one.(1) The legal interest must be existing at the date of the institution of the suit; (5) which must be brought by the person who, at the date of the suit, represents, so far as its subject-matter is concerned, the person with whom the original transaction took place.(6) While the interest may be future, it must be a present and existing one at the time of the suit. Merely "an expectation of the possibility of a future event which, if it occurs, may give birth to an interest," is not such an interest as will give a right of

(1) See Hukm Chand, C. P. C. 350 *et seq.*, where the subject is more fully discussed.

(2) Wilson's Judicature Acts, 2nd ed.; notes on O. XVI. r. 1.

(3) So it has been held that a suit in the name of a firm can be maintained by or against one of its members in a capacity different to that of partner: Premji Ludha *v.* Dossa Doongersey, 10 B. 358, 361 (1886).

(4) Bibee Tamaoonnissa *v.* Woojjulmonee Dossee, 20 W. R. 72 (1873).

(5) Iyyappa *v.* Rama Lakshmamma, 13 M. 549 (1890).

(6) Gossain Gunga *v.* Dabee Dass, 25 W. R. 118 (1876).

suit.(1) The right must have come into existence before the date of the suit, and therefore a real owner's disclaimer, made in his deposition in a suit, has been held not sufficient to give a plaintiff a right to maintain a suit.(2) The plaintiff must have a subsisting cause of action at the time of the institution of the suit, and he cannot take advantage of events that have happened subsequently.(3) A suit by a person in respect of an act by which he may never be injuriously affected at all is premature.(4) Leaving such general considerations, it may be stated that the question as to whether there is a right to relief in any case, and as to the person in whom that right is vested, and against whom it may be claimed, and the nature of the relief, are questions of substantive law, and not part of the law of procedure, which may restrict or even extinguish such a right, but cannot create or extend it.(5) This matter therefore does not come within the scope of this Commentary, and will not be dealt with by it.(6) The rules relating to parties laid down by the Code refer not so much to the persons who may be parties as to their joinder. As to defendants, *vide post*.

"**May be joined.**"—This section, under the Code of 1882, was held to be an enabling one, allowing a number of plaintiffs with the same right to relief to join in one suit instead of bringing separate suits. It did not say that all persons must be joined as plaintiffs when they had the same cause of action against the defendant.(7) The present section is equally enabling. There is a distinction between a joint right and a right enjoyed in common with others. In the first case it may be necessary for all persons jointly interested to be joined as parties, and if they are not joined the suit may be bad for misjoinder.(8) Where a person sues under a power of attorney, the principal's name should appear as plaintiff.(9) It was held that Act X. of 1859 allowed suits to be instituted by zemindars in their own names by their authorized agents, but the agent has no right to institute the suit in his own name. The zemindar's name should appear on the record as the plaintiff.(10) It has been held the managing members of a Mitakshara joint-family can sue without making the other members

(1) Davis *v.* Angel, 4 D. F. & J. 531.

(2) Hari Gobind Adhikari *v.* Akhoy Kumar Mozumdar, 16 C. 364 (1889).

(3) Budh Singh *v.* Niradbaran Roy, 2 C. L. J. 431, 438 (1905).

(4) Bhikdaree Singh *v.* Kishen Prosad, 15 W. R. 106 (1871).

(5) Hukm Chand, C. P. C. 353.

(6) Ib., at pp. 353–367, the following subjects are discussed: p. 353: Right to relief of worshippers; p. 355: Right of suit of person for slander of his relations; p. 357: Right of suit in respect of property bailed or leased; p. 358: Suit by assignee of *chose in action*; p. 358: Right of suit by transferee of property not in transferor's possession; p. 361: When agent may sue on behalf of principal; p. 363: Suits by Co-sharers. A number of cases on these and other points will also be found in the notes to s. 26 of O'Kinealy's Civ. Pr. Code, to which reference may be made.

(7) Baiju Lal Parbatia *v.* Bulak Lal Pathuk, 24 C. 385, 388 (1897). As a general rule, however, all the parties interested in the subject-matter of a suit should be joined in it whether as plaintiffs or defendants: Rajendronath Dutt *v.* Shaik Mahomed Lal, 8 I. A. at p. 142 (1881).

(8) Baiju Lal *v.* Bulak Lal, *supra*, at p. 390; this difference between common and joint interest is the basis of the distinction between necessary and proper parties. See Hukm Chand, C. P. C. 367, 368.

(9) Choonee Sookul *v.* Hur Pershad, 1 A. H. C. R. 277 (1869).

(10) Ladlee Pershad *v.* Gunga Pershad, 4 A. H. C. R. 59 (1872).

of the joint-family co-plaintiffs.(1) Where the plaintiff has assigned his rights during the pendency of the suit it is irregular to substitute for his name that of the purchaser; but it is an irregularity which can be cured by the consent of the defendant.(2) In a suit by or against unincorporated partnerships, the names of all the partners had to be given. This is the rule of the old Common Law, according to which a partnership is not a distinct legal entity entitled to sue or be sued in the firm name as a corporation. In India, the only departure from it recognized was in regard to corporations or incorporated companies authorized to sue or be sued in the name of some officer thereof, under sect. 435 of the last Code. See now O. XXIX. r. 1.(3) A firm thus could not sue or be sued without the names of all the members of the firm being given in the plaint.(4) See now O. XXX.

The question whether and in what circumstances a benamidar is competent to maintain a suit in his own name and without the beneficial owner being a party to the suit (5) has been discussed in a number of rulings in the various High Courts, and in regard to it a considerable conflict of authority prevails. In those cases, which approve (6) the right of the benamidar so

(1) Kishen Pershad *v.* Har Narain, 38 I. A. 45 (1911).

(2) Beer Chunder *v.* Shaikh Tumeezooddeen, 12 W. R. 87 (1869); s. c., 3 B. L. R. 214.

(3) S. 135 of last Code. See Cannan *v.* Kylash, 25 W. R. 117 (1876).

(4) Pulin Behari *v.* Watson, B. L. R. F. B. 904, 906 (1868); Gunga Dutt *v.* Dabee Das, 25 W. R. 118 (1876). See now O. XXX.

(5) If the real owner be co-plaintiff there is, of course, no objection. In Kally Prosonno *v.* Dinonath, 11 B. L. R. 56, 64 (1873), it was held that the real owner should have been co-plaintiff. In Sita Nath *v.* Nobin Chunder, 5 C. L. R. 102 (1879), it was said that the Court ought to direct that the beneficial owner be made a party and ought not to dismiss the suit.

(6) Doe d. Tilluck *v.* Hurry Dey, Mort. 249 (suit on bond) [see Gopeekristo Gosain *v.* Gungapersad Gosain, 6 M. I. A. 63, 72 (1854), the Supreme Court distinguishing between legal and equitable title allowed the benamidar, that is the party in whose name the title deed was, to sue. See Mohendra Nath *v.* Kali Proshad, 30 C. at p. 272 (1902)]; Bhaishankar *v.* Harivallabh, 1 B. H. C. R. 20 (1863) [possessory suit for land; held good if consent of owner could be shown]; Prosunno Coomar *v.* Gooroo Churn, 3 W. R. 159 (1865) [suit for declaration of right to land; real owner should sue; but benamidar may sue as trustee if no objection]; Sreenath Nag *v.* Chundernath, 17 W. R. 192 (1872) [suit for possession after foreclosure; defendant held estopped]; Ram Bhurosee *v.* Bissessur, 18 W. R. 454 (1872) [benamidar can sue for land; defendant could not raise question that he was nominal owner]; Gopi Nath Chobey *v.* Bhugwat, 10 C. 697 (1884) [it is to be presumed that the benamidar has authority to sue *res judicata*; foll.: Shangara *v.* Krishnan, 15 M. 267 (1891)]; Nand Kishore *v.* Ahmad Ata, 18 A. 69 (1895) [benamidar may sue for land; consent presumed; adverse decision *res judicata*]; Bhola Pershad *v.* Ram Lall, 24 C. 34, 36 (1896) [suit to enforce mortgage; cannot be held that a suit by a benamidar can so extend to property instituted, though it may be partially defective; assignees of owner were added under s. 32, after institution of suit]; Sachitananda *v.* Baloram, 24 C. 611 (1897) [suit for foreclosure and possession of land may be brought by benamidar; suit should not be dismissed because beneficial owner not added as a party—estoppel]; followed in Chowdhury Kirtibas Das *v.* Gopal Jiu, 19 C. L. J. 193 (1913); Ravji *v.* Mahadev, 22 B. 672 (1897) [a benami certified purchaser can sue in his own name even when the true owner's name is disclosed, *per* Ranade, J.]; Bijjamma *v.* Venkataramayya, 21 M. 30 (1897) [benamidar payee, or holder of note may sue]; Dagdu *v.* Balvant, 22 B. 820 (1897) [suit for redemption; benamidar may maintain suit in his own name]; Yad Ram *v.* Umrao, 21 A. 380 (1899) [benamidar mortgagee may sue; previous cases reviewed].

to sue, the right has been based partly on the fact that he is the transferee named in the registered instrument constituting the transfer, and on the principle that a contract can be enforced by the parties who have entered into it, partly on the ground that the defendant is estopped from raising the question, and partly on the view that the benamidar must be presumed to be suing on behalf of the beneficial owner, or, to put the same idea into other words, that the suit is really brought by the beneficial owner through, and in the name of, the benamidar. On the other hand, those rulings which are adverse (1) to the right of the benamidar to sue are mainly based on the ground that a suit cannot be maintained by any person who fails to prove, if his title is challenged, that he has a real interest of his own in the subject-matter of the suit.(2) In some cases it seems to have been held that there is a distinction between suits on bonds and the like and suits for immoveable property in that in the former case a benamidar may, and in the latter may not, sue.(3) But even in this the cases are not uniform.(4) As to benamidar defendants, see *post*, and as to adding a benamidar as a party, r. 10, *post*. O. XXXI. contains provisions relating to suits concerning property vested in trustees. The question has arisen in this country generally with reference

(1) Meheroonissa *v.* Hur Churn Bose, 10 W. R. 220 (1868) [suit for declaration of title to land; held, a benamidar has no right to maintain a suit in a Civil Court for property in which he has no beneficial interest]; Fuzeelun Bibee *v.* Omdah Bibee, 11 B. L. R. 60, *n.* (1868) [suit for possession by benamidar dismissed]; Kally Prosonno *v.* Dinonath Mullick, 11 B. L. R. 56, 64 (1873) [suit to have sale set aside]; Bibee Tamaoonnissa *v.* Woojjulmonee, 20 W. R. 72 (1873) [suit should be brought by real and not colourable owner]; Bhoobunessar *v.* Juggessuree, 22 W. R. 413 (1874) [suit for money on bond not maintainable]; Judoo Nath *v.* Girija Bhoosun, 23 W. R. 116 (1875) [suit on bond; if plaintiff not real holder suit must be dismissed]; Sita Nath *v.* Nobin Chunder, 5 C. L. R. 102 (1879) [suit for possession of land secured by mortgage; Court was not prepared to say that benamidar could sue in his own name]; Hari Gobind *v.* Akhoy Kumar, 16 C. 364 (1889) [suit for land; held, plaintiff as benamidar could not sue and that neither the disclaimer of the real owner nor the fact that he was a party to the suit made any difference]; Timmalayappa *v.* Swami Naskar, 18 M. 469 (1894); Issur Chandra *v.* Gopal Chandra, 25 C. 98 (1897) [a mere benamidar cannot maintain a suit for ejectment, he having neither title to nor possession of the property]; Baroda Sundari *v.* Dino Bandhu, 25 C. 874 (1898); s. c., 3 C. W. N. 12 [a benamidar has no right to sue for recovery of possession of immoveable property]; Mohendra Nath *v.* Kali Proshad, 30 C. 265 (1902) [the same]; Chinnan *v.* Ramachandra, 15 M. 54 (1891) [the Court pointed out that when the execution of a document is proved, further evidence is not required to show that the transferee has taken the interest which the document purports to convey; it is not necessary to prove as against a third person that the consideration passed, but dismissed the appeal on its appearing that the plaintiff had no interest].

(2) Yad Ram *v.* Umrao Singh, 21 A. 380, 381 (1899). As to alienation by benamidar; consent of true owner; equitable rights of purchaser, see Sarju Parshad *v.* Bir Bhaddar, 20 I. A. 108 (1890); and as to *bonâ fide* transfer without notice that transferor was benamidar, Mir Mahomed *v.* Kishori Mohun, 22 I. A. 129 (1895); s. c., 22 C. 909.

(3) Mohendra Nath *v.* Kali Proshad, 30 C. 265, at p. 272 (1902); Hari Gobind *v.* Ackhoy Kumar, 16 C. 364 (1889); Bijamma *v.* Venkatavamayya, 21 M. 30 (1897); Sarat Chunder *v.* Kedar Nath, 2 C. W. N. 286 (1898) [a benamidar can sue on a promissory note].

(4) Bhoobunessar *v.* Juggessuree, 22 W. R. 413 (1874); Judoo Nath *v.* Girija Bhoosun, 23 W. R. 446 (1876), in both of which cases the suits were held not to be maintainable.

to suits by a benamidar, who, as already stated, in some cases has been held not to occupy the position of a mere name lender, but a position analogous to that of a trustee holding the legal estate.

This rule itself is not obligatory. It does not enact that any persons must join as parties. It does not even say that all persons who may be interested in the result of an action must necessarily be parties,(1) or that all persons must join as plaintiffs when they have the same cause of action against the defendant.(2) Nor is it laid down anywhere else in the Code as to who must be joined as plaintiffs as distinct from those who may be so joined; and though some idea may be formed from the provisions of rule 10, yet they cannot furnish any general rule, as the first clause of the rule is restricted to the case of a *bonâ fide* mistake, and the discretion of the Court under the second clause is regulated by considerations different from those which must regulate the action of the plaintiffs themselves. The exact character of the right is immaterial,(3) there being no distinction between legal and equitable rights, so far as relief in a particular Court is concerned.

R. 1 was introduced to prevent a miscarriage of justice from want of parties, and to enable persons aggrieved by the same act, or having the same right to relief, to join in one suit instead of bringing separate suits.(4) The former section was not exhaustive in words, and did not say that only persons referred to in it might be joined as parties. The contrary might, no doubt, have been contended for, on the authority of the maxim, *expressio unius personæ est exclusio alterius*. On the other hand, it was held that there were clearly cases not falling within sects. 26 and 28 of the former Code, in which plaintiffs and defendants were and must be allowed to join in a suit. Thus persons having a successive interest were allowed to join as plaintiffs; (5) and in the case cited, in a suit by a daughter to set aside her mother's alienation of the property she held as a widow, the daughter's son was allowed to join as a co-plaintiff, though he could not acquire the property in his mother's lifetime. And in some cases, persons were allowed to join merely *ex abundanti cautela*. Thus a receiver of an insolvent's estate may, after the insolvent's death, sue for everything due to his estate, but for greater security his executrix may be joined as a plaintiff.(6) It is somewhat on a similar principle, that, as a general rule, unless the policy of insurance has been legally assigned, and the assignment recognized by the insurance company, or unless there has been an equitable assignment, and it can be shown that the holder of the policy has given value for it, the company is entitled to insist upon the legal representative of the assured being made a party to the suit for the amount due under the policy.(7) Where, however, there was misjoinder of plaintiffs and causes of action, it was held that there was nothing to necessitate the dismissal of the suit, but that the party should be put to election and the plaint amended.(8)

(1) Gobind Prasad *v.* Chandar Sekhar, 9 A. 486, 491 (1887), *per* Edge, C.J.

(2) Baiju Lal *v.* Bulak Lal, 25 C. 385 (1897).

(3) Hukm Chand, C. P. C. 372, 373.

(4) See Baiju Lal *v.* Bulak Lal, 24 C. 385 (1897).

(5) Narayana *v.* Chengalamma, 10 M. 1 (1886).

(6) Bachubai *v.* Shamji, 9 B. 536, 547 (1885).

(7) Rajnarain *v.* Universal Life Assurance Co., 10 C. L. R. 561 (1882).

(8) Aldridge *v.* Barrow, 34 C. 662 (1907). See notes to O. II. r. 3, *post*.

Relief.—It was considered that the expression "*the right*" in the then subsisting English rule was not identical with "*any right;*" (1) and the expression "*any relief*" to be equivalent to the "*same relief.*" (2) In Sandes *v.* Wildsmith,(3) Wills, J., after observing that the words "*the right to any relief claimed*" were "the governing words of the rule," said that the meaning of the rule was, "that where it is doubtful in whom a right sought to be enforced is vested, it is permissible to put in all possible claimants, but it does not mean that where there are two rights which are essentially different from each other, and there is no doubt as to the person in whom each of those rights is vested, it is permissible to roll two actions into one." The English and present rule use the words "*any right to relief.*"

"In respect of, or arising out of, the same act or transaction."—The words "*in respect of the same cause of action*" were added in the section of the last Code, as taken from the corresponding English rule, on account of its extreme broadness, specially with reference to the decision in Booth *v.* Briscoe (4) in which eight persons were allowed to join in an action of libel, though no joint injury was shown. The section was held not to authorize the joinder of several plaintiffs in respect of separate causes of action.(5) Under the last Code the exact effect of this rule, as depending on the identity of the "*cause of action*," had in the end to depend on the sense in which that expression was understood as used in this section. It is in its broadest sense taken to denote the conditions of the maintenance of an action, which generally consists of a right and its breach. Thus every cause of action presupposes the existence of a right; but it may be observed that an actual breach is not always necessary to constitute a cause of action. In some cases even an actual denial or refusal of the right is not necessary, and a suit may be brought simply on the basis of a right. Thus any person entitled to any legal character, or to any right as to any property, may institute a suit not only against any person denying, but also against every one interested in denying, his title to such character or right.(6) There was a considerable conflict of opinion in cases in which a breach is essential to constitute a cause of action, but the question was whether the breach alone will do that, or the right infringed also must be considered a part of it. Earlier decisions of the Bombay (7) and the Madras (8) High Courts were in favour of the construction,

(1) Gort *v.* Rowney, 17 Q. B. D. 635, *per* Bowen, L.J.

(2) Smurthwaite *v.* Hannay (1894), A. C. 500, *per* Lord Herschell, L.C.; adopted in Haramoni Dossee *v.* Hari Churn Chowdhry, 22 C. at p. 841 (1895). As to the correspondence between this rule and Explanation VI. of s. 11, see Somasundara *v.* Kulandaivelu, 28 M. 457 (1904).

(3) (1893), 1 Q. B. 772.

(4) 2 Q. B. D. 496.

(5) Mohima Chandra *v.* Atul Chandra, 24 C. 540, 543 (1897).

(6) S. 42, Act I. of 1877; Hukm Chand, C. P. C. 377.

(7) Nusserwanji Merwanji *v.* Gordon, 6 B. 266 (1882) [in a suit against a company and its directors by the agents, two of whom were shareholders, the plaintiffs were not allowed to join a cause of action based on an agreement with a cause of action common to two only as shareholders].

(8) Lingammal *v.* Chinna Venkatammal, 6 M. 239 (1883) [where a Hindu widow and her adopted son sued together to recover family property the suit was disallowed as the claims of mother and son were conflicting. This case, however, has been explained and distinguished in Pinapati *v.* Pinapati, 26 M. 647 (1903)].

which included not only the act of violation complained of, but also the right violated by that act. The Calcutta High Court, on the other hand, held, in Haramoni Dassi *v.* Hari Churn,(1) that the expression "*cause of action*" must be understood as used in this section of the old Code "in its popular sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself." According to this view, the qualification implied in the words "*in respect of the same cause of action*" was satisfied if the facts which constituted the infringement of the right of the several plaintiffs were the same, though the facts constituting the right upon which they based their claim to that relief in the alternative may not be the same. Macpherson and Banerjee, JJ., observed, that that construction was necessary, as, if the expression were taken in the other sense, "it is difficult to imagine a case in which two plaintiffs can claim the same relief in the alternative in respect of the same cause of action, that is in respect of the same right and the same infringement thereof;" and "from the very fact of their claiming the same relief in the alternative, the facts which constitute their right to it, as alleged by them, must be not only different but also conflicting and mutually exclusive." This decision was in accordance with a preceding one in the Bombay High Court, in which an adopted son and his mother made common cause to set aside an attachment which with the proceedings consequent thereon were held to constitute the sole cause of action in the case.(2) In an earlier case in the same Court, where managers of a temple had passed a rule restraining the right of persons to enter the temple, it was held that all could join in a suit for an injunction.(3) Both these cases were opposed to the view taken in the earliest Bombay case and were in accordance with that interpretation which was placed on the words "*cause of action*" by the Calcutta High Court. This interpretation was adopted in the most recent decisions of the Bombay (4) and Madras (5) High Courts. The Allahabad High Court also appeared to take the same view. Thus (6) persons having different reversionary shares in a certain estate held by a widow were held entitled to sue jointly to avoid a deed of gift of it made by her. Oldfield, J., observed that the plaintiffs, though owning different shares in the property, were alike affected by the deed of gift and acts of obstruction of the defendants to their possession, and might join in bringing the suit. And that view prevailed on appeal to the Full Bench. Probably therefore it may be stated that had this section been unamended, that view of the term "*cause of action*," which was adopted by

(1) 22 C. 833 (1895); foll. in Sundar Jha v. Bansman Jha, 33 C. 367 (1906); Aldridge v. Barrow, 34 C. 662, 668 (1907); s. c., 11 C. W. N. 688.

(2) Fakirapa *v.* Rudrapa, 16 B. 119 (1892).

(3) Kalidas *v.* Gor Parjaram, 15 B. 309 (1891); and several members of a caste have been allowed to join in a suit against trustees for maladministration: Thakersey *v.* Hurbhum, 8 B. 432, 450 (1883).

(4) In Varajlal *v.* Ramdat, 26 B. 259, 265 (1901), the Court stated, though it was not necessary to decide the point, that they were inclined to agree with the Calcutta case; s. c., 3 Bom. L. R. 878.

(5) In Pinapati *v.* Pinapati, 26 M. 647 (1903), the Court agreed with the Calcutta decision, though it considered its own previous decision not in conflict with it.

(6) Ram Sewak Singh *v.* Nakched Singh, 4 A. 261 (1882).

the Calcutta High Court, would in future have been adopted by all the High Courts.

Even according to this view of the expression "*cause of action*," however, every separate act causing injury to a person constitutes a separate cause of action. Thus, where a number of prisoners were unlawfully detained in jail after the expiry of their term, the cause of action of each in a suit for damages against the Superintendent of the jail was held to be separate, as the actual acts of detention, even if simultaneous, in respect of all the persons would be generally different in the case of each person detained.(1) In the case cited, thirteen persons of the crew were on the same day convicted of desertion, and detained in the same circumstances and released at the same time; and they brought a suit for an aggregate sum, and it was held that there was nothing to justify their joining together in one suit. The headnote of the case observes that they were committed to jail under one warrant, but there is nothing in the Report itself to bear that out, and the point would be immaterial unless the act of detention were deemed to be one.(2) So where six persons jointly sought a declaration that certain proceedings of a District Temple Committee removing them from office were illegal the plaint was returned, the wrongful dismissal of each forming a distinct cause of action.(3) And a plaint was directed to be amended where there was an assault by two persons on the same occasion on two other persons.(4) In a recent case in which six persons jointly sued for libel, it was held that though the injury was caused by one act of the defendant, yet each plaintiff had a separate cause of action in respect of his own reputation.(5) It was not always easy to determine what is a separate act, and how far the unity of the act may be affected by a difference in the objects or persons affected by it. Thus where two persons living in the same house were plundered of their several properties at the same time, and sued jointly for the value of the properties plundered, the objection of misjoinder was not allowed to prevail; and Loch, J., in delivering the judgment of the Court, said: "The cause of action is common to both, viz. the attack on their residence; the time when the injury complained of was committed, is one and the same, and the parties who committed the injury are also the same in both cases. No Court is ousted of its jurisdiction by the form of this action, and the irregularity, if any there be, does not injure the defendants, but is in their favour, inasmuch as they have to defend one instead of two actions; and justice can be done in the form in which the suit has been brought. The cause, the time, the place, and the parties charged, being the same in both instances, the fact that plaintiffs have not a joint interest in the whole of the property plundered by the defendants is insufficient to put them out of Court." (6)

Cause of action is essentially different from subject-matter, and the cause of action mentioned in sect. 26 in the last Code could not in any case be identical with the subject-matter, the identity of which was generally held to be the

(1) Ali Serang *v.* Beadon, 11 C. 524 (1885).
(2) Hukm Chand, C. P. C. 379.
(3) Ramanuja *v.* Devanayka, 8 M. 361 (1885)
(4) Varajlal *v.* Ramdat, 26 B. 259 (1901).
(5) Aldridge *v.* Barrow, 34 C. 662 (1907).
(6) Jugobundhoo Dutt *v.* Maseyk, 1864, W. R. 81. See Hukm Chand, C. P. C. 379.

test of the application of the corresponding early rule of the English Supreme Court. The rule enacted in that section was narrower or broader according as the cause of action was understood in the broad or restricted sense above mentioned.(1) Thus in the case (2) to which reference has already been made, Innes, J., observed that if some such words as "*in respect to a particular subject-matter*" stood in place of "*in respect of the same cause of action,*" the suit might not have been bad for misjoinder; but that "looking to the language of sect. 26, and that of the latter part of sect 54. (of the former Code), as they jointly stand, it appears to us that the Code does not authorize the joining of plaintiffs in a suit in respect of distinct causes of action, in which they are not interested, and their interests are not merely conflicting but antagonistic." On the other hand, Tyrrell, J., in pointing out (3) the distinction between the cause of action and the subject-matter, observed that "the plaintiffs had distinct and separate subject-matters of action, to wit, their separate shares in the estate possessed for her life by the widow in alienating the property to N., to the jeopardy of the future rights of the plaintiffs as her reversionary successors to two-thirds of the estate;" and that "the plaintiffs therefore, though unconnected and separate in respect to the subject-matters of the suit, were conveniently and rightly joined in vindicating the one interest common to them all, centreing in the main issue in the case, which was simply the nature and extent of the widow's dominion over the estate she admittedly possessed."

With a view to meet these various difficulties the Legislature has now omitted all reference to cause of action, and broadened the rule of joinder in accordance with the procedure of English Courts, as to which *vide ante*.

"**Jointly.**"—Thus where a person sued his brothers for his share of their deceased father's estate, but was transported for life, his sons were made co-plaintiffs, on the ground that they would be co-owners with their father in the ancestral estate; the High Court observing that "it is true they would be in law sufficiently represented by their father, but in fact they might not be represented effectually." (4)

"**Severally.**"—In the Court of Chancery there were many cases in which co-plaintiffs might severally be entitled to the same relief and might, before the Judicature Act, have been properly joined although their claim was neither joint nor alternative.(5)

"**In the alternative.**"—These words apply to cases in which there is a doubt as to who is the person entitled to sue upon the cause of action, as in the case of a sale to an agent, in which it may be doubtful whether the principal or agent should sue, or to cases where parties have different and conflicting interests in the same subject-matter, and an act is committed which gives the same cause of action to either party, according to the eventual determination of the Court as to which of the two is entitled to recover:

(1) Hukm Chand, C. P. C. 379.

(2) Lingammal *v.* Venkatammal, 6 M. 239 (1882).

(3) See Ram Sewak Singh *v.* Nakched Singh, 4 A. 261 (1882).

(4) Narakka *v.* Narayana, 6 M. 331 (1883).

(5) Smurthwaite *v.* Hannay, A. C. 501 (1894).

as in a case in which the plaintiffs were respectively a Receiver appointed to take possession of and manage a colliery business and other persons who were executors of the will of an equitable mortgagee of the colliery. They sued for damages for a wrongful levy of execution against the colliery, which was a trespass giving rise to a right of action in which the plaintiffs were severally or, at all events, alternatively interested.(1) In a subsequent decision, in which this passage was cited, the Court said, with reference to the view taken in the earlier case as to the meaning of the term "*cause of action*": "We feel, no doubt, that the cases here suggested are among those to which the words '*in the alternative*' are intended to apply; but what we feel some difficulty in understanding is as to how the principal and agent in the one case, and the parties having different and conflicting interests in the other, can be said to have the same cause of action, if that expression be taken to include the facts which constitute the right and its infringement, when the facts which constitute their rights must be different."(2) A plaint was held not to be bad because it prayed for a decree in favour of all the plaintiffs in certain allegations, or in the alternative, in favour of one of them, if other allegations should be proved.(3)

Rule 2. Separate trials.—See notes to O. II. r. 6.

Rule 3. Joinder of defendants.—The third rule (4) (which [modified to meet the amendments made in r. 1] corresponds with sect. 28 of the last Code) is now substantially the same as r. 4 of O. XVI. of the Rules under the Supreme Court of Judicature Act, 1873. The former section differed from it in that the Indian Legislature had introduced the words "*in respect of the same matter*." The English rule has been construed to embrace cases in which the cause of action is not the same,(5) but not those in which the actions are based on entirely disconnected acts.(6) The terms of the English rule were held to be wider and more general than the terms of the former section,(7) specially as its application was subject to ss. 44, 45 of the former Code, dealing with the joinder of distinct causes of action. It was said with reference to the former Code that the Indian Legislature had in several ways shown that it did not intend to introduce here the wide latitude as to the joinder of parties allowed in English Courts.(8) It thus altogether omitted to enact any provisions corresponding to rr. 48-55 of the Order, dealing with the third party procedure, and to rr. 5 and 7 of the Order, the former of which provides that "it shall not be necessary that every defendant

(1) Lingamma v. Venkatammal, 6 M. 239, 243, 244 (1882).

(2) Haramoni Dass v. Hari Churn Chowdhry, 22 C. at p. 840 (1895).

(3) Lakshmakka v. Nagi Reddi, 28 M. 500 (1904).

(4) See Hukm Chand, C. P. C. 408.

(5) Child v. Stenning, 5 Ch. D. 695.

(6) See Muthappa Chetty v. Muthu Palani, 27 M. 80 (1903), citing Burstall v. Beyfus, 26 Ch. D. 35; Saddler v. Great Western Railway Co. (1896), A. C. 450; Gower v. Couldridge (1897), 1 Q. B. 348.

(7) Muthappa Chetty v. Muthu Palani, 27 M. 80 (1903). But in Kovouri Basivi v. Tallaparagada, 35 M. 39 (1910), it was held that the test whether sect. 28 of the last Code applied was not whether the causes of action were the same, but whether the relief was sought in the same matter.

(8) See Narsingh Das v. Mangal Dubey, 5 A. at p. 170 (1882).

shall be interested as to all the reliefs prayed for, or as to every cause of action included in any proceeding against him." English r. 7 provides that "where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties." These observations are no longer applicable. The limiting words "*in respect of the same matter*" have been omitted; the English rr. 5 and 7 have been incorporated in the present Code as rr. 5 and 7 of the present Order; and power has been given to promulgate further rules. The question of the joinder of defendants must now be dealt with on principles substantially the same as those which govern the English Courts in the same matter.

Persons.—See notes, p. 513, *ante*. In the under-mentioned case,(1) it was held that the rules by which the Poona Cantonment Committee was created, did by implication, though not by express words, create the committee a corporation for the purposes of the conservancy of the cantonment. It could therefore sue, and be sued, in its own name, on contracts entered into in its corporate character.

"**May be joined.**"—It was held that the provisions (2) of sect. 28 also, like those of sect. 26 of the last Code, were neither imperative (3) and obligatory, nor exhaustive. The third rule is in the same terms as sect. 28 of the Code of 1882, except as to the omission (which is of importance) of the words "*in respect of the same matter*," and the introduction of words which bring it into conformity with r. 1. Additional power to make certain persons defendants is given expressly by r. 6, and there are several other cases in which persons may, and in fact must, be joined as co-defendants, though "*any right to relief*" is not alleged, and cannot be alleged, to exist against them. Reference may be made to the case of co-sharers and others, who ought to join as co-plaintiffs, and in their refusal to join as such, must be joined as co-defendants. There are, besides, persons against whom no right to relief exists, or is alleged to exist, and against whom no relief is or can be claimed, but who must be joined as co-defendants for an effective and final determination of the suit, or "*whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit*," and whom the Court may, on that account, implead under r. 10, and therefore it must be permissible for the plaintiff to implead as defendants in a suit. In the case noted,(4) the minor brother of a person who had entered into a contract was held to be rightly joined as a defendant, even though no decree for specific performance, such as was asked against the party to the contract, could be asked against him; the decision proceeding on the ground that the plaintiff was interested in having the minor before the Court, "in order to obtain an adjudication against him, as well with regard to the existence of the contract as with regard to the question

(1) Cantonment Committee, Poona *v.* Bujorji, 14 B. 286 (1889).

(2) Hukm Chand, C. P. C. 409.

(3) Lodai Mollah *v.* Kolly Dass, 8 C. 245 (1881).

(4) Alagappa *v.* Sivaramasundara, 19 M. 211 (1894).

whether the contract is of such a nature as to be binding on him." A leading instance of this necessity of joinder is found in the case of suits on mortgages, in which, on the grounds of equity and good conscience, it has long been considered a general rule in England, as well as in India, that all the persons having an interest in the mortgaged property must be impleaded as parties.(1) Unlike the right of joint contractees, when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise.(2) And in suits on joint torts, the tortfeasors may be sued jointly or separately at the option of the plaintiff, as their responsibility has been held to be not only joint, but several also.(3) The distinction between this rule and r. 10 is this: the former refers to the action of a plaintiff at the time of presentation of the plaint in joining in the same suit as defendants, parties against whom the right to any relief is alleged to exist; while the latter refers to the action of the Court at a stage subsequent to the presentation of the plaint in adding a party either as plaintiff or defendant, whose presence, in the opinion of the Court, is necessary.(4)

The Code does not contain any express provision as to who should be considered necessary parties, and what would be the effect of the omission of a plaintiff to bring on the record all necessary parties. R. 13, however, by implication shows that an objection for want of parties is a valid objection to a suit or proceeding; and this section and r. 10 by implication show who are to be deemed necessary parties. Reading this and r. 10 together, it has been held that in order that a party may be considered a necessary party defendant, two conditions must be satisfied—*first*, that there must be a right to some relief against him in respect of the matter involved in the suit; and *second*, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.(5)

In a recent case in the Allahabad High Court where mortgagees, suing for recovery of the whole of the mortgage-money by sale of the mortgaged property, omitted by an oversight to implead persons who owned a share in the property distinct from the shares owned by the other defendants, it was held that only so much of the claim should be decreed as related to the latter shares.(6)

It is necessary, however, to concur in the language of Judge Story, in which he states the impossibility of laying down any rules which shall be of universal application to the joinder of parties in equity, observing that "whether the common formulary be adopted, that all persons materially

(1) Hukm Chand, C. P. C. 409. This rule has been enacted in s. 85 of the Transfer of Property Act, 1882. Under this rule the plaintiff "may," but under s. 85 of the Act cited (now incorporated in the Code as O. XXXIV. r. 1) he must, make persons, of whose interest he has notice, parties to the suit. See Lala Surja Prosad *v.* Golab Chand, 27 C. 724, at p. 759 (1900); Sidheswari Prosad *v.* Dharanjit Narain, 19 C. L. J. 437 (1914); Ganeshi Lal *v.* Charan Singh, 35 A. 247 (1913).

(2) Contract Act, s. 43.

(3) See cases cited in Hukm Chand, C. P. C. 413.

(4) Sailajananda *v.* Umeshananda, 4 C. W. N. 462, 464 (1899).

(5) Durga Charan Sarkar *v.* Jotindra Mohun Tagore, 27 C. 493, at p. 497 (1899).

(6) Ganeshi Lal *v.* Charan Singh, 35 A. 247 (1913); 17 C. W. N. CCLXXXVII.

interested in the suit, or in the subject of the suit, ought to be made parties, or that all persons materially interested in the object of the suit ought to be made parties, we express but a general truth in the application of the doctrine, which is useful and valuable, indeed, as a practical guide, but is still open to exceptions and qualifications and limitations, the nature and extent and application of which are not, and cannot independently of judicial decision be always clearly defined."(1)

In a suit for declaration of right against a proprietor of an estate it is necessary that the proprietor himself be made a party to the suit, not his *karindah* only. A decree against the latter does not bind the former. The *karindah* may, of course, be retained as a party if it is intended to make a personal claim against him.(2) As regards benamidar plaintiffs, see *ante*. A plaintiff is entitled to a decree against a benamidar defendant who has covenanted with him for the quiet enjoyment of property.(3) In a suit for rent, defendant pleaded non-liability on the ground that he was a benamidar and that the *jote* belonged to A. It was held that the Court was not competent to introduce A into the suit, against whom no relief had been sought by the plaintiff.(4) *Darputnidar* and *Seputnidar* are proper, though not necessary, parties.(5) In a suit for pre-emption the vendor is not a necessary party.(6)

"Any right to relief."—It is not necessary that the relief to which the right is alleged to exist should be the same.(7) Whether there is a right to relief in any case depends on the principles of the substantive law applicable, and reference is made to a few typical cases in the text-book cited.(8) In the under-mentioned case,(9) the absent decree-holders were held not to be merely parties against whom the auction-purchaser defendants were entitled to claim some indemnity, but persons against whom a right to relief existed in the plaintiff if the suit was well founded.

"In respect of or arising out of the same act or transaction."—See notes, *ante*, in particular note under same title, and the next paragraph but one, *post*.

"Jointly, severally, or in the alternative."—The right to relief may exist jointly, severally, or in the alternative.(10) These latter words refer

(1) 1 Story, Eq. P. C. 76 (c).

(2) Madho Rao *v.* Thakur Pershad, 4 Agra. 127 (1868).

(3) Somasundaram *v.* Fischer, 19 M. 60 (1895).

(4) Moharance Surno Moyee *v.* Bykunt Chunder, 25 W. R. 17 (1876) [defendant dead when plaint filed: Court cannot hear or receive written statement from person not a party].

(5) Upendra *v.* Sheikh Sobhan, 15 C. L. J. 6 (1911).

(6) Harbans *v.* Tota Sahu, 32 A. 14 (1909).

(7) Alagappa *v.* Sivaramasundara, 19 M. 211, 215, 216 (1894), *vide ante*, p. 524.

(8) Hukm Chand, C. P. C. 415–418, where also will be found discussed the question as to how far public officers and Government may be made defendants.

(9) Durga Charan Sarkar *v.* Jotindra Mohan Tagore, 27 C. 493, 496, 499 (1899).

(10) For illustrations, see notes to Annual Practice, 1914, Ord. XVI. r. 4, and Hukm Chand, C. P. C. 418, 419. In the recent case of Muthappa Chetty *v.* Muthu Palani, 27 M. 80 (1903), the plaintiff was held not entitled to sue jointly or in the alternative. But this case has not been followed in Aiyathurai *v.* Santhu Meera, 31 M. 252 (1908).

primarily to cases like those of principal debtor and surety in which both are liable, but the creditor may, at his option, enforce his right against either, though not against both. They are not restricted, however, to those cases, and find application also where the plaintiff has no option, and the liability depends on the facts as they may be found.(1) Thus, in suits on contracts entered into by an agent and repudiated by the principal, both the principal and the agent may be joined as defendants with a claim for relief against them in the alternative.(2) Where the claim was to have a *mokurrari* patta enforced as against the co-sharer granting it and the other co-sharers who repudiated it, and in the alternative to have the *salami* paid for the patta returned, it was held that the suit was in substance to enforce a contract to place the plaintiff in possession of the land under the patta and to declare his rights to it as against all the defendants, and to ask for compensation as against the defendant granting it; and that such alternative claims might be allowed against one or more of the defendants.(3) In a suit by a purchaser of land for arrears of rent against the tenant and the vendor, to whom the tenant alleged having paid the same, the two defendants were held to be properly joined, and a decree against the vendor was sustained on appeal.(4) The plaintiff in a suit to recover money from certain persons alleged to have borrowed money from his agent, is entitled, when the alleged debtors deny the loan, to make his agent a co-defendant and pray for a decree in the alternative against such agent.(5)

Omission of the words "in respect of the same matter."—It was a subject of doubt under the Code of 1882 whether the use of the two expressions "*cause of action*" and "*same matter*," in sects. 26 and 28 respectively of that Code, was intended to convey any distinction. As already pointed out, r. 1 now omits all reference to cause of action. The subject will be found further discussed in the notes to O. II. r. 3, dealing with the question whether that rule is a proviso to this. Whether the terms be synonymous or the latter more comprehensive than the former, it was held that if there were but one cause of action the joinder of defendants was justified.(6) On the other hand, where there were separate causes of action against separate sets of defendants, it was held that the trial could not proceed.(7) The difficulty arose in cases where, though there may be strictly different causes of action, the joinder was sought to be justified on the ground that there was yet "*the same matter*," as to which see O. II. r. 3, *post*. This raised the question whether, assuming that the latter term was more comprehensive than "*cause of action*," sect. 28 of the last Code (corresponding with rule 3 of this order) was not controlled by the section corresponding with O. II. r. 3, *post*; (8) and that was the basis of the decision in

(1) Hukm Chand, *op. cit.*

(2) Buddree Doss *v.* Hoare, 8 C. 170 (1882).

(3) Rajdhur *v.* Kalikristna, 8 C. 963 (1882).

(4) Madan Mohun Lal *v.* Holloway, 12 C. 555 (1886).

(5) Meyappa Chetti *v.* Perrannan Chetti, 29 M. 50 (1905).

(6) Loke Nath *v.* Keshab Ram, 13 C. 147, 152 (1886); Ishan Chandra *v.* Rameshwar, 24 C. 831 (1897).

(7) Ram Prosad *v.* Sachi Dassi, 6 C. W. N. 585 (1902).

(8) Hukm Chand, C. P. C. 422.

a case (1) in which the Punjab Chief Court held that a suit by a person to set aside the attachments, made on different dates at the instance of different defendants, of various sums to which the plaintiff was entitled, was bad for misjoinder of causes of action; as also that an order merely for the distribution of assets among several persons under sect. 295 of the former Code did not give a cause of action to a person considering himself entitled to the assets, and that a suit against those persons was not tenable, though it may be that where several decree-holders combine in getting an order of distribution passed to the prejudice of another decree-holder who is solely entitled to the money in the hands of the Court, the latter is entitled to have the question decided in a single joint suit against the former, as well as to recover the monies severally realized by them under the order, as was the case in No. 90, P. R., 1892, and in Gowri Prosad *v.* Ram Ratan.(2) In Gangabai *v.* Bal,(3) 148 persons were joined as defendants, and there was held to be no misjoinder, as the order which the plaintiff sought to have reversed or modified was common to all the defendants, and the plaintiff's claim to relief, in so far as that order was concerned, existed against all the defendants jointly. In the undermentioned suit (4) the matter was held not to be the same, the matter in the one case being an alleged breach of contract by an agent of the firm, and in the other being the right of one partner in the firm as against the other partner to have accounts taken and the partnership wound up. Where a number of persons join fraudulently in combination do some act which leads to plaintiff's ouster from the full enjoyment of his proprietary right, they may all be joined in one suit.(5) So, also, in a suit for damages for assault against several persons, they may all be joined together, if it was simultaneously "made by parties proceeding together and acting in conjunction as to time, place, and assault," as the assault is in such a case only a single act.(6) Where a suit was against two defendants uniting two causes of action, one of which was stated to have arisen out of a joint account of the defendants, and the other out of a transaction in which defendant No. 1 alone was concerned, it was held that the right to relief against the defendants *quoad* the second branch of the claim could not be said to exist, whether jointly, severally, or in the alternative, in respect of the same matter, so as to justify the joinder in the one suit under the former section.(7) A suit (8) against one defendant was for specific performance of a contract to sell land and as against another for a declaration that he was not entitled to any charge upon that land; and Sargent, C.J., held that the relief claimed against the two defendants could not be said to be in respect of the same matter; the right to relief against one defendant being in respect of the non-fulfilment of the contract; and that against the other defendant in respect of a threatened disturbance of his possession. Where, on the other hand, both sets of

(1) Jhaman Lal *v.* Sant Lal (1897), P. R. No. 43; Hukm Chand, C. P. C. 422.

(2) 13 C. 159 (1886).

(3) (1898), B. P. J. 198.

(4) Muthappa Chetty *v.* Muthu Palani, 27 M. 80 (1903).

(5) Gujadhur Pershad *v.* Saheb Roy, 19 W. R. 203 (1872).

(6) Ramessur Bhuttacharjee *v.* Shib Narain, 14 W. R. 419; Varajlal *v.* Ramdat, 3 Bom. L. R. 878 (1901).

(7) Saina Mal *v.* Bag Husain (1888), P. R. No. 189.

(8) Lukumsey *v.* Fazulla, 5 B. 177 (1880).

creditors attached goods which the plaintiff claimed as his, and the plaintiff had to establish his ownership as against both, it was held that the right to relief against all the attaching creditors was in respect of the same matter.(1) The former section was held not to permit a tenant to bring a suit to have it determined which of two defendants, both of whom claimed rent from him, is his landlord ; (2) the High Court observing in the case cited, that "the plaintiffs had no cause of action against the second defendant beyond that he demanded rent from them and obtained a decree for that rent," and "their only cause of action against the first defendant was that he had, on some other occasion, demanded and received rent from them," and "that cannot be considered the '*same matter*' within the meaning of the section." In a recent case decided under the last Code it was broadly held that the general principle governing the joinder of defendants was, that there must be a cause of action in which all the defendants are more or less interested, although the relief against them may vary, but that separate causes of action against separate defendants quite unconnected not involving any common question of law or fact could not safely be joined in one action.(3) In a recent case under the present Code it has been held that the first condition to be fulfilled before joining several persons as co-defendants is that the right to relief must arise against them all from the same act or transaction (or the same series of acts or transactions), and the second condition is that some common question of law or fact would arise against them if separate suits were brought.(4)

The Legislature, recognizing that the words under discussion have given rise to great difficulty, have followed the wording of the English rule and omitted them. *Vide ante*, and notes to O. II. r. 3.

4. Judgment may be given without any amendment—

Court may give judgment for or against one or more of joint parties.

(*a*) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to ;

(*b*) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

"**Judgment may be given,**" **etc.**—Misjoinder of plaintiffs is only a plea in abatement and rather to the form than the substance of the action. It ought not therefore, if possible, to defeat the action altogether unless the defendant has been prejudiced. The provision here referred to is obviously based on the principle that the misjoinder of a party as plaintiff, to whom the relief claimed could not be awarded whilst there are others to whom it might

(1) Raghunath *v.* Sarosh, 23 B. 266 (1898).

(2) Koylash Chandra Dutt *v.* Goluk Chunder Poddar, 2 C. W. N. 61 (1897). As to the joinder of the purchaser of a tenure, see Sm. Jogemaya Dassi *v.* Girendra Nath Mookerjee, 4 C. W. N. 590 (1900).

(3) Mowji Monji *v.* Kuverji Nanaji, 31 B. 516 (1907).

(4) Umabai *v.* Bhan Balwant, 34 B. 358, 366 (1908).

be awarded, is a mere defect of form which is not fatal to the action.(1) Where a person and the widowed daughter-in-law of his deceased father sued for pre-emption as joint co-sharers, and the widow was found to be entitled only to maintenance and therefore not to be a co-sharer, it was held that a decree could not be given to the other plaintiff without an amendment of the plaint, and as it was too late to amend the plaint, the suit was altogether dismissed.(2)

"**Respective liabilities.**"—The liabilities of all the defendants need not be the same, and there will be no misjoinder if some of the defendants are found not to be liable. Thus, if in a suit against six persons for possession of a certain share of land and in the alternative for its rent, the fact that only one of the defendants is found to be in possession and that a portion of the claim for rent is not sustainable against another defendant, is not a ground for dismissing the suit altogether for misjoinder of defendants.(3) An insolvent and his trustees have been sued together, though their liabilities were not the same.(4) It was held there was no misjoinder in a suit against two agents, one of whom was liable to account for twenty years and the other jointly liable with the former for the last two years of this period.(5) The suit, however, has been held to be bad where the plaintiff has united different causes of action in one suit against different defendants, who were not jointly liable in respect of each and all of such causes of action.(6) Where the defendants combined to keep the plaintiff out of his property it was held they were properly joined.(7) In the under-mentioned case the right to relief, so far as regards the first and second sets of defendants, was a right to relief against them severally, but the cause of action arose out of the single subject-matter, which formed the subject of the plaintiff's original mortgage.(8) Where there is no misjoinder of causes, a plaintiff is permitted to bring a single suit against a number of persons, even though some of them may not be interested in the entire subject-matter of the suit.(9) The general principle

(1) Ramanuja *v.* Devanayaka, 8 M. 361, 365 (1885); as to misjoinder of plaintiffs and causes of action, see Varajlal *v.* Ramdat, 16 B. 259 (1901).

(2) Karan Singh *v.* Muhammad Ismail, 7 A. 860 (1885).

(3) Janokinath *v.* Ramrunjun, 4 C. 919, 953 (1879).

(4) Ajudhia Nath *v.* Anant Das, 3 A. 799 (1881).

(5) Degamber Mozumdar *v.* Kallynath Roy, 7 C. 654, 657, 658 (1881).

(6) Narsingh Das *v.* Mangul Dubey, 5 A. 179 (1883); foll. in Bhagwati *v.* Bindeshri, 6 A. 106, 108 (1883), in which it was pointed out that joint interest in the main questions raised by the litigation was a condition precedent to the joinder of several causes of action against several defendants; expld. in Indar Kuar *v.* Gur Prasad, 11 A. 33 (1889).

(7) Omur Ali *v.* Weylayet Ali, 4 C. L. R. 455 (1879); foll. in Loke Nath Surma *v.* Keshab Ram, 13 C. 147, 152 (1886), in which the cause of action alleged was one and the same conspiracy. In Hira Lal Mozumdar *v.* Prosunno Chunder, 12 C. L. R. 556 (1883), the defendants were held to have but one defence. In Sudhendhu *v.* Durga Dasi, 14 C. 435, 439 (1887), and Ram Narain Dutt *v.* Annoda Prosad, 14 C. 681 (1887), it was held that the defendants had not combined and so there was no community of interest. In Ram Narain Dutt *v.* Annoda Prosad, 14 C. 681 (1887), it was held there was misjoinder of causes of action.

(8) Bungsee Singh *v.* Soodist Lall, 7 C. 739, 745 (1889).

(9) Muhammad Baksh *v.* Ramdat (1896), P. R. No. 5.

that the difference of the extent of the defendant's liabilities does no prevent a joinder of them in a suit is specially applicable in cases in whicl several properties comprised in an estate are alienated to different persons and all such alienees are allowed to be joined in one suit.(1) An un successful defendant may be ordered to pay the costs of the successfu one.(2)

Costs.—The second paragraph of sect. 26 of the last Code dealt with th question of costs. The words "*entitled to his costs*," etc., in that section referred to the joining of persons as plaintiffs, as mentioned in the first sentence of the section. The words in the corresponding English rul were held to refer to "the persons who bring the action, who act by one solicitor and who speak of themselves as the plaintiffs, though they allege that each of them has a separate right." (3) If one or some of the plaintiffs are successful, and the other or others unsuccessful, the successful were held liable to pay to the defendant the costs of the unsuccessful plaintiff,(4) and to recover from the defendant the whole of his general costs of the action; (5) Esher, M.R., observing in the case cited, that the last sentence of the section as to costs applies "as between a plaintiff who has succeeded in the action and a defendant who has failed." And it is a settled rule of Englis practice that the costs occasioned to the defendant by the joining of the unsuccessful plaintiff may be deducted from those payable by the defendant to the successful plaintiff.(6) The Select Committee in their report stated that they understood that in practice the provisions of sect. 26 of the last Code relating to costs was not operative in the Mofussil, and that part of the section has therefore not been reproduced.

5. *It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.*

Defendant need not be interested in all the relief claimed.

"**As to all the relief.**"—This rule, which is new, is taken from the first portion of O. XVI. r. 5 of the English rules. The words "or as to

(1) Hukm Chand, C. P. C. 427. See Sami Chetti *v.* Ammani, 7 M. H. C. R. 260 (1873); Vasudeva *v.* Kuleadi, ib., 290 (1873); Mahomed *v.* Krishnan, 11 M. 106 (1886); Abdul *v.* Ayesa, 12 M. 231 (1889); Chuhar Mall *v.* Bakhtwadi (1890), P. R. No. 149; Shoroop Chunder *v.* Mothoor Mohun, 4 W. R. 109 (1865); Krishna Gopal *v.* Hurry Nath Dutt, 25 W. R. 60 (1876); Haranund *v.* Prosunno Chunder, 9 C. 763 (1883). So in Ishan Chandra *v.* Rameswar, 24 C. 831 (1897) (approved in Umabai *v.* Vithal, 33 B. 293 (1908)), it was held that the reversionary heirs of a Hindu can, in a suit to set aside the separate alienations of several parcels of the husband's land, made by the widow, join the several alienees. Though see Ganeshi Lal *v.* Khairati Singh, 16 A. 279 (1894); Kachar Bhoj *v.* Bai Rathore, 7 B. 289 (1883), in which there was held to be misjoinder, each alienation being treated as a separate cause of action. The latter case has been distinguished in Umabai *v.* Vithal, 33 B. 293 (1908).

(2) Child *v.* Stenning, 11 Ch. D. 82.

(3) D'Hormusgee *v.* Grey, 10 Q. B. D. 13.

(4) Ib.

(5) Gort *v.* Rowney, 17 Q. B. D. 625.

(6) Umfreville *v.* Johnson, 10 Ch. App. 580; Hukm Chand, C. P. C. 380.

every cause of action included" which appear in the English rule have been omitted.

Joinder of parties liable on same contract.

6. The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties in same contract.—This rule, which corresponds with sect. 29 of the last Code, is the same as r. 6 of O. 16 of the English rules, except that the word "hundis" has been added. It is a modification of the general principle which required that wherever more than one person was liable to contribution to the plaintiff's demands, they should all be made parties to the suit.(1) The word "contract" is, however, to be construed strictly, and a liability to account under a will is not a liability under a contract.(2) In Baldeo Prasad *v.* Grish Chundar,(3) the endorsee of a cheque sued the endorser for a duplicate or the amount of the cheque said to have been lost, and the High Court ordered the plaint to be returned, so that the drawer might be joined as a defendant; but this was on the ground that a duplicate cheque could not be given by the endorser without the co-operation of the drawer. The rule is merely an enabling one, and does not prevent the joinder in any case in which it would otherwise be proper. Thus it has been held that the drawer and the acceptor of a bill of exchange may be joined as co-defendants in a suit brought by the holder.(4) When two out of three defendants liable for a joint debt had promised to pay separately it was held that the suit could proceed against them only.(5)

When plaintiff in doubt from whom redress is to be sought.

7. *Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.*

"Is in doubt."—This rule, which is new, is taken from O. 16, r. 7 of the English rules with some slight verbal modifications. It has been held under that rule that while alternative relief of different kinds may be given against alternative defendants,(6) it does not enable a plaintiff to bring separate causes

(1) (1905), Ann. Prac. 157.

(2) Smith *v.* Allen, 2 Ch. 349 (1891). As to the effect of this section, and s. 43 of the Contract Act, see Muhammad Askari *v.* Radho Ram, 22 A. 307, 316 (1900).

(3) 2 A. 754 (1880).

(4) Pestonjee *v.* Mirza Mahomed, 3 C. 541 (1878).

(5) Bhugabuth Thakur *v.* Madhub Kristo Sett, 23 C. 553 (1896).

(6) Honduras, etc., Co. *v.* Lefevre, 2 Ex. D. 307; Massey *v.* Heynes, 21 Q. B. D. 334.

of action against different persons in one action.(1) The costs of a successful defendant sued in the alternative may be ordered to be paid by the unsuccessful co-defendant.(2)

One person may sue or defend on behalf of all in same interest.

8. (1) Where there are numerous *persons* having the same interest in one suit, one or more of such *persons* may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of *or for the benefit of* all *persons* so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such *persons* either by personal service or, *where* from the number of *persons* or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf *or for whose benefit* a suit is instituted or defended under *sub-rule* (*1*) may apply to the Court to be made a party to such suit.

Scope of Indian and English rule.—It is a general rule that all persons interested ought to be made parties to a suit, howsoever numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the Court may be safely executed by those who are compelled to obey them, and future litigations may be prevented; also that a person who ought to be, but is not, a party to a proceeding is not ordinarily bound by any decree or order passed therein. This rule yields to the exigencies of particular cases, and there are well-established qualifications to it, such as the power of the Court under this rule to make a representative order.(3)

This rule, which corresponds with sect. 30 and a portion of sect. 32 of the last Code,(4) is the same as the English r. 9 of O. 16, except that in the present rule the word "suit" is substituted for "cause of matter," and it is here necessary to obtain permission of the Court for suing also, while under the English rule the permission is required only for defending a suit on behalf of others. The second sentence also has been added.(5) The effect of the statutory rule is merely to give Legislative sanction to the practice which long prevailed in the Equity Courts of England. The great risk from abatement, and the inconvenience and the expense involved in a great number of persons being parties, led those Courts to recognize the representative system, as it was not inconsistent with general principles that certain judicial proceedings taken by, or against,

(1) Thompson *v.* London City Co., 1 Q. B. 884 (1899); Frankenburg *v.* Great Horseless Car Co., 1 Q. B. 512 (1900).

(2) Sanderson *v.* Blyth, etc., 2 K. B. 533, C. A. (1903).

(3) Chudasama Sursangji *v.* Partapsang Khengarji, 28 B. 209 (1903); s. c., 5 B. L. R. 937. See also Hira Lal *v.* Bhairon, 5 A. at p. 607 (1883), which states one of the grounds on which the section is based.

(4) Hukm Chand, C. P. C. 431.

(5) See as to these amendments of the English rule, observations of Norris, J., in Oriental Bank Corporation *v.* Gobind Lall Seal, 9 C. 606, 607 (1883).

a select number as representing a large class might, if fairly and honestly conducted, bind or benefit the whole class.(1)

In the first place, the rule does not constitute but presupposes the existence of a right to sue, without which it can find no application.(2) The rule deals with procedure only, and does not affect substantive rights.(3) In the undermentioned case,(4) Shephard, J., referring to the case of Jan Ali *v.* Ram Nath,(5) observed that "it seems to have been considered that the granting of leave under the section would have made up for the insufficiency of interest disclosed in the plaint," but added that "with great deference, that view appears to be incorrect."

Nextly, assuming that a right of suit exists under the substantive law, the rule is merely an enabling one, allowing a suit to be instituted under certain circumstances by some of the persons interested on behalf of all.(6) Beverley, J., observed, in the case first cited, that "there are no words in the section to the effect that where persons have the same interest in a suit they are debarred from suing either jointly or severally unless they obtain the permission of the Court to sue on behalf of all the persons similarly interested;" and "the section does not forbid them from suing in their own right; it merely says that if they desire to sue on behalf of others, they must obtain the permission of the Court." Ameer Ali, J., after observing that "that section is an enabling section, and must be read in conjunction with Explanation V. to sect. 13" (corresponding with sect. 11), said: "The effect of sect. 30, therefore, to my mind is, that unless such permission is obtained by the person suing or defending the suit, his action has no binding effect upon the persons whom he chooses to represent. Where there is a joint right it may be necessary for all persons jointly interested to be joined as parties, and if they are not joined the suit may be bad for misjoinder. In order to prevent the record from being unnecessarily encumbered by many names, sect. 30 allows one or more persons having a joint interest to sue or defend with the authorization or permission of the Court on behalf of all. The section, in fact, embodies a rule of convenience based on reason and good policy, but in my opinion it was not intended to take away, nor does it take away, any right. It seems to me that sect. 30 does not give any warrant for the contention that because a person has a right in common with others he may not maintain an action for the establishment or enforcement of his own right. There is no obligation on him to sue or defend on behalf of others; and if he does not seek any relief on behalf of those who have an interest in common with him, or to bind them by his action, there is nothing in the section or in any other law to debar him from maintaining the action. Even if he were to bring a suit on behalf of himself and the others, he may choose to go on with the action on his own behalf, and would be entitled

(1) Jenkins *v.* Robertson, 1 H. L. Sc. 117.

(2) Anundrav Bhikaji *v.* Shankar Daji, 7 B. 323 (1883).

(3) Srinivasa Chariar *v.* Raghava Chariar, 23 M. at p. 31 (1897).

(4) Ib., 7 M. L. J. R. 281; 23 M. at p. 32 (1897).

(5) 8 C. 32, at p. 41.

(6) Baiju Lal *v.* Bulak Lal, 24 C. 385, 389 (1897). The Rule is permissive and not prohibitive: Srinivasa Chariar *v.* Raghava Chariar, 23 M. 28, 31 (1897); Gulba *v.* Kishan, 32 A. 284 (1910).

to do so, if he makes the necessary amendments. The English cases on the point are collected in Daniell's Chancery Practice,(1) and tend to show that the plaintiff, if he has a right in himself to bring an action, or the defendant if he has a right in himself to defend an action, is entitled to sue or to defend in any way he chooses without making any person a party to the action or to the defence, so long as the effect remains confined to himself." (2) As to execution, see the case cited below; (3) and as to public charity suits,(4) notes to sects. 92 and 93, *ante*.

"**Numerous.**"—There is no absolute rule as to what number will be considered sufficient, though in the case mentioned (5) twenty persons were not considered sufficiently numerous. A question as to the applicability, however, of the rule has arisen where the parties are numerous. This rule, as already observed, deals with procedure only and does not confer substantive rights of suit. Under the ordinary rule of the substantive law no action is maintainable by a private individual for an infringement of the rights of the general public, unless he has suffered special damage.(6) As this rule presupposes a right to sue it gives none where there is otherwise none. This rule does not therefore allow one or more persons to sue on behalf of the general public.(7) In the case therefore of an infringement of a right of the public at large no suit will be under this section, or at all, unless on proof of special damage, in which case either one person sues in respect of his individual right, and the rule does not apply, or if he should sue on behalf of others similarly specially injured, he sues on their behalf and not on behalf of the general public.(8) In the case cited(9) it was held that a suit could not be brought on behalf of a portion (10) of the general public, such as the Hindu community, as the entire Hindu community was incapable of ascertainment, and that the words "numerous parties" (in the former section) meant parties capable of being ascertained, as "seems clear from a reference to the provisions for service of notice upon all such parties." (11) No doubt the rule is often applied where the parties though numerous can be definitely ascertained, as in the case of

(1) P. 215, 5th ed.

(2) The same view was taken by Shephard, J., in Srinivasa Chariar *v.* Raghava Chariar, 23 M. 28, 32 (1897), where it was pointed out that there was an individual right to sue, and that if the course prescribed by this Rule was not followed in a case such as that dealt with, the only consequence was that the judgment did not bind the persons whose names were not on the record. In Kalidas *v.* Gor Parjaram, 15 B. 309, 319 (1890), and Tanudin *v.* Pandu, 18 B. 699 (1893), the corresponding section was held to be inapplicable, as the plaintiffs sued for themselves, and it was not a case of persons suing on behalf of a class.

(3) Sadagopachari *v.* Krishnamachari, 12 M. 356 (1889).

(4) Budree Das Mukim *v.* Chooni Lal Johurry, 33 C. 789 (1906).

(5) Harrison *v.* Stewardson, 2 Ha. 530, and *vide post*, notes on "Permission."

(6) Adamson *v.* Arumugam, 9 M. 463, 466 (1886); London Association of Shipowners *v.* London and India Docks, 3 Ch. D. (1892), at pp. 257, 270, and next note.

(7) Monmotho Nath Das *v.* Harish Chandra Das, 33 C. 905; s. c., 10 C. W. N. 867 (1906).

(8 Ib.

(9) Sajedur Raja *v.* Baidyanath Deb, 20 C. 397 (1892).

(10) See Monmotho Nath Das *v.* Harish Chandra Das, 33 C. 905; s. c., 10 C. W. N. 867 (1906).

(11) Sajedur Raja *v.* Baidyanath Deb, *supra*.

creditors,(1) legatees,(2) members of a *samaham*,(3) debenture holders, bondholders, club, and the like.(4) The rule, however, is not limited to such cases. The decision of the Madras High Court,(5) which was cited in the Calcutta case,(6) is not an authority for the principle laid down by the latter. The Hindu community,(7) no more than the Mahomedan community,(8) is not the general public but only a particular portion, though it may be a large one of the population of this country, which consists of various races and creeds.(9) Nextly, the observation of the Madras High Court that the section is "rather designed to allow one or more persons to represent a class having special interests," seems to show that the decision in the Calcutta case is incorrect, even according to the Madras decision which it approved.(10) Further, the provisions of the rule as to advertisement appear to have been overlooked, and, lastly, other decisions are not consistent with it. One or more persons have been allowed to represent classes of the general public having special interests, though they cannot sue on behalf of the whole general public. So suits have been allowed by one or more persons on behalf of others of a sect.(11) caste,(12) worshippers at a mosque,(13) parishioners of a church,(14) fellow villagers,(15) or class of villagers.(16) All these cases are suits on behalf of a defined class, though that class is composed of a more or less "indefinite number of persons." (17) Thus in one of the cases cited (18) two Brahmins were permitted to sue to enforce a trust for the benefit of Brahmins generally, of whatever kind or sect or place. In many if not in all of these cases, if the matter is looked at strictly, it cannot be said that all the parties are capable of being ascertained so that a notice might, if required, be served on each and all of them. An inquiry made for such a purpose would have no abiding result. While it was being made, and after it had been made, its subject-matter would

(1) Oriental Bank *v.* Gobind Lall Seal, 9 C. 604 (1883); see Manickavelu *v.* Arbuthnot, 4 M. 208 (1882).

(2) Geereeballa Dabee *v.* Chunder Kant, 11 C. 213 (1885).

(3) Chennu *v.* Krishnan, 25 M. 399 (1901).

(4) Ann. Pr. 1906, notes to Ord. XVI. r. 9.

(5) Adamson *v.* Arumugan, 9 M. 463 (1886).

(6) Sajedur Raja *v.* Baidyanath Deb, 20 C. 397 (1892).

(7) Monmotho Nath Das *v.* Harish Chandra Das, 33 C. 905; s. c., 10 C. W. N. 867 (1906).

(8) Jawahra *v.* Akbar Husain, 7 A. at p. 182; Ram Chandra *v.* Ali Muhammad, 35 A. 197 (1913).

(9) Monmotho Nath Das *v.* Harish Chandra Das, 10 C. W. N. 867 (1906); s. c., 33 C. 905.

(10) Ganaipati Iyer's Hindu and Mahommedan Endowments, cclxxxii.

(11) Srinivasa Chariar *v.* Raghava Chariar, 23 M. 28 (1897); Dhunput Singh *v.* Paresh Nath, 21 C. 180 (1893); Maharaj Bahadur *v.* Paresh Nath, 31 C. 839, 845 (1904); Raghava *v.* Rajaratnam, 14 M. 57 (1890); Baldeo Bharthi *v.* Bir Gor, 22 A. 269 (1900).

(12) Ganapati Ayyan *v.* Savithri Ammal, 21 M. 10 (1897); Monmotha Nath Das *v.* Harish Chandra Das, 10 C. W. N. 867 (1906).

(13) Jan Ali *v.* Ram Nath Mundal, 8 C. 32 (1881).

(14) Fernandez *v.* Rodriguez, 21 B. 784 (1897).

(15) Haradhone Dass *v.* Ramdoyal Rai, 21 C. 181 *n.* (1890); Kalu Kabir *v.* Jan Meah, 29 C. 100 (1901); Thanakat *v.* Muniappa, 8 M. 496, 499 (1885).

(16) Ahmedbhoy Habibhoy *v.* Balkrishna Mukund, 19 B. 391 (1894); Bhundal Panda *v.* Pandal Pos, 12 B. 221 (1887).

(17) To use the language of the Court in Srinivasa Chariar *v.* Raghava Chariar, 23 M. 28, 30 (1897).

(18) Ganapati Ayyan *v.* Savithri Ammal, 21 M. 10 (1897).

constantly be liable to change, owing to deaths and births, new arrivals and departures of the members of the class on whose behalf the suit was sought to be instituted. The limitation of this rule, therefore, to cases where the parties can be ascertained has been dissented from in a case in which it was held that the Satchari caste of Chatra was a defined class of the general public and that the suit had been properly instituted under the former section, whether all the members of such caste were or were not capable of being so accurately ascertained as that notices could, if required, be served on each and all of them.(1)

To sum up, no suit can be brought on behalf of the general public. A suit may lie on behalf of a class of the general public having special interests, though that class may consist of a more or less indefinite number of persons; as also on behalf of numerous parties who can, in the strict sense, be accurately ascertained, as in the case of a suit by a legatee on behalf of all other legatees.

"Persons."—"Parties" was the word used originally in the corresponding rule of the English law, but it has since been altered to "*persons*." In Oriental Bank Corporation *v.* Gobind Lall Seal,(2) it was contended, without success, that the word "parties" did not mean persons in the position of creditors, but "only parties necessary to the suit, without whose presence on the record the suit would be defective;" and Norris, J., observed that the word "parties" meant persons, and "that the provisions would be unintelligible unless the word received that meaning." In accordance with this decision the word "*persons*" has been substituted for the word "*parties*" in the former Code as being the more appropriate expression. As a result of the representative system enacted in this rule, the parties represented by another, though interested, will not be parties to the suit;(3) but they can apply to be made parties; and if any person thinks that he is not properly represented by the plaintiff, as holding different views from his, he should apply to be made a party personally.(4) It has been held that it is undesirable that individual creditors should be added as parties in an administration-suit, unless they can show strong reason to think that the person who has filed the suit on their behalf is not conducting it properly.(5) Though the effect of an order under this rule is that the parties, who have obtained permission to sue as representatives, have the conduct of the suit on behalf of all those they purport to represent; yet if any person is dissatisfied with the conduct of the suit, or deems that he is not properly represented, it is open to him to make an application to secure his views being properly represented, and if necessary to take the conduct of the suit out of the hands of those who by the permission of the Court represent him.(6)

(1) Monmotho Nath Das *v.* Harish Chandra Das, 10 C. W. N. 867 (1906); s. c., 33 C. 905.

(2) 9 C. 604, 606 (1883).

(3) Leathley *v.* McAndrew, Eng. (1875), W. N. 259.

(4) Watson *v.* Cave, 17 Ch. D. 19; Fraser *v.* Cooper, 21 Ch. D. 718.

(5) Vassonji *v.* Esmailbhai, 34 B. 420 (1909).

(6) Dhuncooverbhai *v.* Advocate-General, 1 Bom. L. R. 743 (1899).

A represented person should not be made a party simply for the security of the defendant's costs, as the Court may order security for them otherwise.(1)

"**Same interest.**"—The word "interest" in the corresponding English rule was formerly held to denote "beneficial proprietary interest." (2) But it has been more recently held that the rule is not confined to such cases, and that, given a common interest and a common grievance, a representative suit is in order if the relief sought is in its nature beneficial to all whom the plaintiff proposed to represent.(3) In the first of the cases last cited, it was held that the plaintiffs had a common right, which was invaded by a common enemy, and that they were entitled to join in attacking the common enemy in respect of the common right, although *inter se* they might have different rights. The identity of interest in a suit depends directly on the identity of the *relief* sought, and only indirectly on the *right* on the basis of which the relief is sought. The rule is therefore independent of the joint, common, or several character of the right sought to be enforced, except so far as that character may determine the nature of the relief sought. Whether a right is "joint," or "common," or "several," the rule is equally applicable or not applicable according as the relief sought is, or is not, the same in any of those cases.(4) Where there is a joint right all interested must sue, or some one or more may sue on behalf of the rest. Where the right is common or several, a complete option is given. Separate suits may be prosecuted by each of the persons interested, or if numerous parties possess the same interest, some one or more may sue on behalf of the rest under the terms of this rule. The matter has been well summarised by Shephard, J., (5) who said, "The rule of the Court of Chancery, to which the section owes its origin, appears to have been made applicable in two classes of cases. There are the cases in which the number of persons claiming *concurrent* interest in the subject-matter, and therefore, according to strict rule, *necessary* (6) parties to the suit, is so large that they cannot all be conveniently joined with any chance of bringing the suit to a conclusion. And there are the cases in which numerous persons have *distinct* but *similar* rights *which might be prosecuted in distinct suits*. For instance, there is the case of numerous creditors of the

(1) De Hart *v.* Stevenson, 1 Q. B. D. 313.

(2) Temperton *v.* Russell, 1 Q. B. 435 (1893).

(3) Duke of Bedford *v.* Ellis, A. C. 1 (1901), at p. 8; see lower Court, 1 Ch. 494 (1899); and cf. Taff Vale Ry. Co. *v.* Amalgamated Society, etc., A. C. 426, 443 (1901).

(4) Hukm Chand, C. P. C. 434, 435.

(5) Srinivasa Chariar *v.* Raghava Chariar, 23 M. 28, 31 (1897); s. c., 7 M. L. J. R. 286.

(6) Jawahra *v.* Akbar Husain, 7 A. at p. 182 (1884). The passage at p. 580, 17 C. (1889), Mohini Mohun Das *v.* Bungsi Buddan, was not meant to limit the rule to cases of joint rights strictly so-called. "Joint interests" was there used in the non-technical sense of "same interests." As to joint rights, see Nityanund Ghose *v.* Mohendro Kristo, 21 C. 181 *n.* (1889); Chuni Lall *v.* Ram Kishen, 15 C. 465 (1888); Lutifunnissa *v.* Nazirun, 11 C. 33 (1884); and see Jan Ali *v.* Ram Nath, 8 C. 32 (1881), where the right was treated as a joint one. [It has, however, since, been held, following Zafaryab *v.* Bakhtawar, 5 A. 497 (1883); Jawahra *v.* Akbar Husain, 7 A. 178 (1884), that the right of worship of each worshipper is an independent right wholly irrespective of the right of the other worshippers, and that neither the joinder of other worshippers nor leave under this section is necessary: Mohiuddin *v.* Sayiduddin, 20 C. 810, 816 (1893), and see as to individual rights, Kalidas Jivram *v.* Gor Parjaram, 15 B. 309 (1890).]

same person, or that of many persons claiming a right of common or right of fishing in respect of the same property." (1) As already stated, the rule is an enabling one, and therefore a person whose individual several right has been infringed may sue alone. But he may also sue on behalf of himself and others, whose individual rights have been infringed, if they have the same interest with him within the meaning of the rule.(2) Co-sharers in joint property have, however, not necessarily the same interest in a suit relating to that property. In Hira Lal *v.* Bhairon (3) the suit was by one co-sharer against three other co-sharers to prevent them from usurping exclusive possession of the joint land, and it was held that the suit would lie, and that the corresponding section to this rule did not apply to it, as though the remaining co-sharers would in such a case have co-parcenary or joint interest with the plaintiff in the subject-matter of the suit, they would not have the same interest in the suit, and would not be so "interested" in like manner as he was; as it might be "indifferent to them whether the defendants usurped exclusive rights in the *shamilat*, or it may be inconvenient to them at this moment to assert their own rights." And this decision was cited with approval in Dhunput Singh *v.* Pareshnath Singh,(4) in which it was held that the other persons of the *Sitambary* sect were similarly interested in suing, though the Digambary Jains were not similarly interested. It was held by a Full Bench of the High Court in Vasudevan *v.* Sankaran (5) that sect. 30 (corresponding to this rule) has no application to suits to which a *Karnavan* is a party in a representative capacity; Shephard, J., pointing out that the interest of the *Karnavan* "with his right of management and possession and his obligation to maintain the junior members, is surely not identical with the interest of a junior member who has a claim for maintenance only." It has been held that a suit is maintainable under this rule where a right to a village pathway is the subject-matter of litigation, even in the absence of special damage.(6) Where a party to a suit represents others under this rule, the decree is binding on those he represents; but when such a party disobeys an injunction (which is personal in its nature) and is proceeded against in execution for that disobedience, an order in such proceedings will not be binding on those whom he was allowed to represent.(7)

Permission.—The Calcutta High Court has held that the requirement as to the permission is imperative, so that where it is not obtained the suit

(1) In Ahmed[illegible]y *v.* Balkrishna, 19 B. 391 (1895); Bhundai *v.* Pandal Pos, 12 B. 221 (1888); Haradhone Dass *v.* Ramdoyal Rai, 21 C. 181 *n.* (1890); Kalu Khabir *v.* Jan Meah, 29 C. 100 (1901).

(2) In Jawahra *v.* Akbar Husain, 7 A. 178 (1884), at p. 183, Mahmood, J., said, that the rule only applied where no individual right was interfered with but what was meant was *necessarily* applied. There was in this case a private individual right, and it was therefore held that the plaintiff could sue alone and need not have recourse to this rule or ss. 92, 93, *ante*.

(3) 5 A. 602 (1883).

(4) 21 C. 189 (1894).

(5) 7 M. L. J. R. 102, cited in Hukm Chand, C. P. C. 436.

(6) Kali Charan *v.* Ram Kumar, 17 C.W.N. 73 (1912).

(7) Srinivasa *v.* Arayar Srinivasa, 33 M. 483 (1910).

must be dismissed.(1) and that the permission must have been obtained prior to the institution of the suit, and cannot be given at the hearing *nunc pro tunc*.(2) A Full Bench of the Bombay High Court, however, has held that permission may, as under the old Chancery practice in England, be given at any time, as it does not involve a question of jurisdiction, and is analogous to that of adding parties, and where a suit is defective as to parties the requisite parties can be added after the suit is filed.(3) The decision has been followed by the Allahabad High Court (4) and the Madras High Court,(5) the latter also holding that where leave had been given after the commencement of the suit it was immaterial that an application to sue had been previously refused. The permission need not be in express words.(6) In the case cited, Petheram, C.J., and Ghose, J., observed "that if permission can be well gathered from the proceedings of the Court in which the suit was instituted, the Appellate Court ought to hold that such permission was really granted." The Court should exercise a judicial discretion in granting the permission to some definite person or persons; (7) and permission should be given only if the number of persons suing or defending is so large as will fairly and honestly try the legal right in dispute,(8) and every right adverse to the opposite party would be represented.(9)

"**On behalf.**"—The first part of the rule implies that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same.(10) In a recent case the Court referring to this observation, though not deciding the point, observed that as the plaintiff sued on behalf of the sect of Digambary Jains, this section *primâ facie* applied, but that there was nothing to indicate that the other members of the sect wished to bring the suit.(11) The present section includes also the words "or for the benefit of." "*On behalf*" will only be so far as the "*same interest*" is concerned. Thus, an order appointing a person to represent a class such as the next of kin does not affect one of the next of kin who has a distinct and independent right,(12) nor will it affect the class except as regards the property which he can legally

(1) Geerceballa *v.* Chunder Kant, 11 C. 213 (1885); Nityanand Ghose *v.* Mohendro Kristo Ghose, 21 C. 181 *n.* (1889).

(2) Oriental Bank Corporation *v.* Gobind Lall, 9 C. 604 (1883), *per* Norris, J.

(3) Fernandez *v.* Rodrigues, 21 B. 784 (1897).

(4) Baldeo Bharthi *v.* Bir Gir, 22 A. 269 (1900).

(5) Chennu Menon *v.* Krishnan, 25 M. 399 (1901). In Srinivasa Chariar *v.* Raghava Chariar, 23 M. 28 (1897), it was also held that the granting of leave was not a condition precedent.

(6) Dhunput Singh *v.* Pareshnath, 21 C. 180 (1893) [followed in Kalu Khabir *v.* Jan Meah, 29 C. 100 (1901)], dissenting from dictum of Stuart, C.J., in Hira Lal *v.* Bhairon, 5 A. 602, 604 (1883), on which the decision in the case did not turn, and which was not approved by the other Judges. Ragava *v.* Rajaratnam, 14 M. 57 (1891), is not against this view, as it was simply held that the order in question did not intend to give permission; Dasondhay *v.* Muhammad, 33 A. 660 (1911).

(7) Kali Kanta *v.* Gouri Prosad, 17 C. 906, 910 (1890).

(8) Adair *v.* New River Co., 11 Ves. 429.

(9) Cramer *v.* Bird, L. R. 6 Eq. 143.

(10) Hira Lal *v.* Bhairon, 5 A. 602 (1883), *per* Straight and Tyrrell, JJ.

(11) Maharaja Bahadur Singh *v.* Paresh Nath Singh, 31 C. 839, 845 (1904).

(12) *In re* Last-Wilkinson *v.* Blades, 2 Ch. 793 (1896).

epresent.(1) It has been held that persons conducting a suit on behalf of themelves and others with the leave of the Court under sect. 30 of the last Code now represented by this rule) have authority to enter into a compromise, so as to bind those whom they represent. In such a suit all the members of the class represented are in effect parties; and any one of them is entitled to bring himself on the record as an actual party. There is no difference between the powers of the representatives in the original litigation and in appeal.(2)

Notice.—The notice must include the names of the persons who have been permitted to represent others, so that the persons interested may have an opportunity of knowing who have been selected to represent them.(3) It is the duty of the Court to cause service of the notices or advertisements to be published under this rule. If a plaintiff omits to move the Court for that purpose, his suit should not be dismissed on account of the failure of the Court to perform this duty.(4)

Misjoinder and non-joinder.

9. No suit shall be defeated by reason of the misjoinder *or non-joinder* of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

English and Indian rules compared.—This rule reproduces sect. 19 of the Common Law Procedure Act, 1860, and is now substantially the same with the first sentence of O. XVI. r. 11, as it appeared after the revision of the rules in 1883. Following the English rule the rule has now been amended to include the case of non-joinder also. The rest of Order XVI. r. 11 corresponds with portions of the following rule.

Misjoinder.—Misjoinder is of several kinds: (5) (*a*) *Of plaintiffs.* This is dealt with by this rule, which deals with misjoinder of parties only. There is no misjoinder where a plaintiff is entitled to recover all the estate sued for, and the name of another person is added merely as a matter of caution.(6) (*b*) *Of defendants.* This is also covered by the present rule. (*c*) *Of causes of action*, or subjects of suit. This class of misjoinder is dealt with by O. II. rr. 3–7, *post.* (*d*) *Of plaintiffs and causes of action.* This was impliedly forbidden by the second paragraph of this section in the last Code, read with sect. 26 of that Code.(7) But see now, *post*, "*Distinct causes of action.*" (*e*) *Of defendants*

(1) Sahib Thambi Marakayar *v.* Hamid Marakayar, 36 M. 414 (1911).

(2) Krishnamachariar *v.* Chinnamal, 24 M. L. J. 192 (1913).

(3) Kali Kanta Surma *v.* Gouri Prosad, 17 C. 910 (1890).

(4) Mukh Lal *v.* Jagdeo Tewari, 35 C. 1021 (1908).

(5) O'Kinealy's Civ. Pr. Code, s. 31.

(6) Bachubai *v.* Shamji, 9 B. 536 (1885).

(7) See Mohima Chandra *v.* Atul Chandra, 24 C. 540, 543 (1897), in which the frame of the suit was held to be bad, there being a misjoinder of two plaintiffs with two distinct causes of action, and see *post.*

and causes of action, or multifariousness strictly so called; that is, when one of the defendants is not interested in the whole of the relief sought. See notes to O. II., *post*.

Where a plaintiff alleging himself to be entitled on the death of a Hindu widow to the possession of certain immoveable property, upon the death of such widow brought a joint suit against three sets of defendants, being persons to whom the widow in her lifetime had by separate alienations transferred separate portions of the property claimed. *Held*, that such suit was bad for misjoinder of both parties and causes of action, and that sect. 578 of the former Code could not be applied to cure the defect: but the plaintiff was allowed on terms to withdraw his suit as against two out of three sets of defendants with liberty to bring a fresh suit on the same cause of action.(1) But see now sect. 99, which is amended to include misjoinder.

Nonjoinder.—Even before the revision of the rules in 1883, the Court, notwithstanding the absence of these words, treated the English rule as comprehending cases of "non-joinder" as well as "misjoinder."(2) It was said that it could not be legitimately inferred from the provision as to misjoinder that the suit "shall be defeated by reason of non-joinder of plaintiffs who ought to sue;" (3) and that a similar construction to that put upon the English rule should be followed here, the power given by the last clause of the first paragraph of this section in the old Code being held to amount to a direction to the Court not to dismiss a suit on the ground either of misjoinder or of non-joinder.(4) The amendment of the section now makes this point clear. The English rule, which corresponds with this and the next rule, was intended to do away with pleas in abatement and demurrers for want of parties.(5) The present remedy is to apply for the joinder of the party. The rule as to parties is for the purposes of justice, and the Court has ample powers under rule 10 to add parties whenever they ought to have been joined, or whenever without them the Court cannot deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.(6) So far as the initial stage of the suit is concerned, there can be no question. If an objection is taken by the defendant to the non-joinder of a necessary party, the Court will not dismiss the suit if an application be made to it by the plaintiff to add that party, but will add the party and proceed with the suit.(7) There is, however, this distinction between the two cases, that misjoinder of plaintiffs can never subsequently be fatal to a

(1) Ganeshi Lal *v.* Khairati Singh, 16 A. 378 (1894).

(2) Werderman *v.* Société Générale d'Electricité, 19 Ch. D. 246, 251, cited in Mahabala *v.* Kunhanna, 21 M. 373, at p. 383 (1898).

(3) Kale Khan *v.* Sera Ram, P. R. No. 153 (1889), p. 534, *per* Plowden, J.

(4) Mahabala *v.* Kunhanna, 21 M. 373, at p. 383 (1898).

(5) Ib.; Kendall *v.* Hamilton, 4 App. Cas. 504, *per* Cairns, L.C.; Robinson *v.* Geisel, 2 Q. B. 685 (1894).

(6) Mahabala *v.* Kunhanna, *supra*.

(7) Ramsebuk *v.* Ramlall Koondoo, 6 C. 815 (1881), at p. 823, though a question may arise whether the suit is not barred under the provisions of s. 22 of the Limitation Act.

suit; though non-joinder of a plaintiff in certain cases may.(1) An objection may be taken to misjoinder and no notice may be taken of it. If there has in fact been a misjoinder, the suit will be dismissed as regards the party misjoined and the Court will deal with the rights of the other parties.(2) Where, however, it is the right of the defendant if he takes the objection in proper time to insist upon all of certain persons being joined as plaintiffs; and if after the objection has been raised the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has been objected to and the Court finds that the objection is well founded, the suit must be dismissed.(3) A suit may be dismissed for non-joinder of persons against whom the plaintiff is entitled to relief in respect of the matter involved in the suit and whose presence is necessary in order to enable the Court to adjudicate upon all the questions involved in the suit.(4) Apart from cases where joinder of parties is required under the Common Law, the effect of non-joinder must also be considered with reference to any special statutory requirements which may exist on the subject. Thus, sect. 85 of the Transfer of Property Act required that all persons having an interest in the mortgaged property should be joined, provided that the plaintiff has notice of such interest. This section is now incorporated as r. 1 of O. XXXIV. As to the effect of non-joinder of persons interested in mortgaged property, see the cases undermentioned.(5)

The principle of this section should be applied, so far as may be, by Appellate Courts also.(6) In the case cited, the suit was for possession of a small corner of *gorah* land, which had been awarded to the plaintiff on a partition of the whole culturable land of the village. Only eleven of the proprietors were made defendants by the plaintiff, but the Original Court impleaded the entire proprietary body as co-defendants. On appeal, the

(1) Ramsebuk *v.* Ramlall Koon loo, 6 C. 815 (1881), at p. 825.

(2) Ib.

(3) Ib. at p. 823. Rajendronath Dutt *v.* Shaikh Mahomed, 8 C. 42 (1881), where a suit by three out of four shebaits was dismissed for non-joinder of the fourth. In Ramayya *v.* Venkataratnam, 17 M. 122 (1893), the objection of non-joinder was held not to be fatal, there having been an application to add party which was refused, and the plaint showing that the plaintiff sued in a representative capacity. In Mahabala *v.* Kunhanna, 21 M. 373 (1898), it was held that there was no non-joinder as one tenant in common could sue in tort without joining others. In Chief of Lundi *v.* Secretary of State, 14 B. 299, at p. 305 (1889), the Court in remanding the case said that the lower Court would consider whether certain persons should be joined after the fuller statement of the plaintiff's claim.

(4) Durga Charan Sarkar *v.* Jotindra Mohan Tagore, 27 C. 493 (1900).

(5) Janki Prasad *v.* Kishen Dat, 16 A. 478, F. B. (1894); Bhawani Prasad *v.* Kallu, 17 A. 537, F. B. (1895); Ghulam Kadir *v.* Mustakim, 18 A. 109 (1895) [non-joinder is fatal unless cured by action of Court under s. 29; where non-joinder Court will dismiss suit]. Sri Gopal *v.* Prithi Singh, 20 A. 110 (1897); Mehrbano *v.* Nader Ali, 22 A. 212 (1900); Baldeo Singh *v.* Jaggu Ram, 23 A. 1 (1900); Kudrat Ullah *v.* Kubra Begam, 23 A. 25 (1900); Krishnan *v.* Chadayan, 17 M. 17 (1892); Ramasamayyan *v.* Virasami Ayyar, 21 M. 222 (1898); Palani *v.* Rangayya, 22 M. 207 (1898); Sorabji *v.* Rattonji, 22 B. 701 (1898); Lala Suraj Prosad *v.* Golab Chand, 27 C. 724 (1900); Sidheswari Prosad *v.* Dharamjit Narain, 19 C. L. J. 437 (1914).

(6) Ali Mir *v.* Gulab Din, 1892, P. R. No. 5, cited in Hukm Chand .C. P. C. 442.

plaintiff again impleaded only eleven, contending that he could obtain full relief from them. The lower Appellate Court dismissed the appeal for the non-joinder of the other proprietors. The Chief Court held the dismissal to be wrong, and observed that the lower Appellate Court should either have decided "the appeal as between the parties before it, leaving with the plaintiff the risk of not having the other defendants before the Court," or, under O. XLI. r. 20 made them respondents. In a recent appeal under sect. 15 of the Letters Patent, where, in a suit instituted under the last Code, a co-sharer had omitted to join parties who were apparently his co-sharers, it was held by the Calcutta High Court that the suit was bad for misjoinder, since it was not under this rule but under sect. 31 of the last Code, which did not contain a saving clause in favour of non-joinder.(1)

"**Defeated.**"—If there is such a misjoinder as to cause inconvenience and expense to the defendant, the suit should not be tried, but the proper course will not be to dismiss the suit, but to reject the plaint.(2) Where there is no misjoinder of parties, but misjoinder of causes of action against the same defendant, the causes not triable conveniently should be tried separately or excluded under O. II. r. 6.(3) Where, however, there was misjoinder both of parties and causes of action, it was held that the suit should be dismissed.(4)

Distinct causes of action.—The second paragraph of this section under the last Code ran: "*Nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.*" It was not to be read as if it ran, "Nothing shall be deemed to enable a plaintiff to join distinct causes of action." This was clear from the provisions of sect. 45 of that Code, and O. II. r. 3 of this, which distinctly enable a plaintiff to join in the same suit several causes of action against the same defendant or the same set of defendants.(5) In this case, a plaintiff came into Court claiming a portion of the inheritance of a deceased Mahomedan on the allegation that he had by two separate sale-deeds of different dates purchased the property from two of the heirs of the deceased, and that the said property was withheld from him by another of the heirs of the deceased, who was in possession of some of it; and by certain transferees of other portions from the said heir. Both the remaining heir and the transferees from him were made defendants. Held that there was no misjoinder of parties or of causes of action in such a suit.(6)

The second paragraph was held not to apply where plaintiffs joined in respect of the same cause of action, as, for instance, where a widow and the son adopted by her to her deceased husband sued to have the deceased's property declared theirs, the widow admitting the adoption, and there being no antagonism

(1) Sheikh Fazu *v.* Sheikh Doman, 19 C. L. J. 455 (1914).

(2) Sudhendu Mohun Roy *v.* Durga Dasi, 14 C. 435 (1887).

(3) Janokinath *v.* Ramrunjun, 6 C. 949, 953, 954 (1879); Gur Prosad Singh *v.* Gur Prosad Lal, 19 C. L. J. 316 (1914).

(4) Ram Narain Dutt *v.* Annoda Prosad Joshi, 14 C. 681 (1887).

(5) Mazhar Ali Khan *v.* Sajjad Husain Khan, 24 A. 358 (1902).

(6) Ib.

between the claims of the two.(1) A Mahomedan widow and her daughter instituted a suit against her husband's heirs for their shares in the husband's property, the widow alleging that a certain conveyance and a release which she was induced to execute under a false representation were invalid; and the daughter relying on this and on the further allegation that the widow had no power in any case to execute the release so far as the daughter's share was concerned. For defendants it was contended that the suit was bad for misjoinder and multifariousness, but it was held that neither of these contentions was good. The plaintiffs sought their share of the family property and claimed that their shares had been improperly dealt with. It was true that the defendants set up different claims to the property, but they were all based on the validity or otherwise of the release.(2)

This paragraph no longer appears in the present rule, doubtless because of the amendments made in O. I. r. 1. Probably the position now is that where two or more plaintiffs base their claims to relief on a common ground within the meaning of that rule, claims may be united in the same suit.

Suit in name of wrong plaintiff.

10. (*1*) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

Court may *strike out* or add parties.

(*2*) The Court may at any *stage of the proceedings* either upon or without the application of either party, and on such terms *as may appear to* the Court *to be* just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(*3*) No person shall be added as a plaintiff *suing without a next friend* or as the next friend of a plaintiff *under any disability* without his consent.

Where defendant added, plaint to be amended.

(*4*) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons *and of the plaint* shall

(1) Fakirapa *v.* Rudrapa, 16 B. 119 (1891); foll. in Ningawa *v.* Ramappa, 5 Bom. L. R. 708, 710 (1903).

(2) Amirbibi *v.* Abdul Latif, 3 Bom. L. R. 658 (1901).

be served on the new defendant and, *if the Court thinks fit, on* the original defendants.

(5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against *any person* added as defendant shall be deemed to have begun only on the service of *the* summons.

Sub-Rule (1). English rule and Indian rule compared. This rule is an amalgamation of sects. 27, 32 and 33 of the last Code, and the first sub-rule corresponds with sect. 27 of the old Code.(1) The latter, as originally enacted, was the same as r. 2 of O. XVI. of the Supreme Court of Judicature Act, with the exception that the terms in which the substitution or the addition of the plaintiff could be ordered were not required to be "just," but such as "the Court might think just." Act XII. of 1888 inserted further in this section the words "at any stage of the suit," and "with his or their consent;" the former evidently to avoid the construction placed on the section by Pontifex, J.,(2) and the latter with reference to the construction placed on the English r. 2, in which a person was not allowed to be joined as a plaintiff without his consent.(3) This is now provided for by the third sub-rule. Sir Arthur Wilson, in explaining the effect of the first sub-rule, says: (4) "It has often happened that actions have been inadvertently brought by the wrong person—as by *cestui que trust*, instead of trustee; by mortgagor, instead of mortgagee. Often the same mistake has been made where it was a matter of real difficulty to say which of two persons ought to sue—as in the case of contracts made by agents, as to which it is often a question of much nicety to determine who ought to sue. Though the Common Law Courts had the largest powers of adding parties, or amending misdescriptions of parties, they had no power to substitute one plaintiff for another, such as this rule confers." (5) The same difficulty was experienced in British India, as the Courts had no power here also to substitute any person's name for the plaintiff's.(6) The rule, however, does not give a Court unlimited power to remodel the proceedings.(7) It has been held that the power given under this rule is not excluded in cases where the person originally suing has no right to institute the suit.(8)

"**Suit.**"—In the undermentioned case,(9) Banerjee, J., held that this word did not include an appeal, sect. 582 of the former Code (corresponding with sect. 107 of this) not making all the provisions applicable to suits applicable also to appeals. Maclean, C.J., expressed a grave doubt whether this word

(1) See Hukm Chand, C. P. C. 381.

(2) Chunder Coomar Roy *v.* Gocool Chunder, 6 C. 376 (1879).

(3) Tryon *v.* National Provident Institution, 16 Q. B. D. 678.

(4) Wils. Prac. 173. See Gopal Dass Agrawalla's *v.* Budree Das Sureka, 33 C. 657 (1906); s. c., 10 C. W. N. 662.

(5) De Gendre *v.* Bogardus, L. R. 7 C. P. 409.

(6) Judooputtee *v.* Chunder Kant, 9 W. R. 309 (1868).

(7) Turquand *v.* Fearon, 4 Q. B. D. 280.

(8) Krishna Boi *v.* Collector Tanjore, 30 M. 419 (1907).

(9) Dwarka Nath Biswas *v.* Debendro Nath Tagore, 4 C. W. N. 58 (1899).

and "plaintiff" could be read as including an "appeal" and "appellant." These doubts were, however, based on the wording of sect. 582. The drafting has now been altered, the first portion of sect. 582 standing by itself as sect. 107, and the latter portion being represented by O. XXII. r. 13. In an early case,(1) the High Court, in a special appeal, allowed the name of the real persons to be substituted for that of the receiver, who had by mistake brought the suit on their behalf in his name. And in Seshamma *v.* Chennappa,(2) the original Court dismissed the suit on the ground that the will relied upon was not genuine, and the lower Appellate Court on the ground that the suit was wrongly brought in the name of the plaintiffs as executors. The High Court, on second appeal, allowed an amendment by substituting the minor son as plaintiff with one of the original plaintiffs as next friend. In the converse case where a plaintiff sued in his personal, instead of his representative, capacity an order under this rule was made.(3)

The principle of the section has been, moreover, held to be of general application, and to apply analogically to a miscellaneous application also.(4) In the case cited, an application to raise the attachment of a property was made by the Official Assignee of Bombay as an attorney of the Official Assignee of Madras, and he was, instead of the latter, wrongly described as the applicant; and Strachey, J., held that as the affidavit annexed to the application showed the real fact, the application was not to be dismissed, but amended by the substitution of the correct name, and that the analogy of a plaint would, under this rule, support the amendment.

"**Doubtful.**"—So where it was doubtful whether a road contractor or the vestry ought to sue a tramway company which had injured the road, the vestry was therefore added as a co-plaintiff in a suit by the road contractor.(5) In the under-mentioned case the suit was filed by a benamidar. Parsons, J., said that he would hesitate before deciding that the suit was wrongly filed, but any defect there may have been was cured by the lower Court acting under this section.(6)

"**The right plaintiff.**" The question as to who is the right plaintiff will depend on the circumstances of the case in which the question should arise, and on the substantive law applicable. From a general point of view, it has been explained already who may be a plaintiff. Every person will be a right plaintiff in a suit if he could join as a plaintiff in that suit.(7) If, however, there has been a *bonâ fide* mistake the Court will rectify it. So where a suit was brought by one, X, as the authorized manager of Y, an amendment was made by striking out X and instituting Y, his employers, as plaintiffs in the case.(8) A case of misdescription must be distinguished from that of

(1) Juggernauth Pershad *v.* Hogg, 12 W. R. 117 (1869).

(2) 20 M. 467 (1897).

(3) Gopal Dass Agrawallah *v.* Budree Das Sureka, 33 C. 657 (1906).

(4) Sardarmal *v.* Aranrayal, 21 B. 205 (1896).

(5) Val de Travers Asphalte Co. *v.* London Tramways Co., 48 L. J. C. P. 312.

(6) Ravji *v.* Mahadev, 22 B. 672 (1897).

(7) Hukm Chand, C. P. C. 382; *vide ante*, p. 514.

(8) Subodini Debi *v.* Ganoda Kant Roy, 14 C. 400 (1887).

non-joinder.(1) The rule has been said to be applicable where it is found that a plaintiff cannot get the full relief which he seeks without joining some other persons as co-plaintiff.(2) It may, however, be a question whether in some cases, at any rate, such a joinder should not be made under sub-clause (2). Under this sub-rule there may be substitution, with which the second sub-rule does not deal,(3) or addition. In the case of the first sub-rule, the original plaintiff may be either a wrong plaintiff or a doubtful plaintiff. The second sub-rule deals with the case of a person who is a right plaintiff in the sense that he is a person who should sue though he may be a person who is unable to obtain relief unless others are joined as co-plaintiffs with him. The matter, however, is not one of practical importance unless it be correct, as has been held,(4) that a change of parties as plaintiffs under this sub-rule does not give rise to such a question of limitation as arises under the second sub-rule.

"**May.**"—The Court is not bound to add any person. In a case (5) apparently under the section corresponding to the second sub-rule, the Court over-ruled the defendant's objection as to the non-joinder of certain co-sharers of the plaintiff, but the lower Appellate Court decided it against the plaintiff. It was contended, on second appeal before the High Court, that that Court was bound to do justice by adding them as parties. The High Court observed, however, that "if the plaintiff has insisted upon his right to bring an action in the absence of his co-sharers, he must abide by the result; and that it is too late, at this stage of the case, for him to ask to be allowed an indulgence of which he did not avail himself when it was available."

"**Mistake.**"—The mistake may be either of law or fact.(6) Fry, J.,(7) considered that the corresponding rule of the English law did not apply where the plaintiff did not admit his mistake and insisted on his rights, but that while the Court could not substitute one plaintiff for another, except by the first plaintiff's consent, and where he admits that he has commenced his action improperly, yet in a proper case the Court will add a plaintiff under the second sub-rule. Where a son sued for his share in the family inheritance to which his father, then alive, was entitled, alleging that the father was insane, it was held that in the absence of anything to show that the father authorized the suit, the Court could not regard its being brought in his son's name and not in his own as a *bonâ fide* mistake, such as could be corrected under

(1) Kasturchand *v.* Sagarmal, 17 B. 413 (1892). In Mandardhar Aitch *v.* Secretary of State, 6 C. W. N. 218 (1901), it was held that there was no misdescription.

(2) Ayscough *v.* Bullar, 41 Ch. D. 341; and see Vadilal *v.* Shah Khushal, 27 B. 157 (1902).

(3) Heiniger *v.* Droz, 25 B. at p. 463 (1900).

(4) Subodini Debi *v.* Ganoda Kant Roy, 14 C. 400 (1887). See, however, s. 22 of the Limitation Act, which is not repealed by ss. 26–32 of the Code, and pp. 754, 756, 757, Mitra's Limitation Act, 4th ed. The dictum in this case does not appear to be correct, for if the substituted or added plaintiff is a new plaintiff, then s. 22 of the Limitation Act will equally apply in the case of the first as of the second sub-rule. This dictum has been recently doubted in Bhola Roy *v.* Jung Bahadur, 19 C. L. J. 5 (1913).

(5) Obhoy Gobind *v.* Hurrychurn, 8 C. 277 (1882).

(6) Gopal Dass Agrawallah *v.* Budree Das Sureka, 33 C. 657 (1906); Duckett *v.* Gover, 6 Ch. D. 82.

(7) Emden *v.* Carte, 17 Ch. D. 169, 173.

this rule.(1) An action, through a *bonâ fide* mistake, was commenced in th name of the wrong person as plaintiff, and the case on a point of law was decide against him. The original plaintiff then moved to substitute another as plaintif which was done.(2) There can be no *bonâ fide* mistake when the person askin to be substituted or added acquired his right to be a plaintiff since the institutio of the suit, and had no *locus standi* at the time of the institution.(3) Th mistake must be as to the plaintiff, because a mistake as to the defendant can b rectified only under the second sub-rule.(4)

"**Necessary for the determination.**"—Under this rule it is essentia that the order for substitution or addition should be necessary for the deter mination of the real matter in dispute.(5) It contemplates, it has been said only cases in which the necessity is of the joinder of a person as a plaintiff, an there can be no determination of the matter in dispute until such joinder—a case which chiefly arises in suits for the enforcement of or relating to join rights by persons jointly entrusted as co-contractors, joint-owners and co-sharer of property, or as members of joint families, or partners in business.(6) Th question who should be joined is part of the substantive law applicable to th case, and is not therefore here considered.(7)

"**Substituted or added.**"—There is no difference in principle whethe a plaintiff is added or substituted.(8) In the following cases, plaintiffs hav been substituted,(9) or added,(10) under this rule or the section corresponding t

(1) Muhammad Kalu Khan *v.* Saifulla Khan (1887), P. R. No. 91.

(2) Hughes *v.* Pump House, etc., Co., 2 K. B. 485, C. A. (1902).

(3) House Property Co. *v.* Horse Nail Co., 29 Ch. D. 190.

(4) See Challinor *v.* Roder, 1 Times Rep. 527; see Ganendra *v.* Surya Kant, 17 C. W. N. 462 (1912) [alleged mistake as to defendants].

(5) See Heiniger *v.* Droz, 25 B. 433, 464 (1900), in which the section was held to be inapplicable.

(6) Hukm Chand, C. P. C. 383.

(7) See ib. pp. 383–402, where the question is considered under the following headings :— p. 384 : "One of joint lessors cannot sue for his share of rent;" p. 385 : "Separate rent may be claimed under special arrangement among co-sharers;" p. 386 : "All co-sharers are necessary parties in a suit for relief by any co-sharer in respect of his own share;" p. 387 : "Suit by one of several persons entitled to equity of redemption for redemption of his own share;" p. 388 : "Suits by one of several mortgagees for sale or foreclosure;" p. 389 : "One of the heirs of a creditor cannot sue for his share of the debt;" p. 390 : "One of the heirs of a promisee cannot sue for his rights;" p. 392 : "In England co-contractees must be joined in a suit to enforce joint rights;" p. 393 : "Non-joinder of co-contractees not necessarily fatal in India;" p. 395 : "Case of persons jointly interested different from that of joint contractees;" p. 395 : "All joint lessors must be parties in a suit for rent by one of them;" p. 396 : "All co-sharers must be parties in a suit relating to joint property;" p. 396 : "Even in a suit by managing co-sharer;" p. 397 : "Suit by a member of a joint Hindu family;" p. 398 : "Manager of same cannot sue;" p. 399 : "All partners must be parties in a suit by one;" p. 400; "Suit by surviving partners; representative of deceased partner not necessary party;" p. 401 : "Persons jointly injured need not all be parties in a suit on tort."

(8) Hughes *v.* Pump House, etc., Co. (1902), K. B. 485, C. A.

(9) Ib.; The Duke of Buccleugh, P. 201, C. A. (1892).

(10) Caldwell *v.* Pagham Harbour etc., Co., 2 C. D. 221; and see Long *v.* Crossley, 13 C. D. 388; Bourke *v.* Davis, 44 C. D. 112. As to notice, see Tildesly *v.* Harper, 3 Ch. D. 277.

the second sub-rule. It is no objection to the substitution or addition of another person that the suit will fail even if he is substituted or added as the object of the provisions of the section is not that a party's case should be so framed as to succeed, but that it should be so framed that it can be adjudicated upon by the Court, whether in his favour or against him.(1) The institution of a suit by a wrong party cannot operate to keep alive the rights of one who by his delay has brought himself within the provisions of the Limitation Act.(2) It has therefore often been held that if the period of limitation has lapsed as regards the person added, the suit must be dismissed.(3) Although this rule only applies where the action has been commenced through a *bonâ fide* mistake as to the plaintiff, yet as the former section and sect. 32 of the former Code were both used together, the Court had full power under the combined rules to deal with all questions relating to the adding, striking out, or substitution of parties.(4)

Consent.—Reference to this has been struck out as it has been dealt with in the third sub-rule. No person is obliged to have his or her name added as plaintiff in a suit without his or her consent. And the justice of the rule is obvious, because the suit may be improperly brought; and if a party were made plaintiff without his consent, he might also be made liable to costs. If other parties should be joined as plaintiff, and they refuse to be joined, the proper course is to make them defendants, so that they are all before the Court, and the latter may make what order it considers just as to costs.(5)

"**Upon such terms.**"—Amendment is an indulgence, and the applicant will generally have to bear costs. The terms usually imposed are that, if the original plaintiff is found not to be entitled to maintain the action, he must pay the costs up to the time of the joinder or substitution, and that the plaintiff joined or substituted will be entitled only to such relief as he could have claimed if the action had commenced at the time of his joinder as plaintiff.(6)

(1) Long *v.* Crossley, 13 C. D. 388, 391.

(2) Kishen Loll *v.* Chunder Cooma Roy, W. R. 152 (1864).

(3) See cases cited in Mitra's Limitation Act, notes to s. 22; Hukm Chand, C. P. C. 403. As to whether s. 22 is applicable to change of plaintiffs under this section, *vide ante*. The question chiefly arises in suits on joint contracts by one or more of the promisees, or for joint rights by one or more of the co-owners where the remaining promisees or co-owners do not join until after the expiry of the limitation period.

(4) Annual Practice, 1906. See notes to O. XVI. r. 2.

(5) Uma Sundari Dasi *v.* Ramji, 7 C. 242 (1881); and see generally as to impleading defendants who refuse to concur in a suit, Rustum Ally *v.* Ameer Ally, 10 W. R. 487 (1868); Jagadamba Dasi *v.* Haran Chandra, 6 B. L. R. 526 *n.* (1868); Kanna Pesharody *v.* Narayanan, 3 M. 236 (1881); Kandhiya Lall *v.* Chandar, 7 A. 326 (1884); Kali Chandra *v.* Raj Kishore, 11 C. 618 (1885); Parameswaran *v.* Shangaran, 14 M. 489 (1891); Dwarka Nath *v.* Tara Prosunna Roy, 17 C. 160 (1889); Unni Nambiar *v.* Nilakandan Bhattathiripad, 4 M. 141 (1881); Shoshee Shekhareswar Roy *v.* Giris Chandra, 1 C. W. N. 659 (1895); Dwarka Nath *v.* Tara Prosunna, 17 C. 160 (1889); Jibanti Nath Khan *v.* Gocool Chunder, 19 C. 760 (1981); Tarini Kant *v.* Nund Kishore, 12 C. L. R. 588 (1882); Bisseswar Roy *v.* Broja Kant Roy, 1 C. W. N. 22 (1894).

(6) Ayscough *v.* Bullar, 41 Ch. D. 340. And see Long *v.* Crossley, 13 Ch. D. 388; Turquand *v.* Fearon, 4 Q. B. D. 282.

Origin and scope of sub-rule 2.—This clause, which as well as clauses 3 and 5 corresponds with sect. 32 of the last Code, is taken from r. 11, O. 16, of the English rules. The distinction between this clause and O. I. r. 1, is that the latter refers to the action of the plaintiff at the time of the presentation of the plaint in joining defendants, whilst this rule refers to the action of the Court at a stage subsequent to the presentation of the plaint in adding a party either as plaintiff or defendant.(1) It deals with joinder and not with substitution.(2) It does not apparently apply to divorce proceedings; (3) but the provisions of sect. 53 of Act I. of 1894 (Land Acquisition) are sufficiently large to allow the adaptation of this section to matters before the Judge referred to him by the Collector.(4) As to Revenue Courts,(5) see note. It was held under the Code of 1859 that the section should receive a very liberal construction; (6) and under the Code of 1882 that the section was wide enough to meet every case of defect of parties.(7) The section is not exhaustive, and it was held in the case cited below,(8) that even if it did not apply, the Court had, in the circumstances of that case, which dealt with a public trust, an inherent power to add new parties. The effect of the amendment of the section is to bring it into greater conformity with the English rule (*vide post*). The last clause but two of sect. 32 of the last Code is now incorporated in O. I. r. 8. Where in a suit for the recovery of possession of property, the plaintiff falsely denied the title of persons whom he had joined as defendants and asserted that an exchange by which he had transferred this property to the defendants had never been acted upon, but it was found that the exchange had in fact terminated his title and had been acted upon, and he could not sue the principal defendant, it was held that he had not made a *bonâ fide* mistake within the meaning of this rule.(9)

Court.—Upon the question whether the powers given by this rule are exercisable only by the Court of first instance, or both by it and a Court of Appeal, a distinction must be drawn between the case (A) where a person has been a party to the original suit, but is not a party to the appeal, and this may be (*a*) where the party to the original suit has died, or (*b*) has not been added a party to the appeal; and (B) where the person sought to be added has not been a party to the original suit.

Case (A) (*a*) is provided for by sect. 107. When the person alleged by the appellant to be the legal representative of a deceased respondent had been put on the record under these provisions, the Madras High Court held that the Court might add under this section another person who claims on good *primâ facie* grounds to be the representative of the deceased.(10)

(1) Sailajananda *v.* Umeshananda, 4 C. W. N. 462, 464 (1899).

(2) Heiniger *v.* Droz, 25 B. 433, 463 (1900); but see Annual Practice, 1905, p. 171.

(3) Ramsay *v.* Boyle, 30 C. 489 (1903).

(4) Kishan Chand *v.* Jagannath Prosad, 25 A. 133 (1902).

(5) Shib Gopal *v.* Baldeo, 2 A. 264 (1879).

(6) Nga Tha Ya *v.* Mi Khan Mhaw, 5 B. L. R. 371, 379 (1870); Vakatchand *v.* Advocate-General, 8 B. H. C. R. at p. 100 (1871).

(7) Bhola Pershad *v.* Ram Lall, 24 C. 34 (1896).

(8) Gyanananda Asram *v.* Kristo Chandra, 8 C. W. N. 404 (1901).

(9) Ganendra *v.* Surya Kant, 17 C. W. N. 462 (1912).

(10) Atheappa *v.* Ayanna, 8 M. 300 (1884), and under similar circumstances the Bombay High Court, following this decision, added a

Case (A) (*b*) is provided for by O. XLI. r. 20, so far as the addition of a person as respondent is concerned. The Court may in second appeal act under this rule, although the person added was not a party to the first appeal.(1) Under the Code of 1859 the Court exercised this jurisdiction under the section corresponding to the present one.(2) The Bombay High Court has held that the Court cannot make any person a co-appellant who was a party to the original suit but who did not appeal.(3)

As regards case (B), it is sufficiently established that the powers conferred by this section may be exercised under sect. 107 by a Court of Appeal, and that by the operation of that section the present rule is applicable to the Appellate Court. So an Appellate Court may strike out the name of any party improperly joined.(4) It may also add a party and remand the suit for trial,(5) or without remand proceed with the appeal if the party added so desires.(6)

It is true that the Court in Mihin Lal *v.* Imtiaz Ali,(7) observed that "a person who has been a stranger to the suit in the Court of first instance ought not to be brought in to the record of an appeal, unless he is brought in as a representative under the sections applying to the bringing in to the record of a representative in case of the death of a party to the suit, or the devolution of title. When an Appellate Court thinks it is necessary to have as a party before it in appeal a person not appearing in a representative capacity and who is not a party to the suit in the Court of first instance, the Appellate Court should, in our opinion, remand the case to the Court of first instance, direct that Court to bring in the particular person as a defendant, or as a plaintiff if he consented, give him time to file his statement and opportunity to produce his evidence, and try the issues raised between him and the opposite side." These observations, however, which were *obiter dicta*, must,

person claiming to be an adopted son: Lakshmibai *v.* Santapa, 13 B. 22. The first case was referred to in Kadir *v.* Muthu Krishna, 26 M. 230, 234 (1902), and dissented from in Muhammad Husain *v.* Khushalo, 10 A. 223, 237 (1888), referring to Harnarain Singh *v.* Kharag Singh, 9 A. 447 (1887). Since these two last decisions, the last paragraph was added to s. 368 of the former Code, enabling the Court under that section to join a person claiming to be the legal representative.

(1) Paya *v.* Kovamel, 19 M. 151 (1895); dissented from Chunni *v.* Lala Ram, 16 A. 5 (1893), *contra*.

(2) Achambah Paurey *v.* Ramsahoy Paurey, W. R. 136 (1864).

(3) Vasudev *v.* Sabuthai, 10 B. 227 (1885).

(4) Vasudev *v.* Sabuthai, 10 B. 227 (1885). In Krishnabai *v.* Sonabai, 2 B. H. C. R. 310 (1865), the Court struck out, on appeal, an infant party as plaintiff and made her defendant. See Annual Practice, 1905, p. 167; Seton, 974; Bucha Singh *v.* Mirza Mashook, 15 W. R. 572 (1871); Nagur Chand *v.* Doorga Das Chowdhury, 11 W. R. 137 (1869). In Kewul Sahao *v.* Issur Dyal, 12 W. R. 334, 336 (1869), the Court, on the facts, refused to strike out parties. In Kristo Sunkur Dutt *v.* Koylashnath Dutt, 15 W. R. 6 (1871), the lower Court was directed to strike a person's name out of the list of defendants in the decree.

(5) Thirthasami *v.* Gopala, 13 M. 32 (1889); Krishnabai *v.* Jonubai, 2 B. H. C. R. 310 (1865).

(6) Gyanananda Asram *v.* Kristo Chandra, 8 C. W. N. 404 (1901). In Pateshri Partap *v.* Rudra Narain, 26 A. 528 (1904), the Court, on its own motion, added a party in appeal, even though the suit, so far as he was concerned, would have been by that time barred by limitation.

(7) 18 A. 332 (1896). In Chinnan *v.* Ramchandra, 15 M. 54, 56 (1891), the High Court directed the Subordinate Judge to add a party.

is submitted, be read in connection with the circumstances of that case nder which a remand might have been necessary. In a subsequent ecision,(1) the same High Court assumed that the Appellate Court might self add a new party, though upon such addition it would ordinarily ad in the absence of consent of the party so added be necessary to mand the case so that it might be re-tried in his presence. In Madhub hunder *v.* Buktesuree,(2) the lower Appellate Court had dismissed a uit brought by a person on behalf of a minor without obtaining a certificate f guardianship, and the High Court on special appeal allowed the minor who ad just come of age to be made a plaintiff. In this case the party as already on the record, and the suit which was originally instituted on his chalf was allowed to proceed directly at his instance. Where the receiver f an estate, under the permission of the Court and on behalf of the parties nterested in the estate, brought a suit by mistake in his own name, it was eld on appeal that the receiver having full power to institute the suit, and no bjection having been taken in the first Court, the error could be rectified without ne consent of the persons interested or further notice of appeal.(3) A lower ourt cannot add parties after the suit has been carried out of it into the Court f Appeal.(4)

"**May.**"—The section is thus permissive and not imperative,(5) the matter esting in the Court's discretion. As to the meaning of this word, see notes to reamble, *ante*. But notwithstanding that the Court has a discretion to act, the case is one in which it should act, it ought to act.

Speaking of the expression in the corresponding rule of the English law, essel, M.R., in Wilson *v.* Church,(6) said: "It is absurd to say that the Court *may*' do so, if it did not mean that it was the duty of the Judge to add the arty if the proceedings were in such a state that the party could properly be dded. The Legislature were obliged to say '*may*,' because it might be at ny stage of the proceedings." And it is held there, as a general rule, that the Court thinks that the effect of non-joinder in a suit can be removed by aking a person a defendant, the Court should order him to be so made, and ot allow the suit to be defeated on account of non-joinder.(7) And the same ule applies in this country.(8) And in Jonab Ali *v.* Golam Assad,(9) Jackson, J., bserved: "As to the defect of parties, it seems almost incredible that the udge should, when a suit is ready for hearing, and when he himself has failed o take action under that section (corresponding to sect. 32 of the Code of 1882), ismiss a suit upon the technical ground that some persons having interest n the subject-matter of the suit have not been made parties. If it were at all ecessary, it was the duty of the Court to take action under that section, and ring the proper parties on the record."

(1) Habib Baksh *v.* Baldeo Prasad, 23 A. 67, 172, 173 (1901).
(2) 12 W. R. 102 (1869).
(3) Juggunnath Pershad Dutt *v.* Hogg, 12 W. R. 117 (1869).
(4) Ram Nidhee Koondoo *v.* Ajoodhya Ram Khan, 20 W. R. 123 (1873).
(5) Poran Mundul *v.* Sham Chand Ghose, 1 W. R. 228 (1864).
(6) 9 Ch. D. 552, at p. 558.
(7) Van Gelder *v.* Sowerby, 44 Ch. D. 374, 394.
(8) Jonab Ali *v.* Golam Assad, 21 W. R. 187 (1874), and see *post*.
(9) 21 W. R. 187 (1874)

The power conferred by this rule, which should be liberally construed, is necessarily very wide. It should, however, be exercised in a reasonable manner.(1) and the Courts ought to take care in its exercise. Thus, Markby, J., in the case cited.(2) said: "To bring persons on to the record, whose interests are not identical with either plaintiff or defendant, necessarily complicates the proceedings, and greatly impedes the progress of the suit. This disadvantage very frequently outweighs the advantages arising from finality of litigation, which is, upon the whole, the best justification for bringing in fresh parties. This alone ought to make the Courts of first instance very careful in the exercise of the power granted by sect. 73 (now the present rule)." If embarrassment or inconvenience will be caused, the order will probably not be made.(3)

It is not profitable, however, in a matter of discretion to attempt to formulate particular rules for its exercise. Addition has been refused, where it would have led to a great variation in the plaint.(4) Generally, but not always, the Court will in the exercise of its discretion refuse to give leave to add a plaintiff when the result would be to introduce a new cause of action, and subject to the rule enacted by clause 1, where the original plaintiff has no right of action, he cannot by amendment under this rule introduce a plaintiff in whom there is a right of action and so make an entirely new case.(5) And generally, care should be taken that the nature of the suit is not changed.(6) But it was held in the under-mentioned case that at an early stage a person may be added as a party, even though the addition may lead to an alteration in the nature of the proceedings. Thus in an action *in personam* against the owners of a vessel for damages caused by its collision, the ship has been added as a defendant. The vessel had not been impleaded originally, as at the time of the institution of the suit it was submerged in the harbour. It was contended that it was not competent to engraft proceedings *in personam* upon proceedings *in rem*; but Farran, J., said: "The later decisions afford no ground for the contention that at an early stage and in a proper case the initial proceedings cannot be amended so as to bring them into the form which they would have assumed in the first instance, but for the ship not being, or not being supposed to be, amenable to the process of the Court." (7)

(1) Googlee Sahoo *v.* Premlall, 7 C. 148, 149 (1881); Thakur Das *v.* President Municipal Co., 1890, P. R. No. 36, cited in Hukm Chand, C. P. C. 445.

(2) Kalee Pershad Singh *v.* Joy Narain Roy, 11 W. R. 361, 365 (1869); and see observations of Phear, J., in Kartick Nath *v.* Chummun Roy, 21 W. R. 50, 51 (1874).

(3) The Germanic, 1896, P. 84; McCheane *v.* Gyles, No. 2, 1 Ch. 917, 918 (1902); Bower *v.* Hartley, 1 Q. B. D. 652, *per* Mellish, J., and James, L.J. as where by the addition of new parties either of the parties on the record would be prejudiced or hindered of their remedies: Vidianada *v.* Sitarama, 5 M. 52, 54 (1881).

(4) Biddia Soondaree *v.* Doorganund, 22 W. R. 97 (1874).

(5) Annual Practice, 1905, p. 168, *et ibi casas*. So also as to introducing a new cause of action where this would be the effect of adding defendant and would be inconvenient, the Court will refuse to do so: Raleigh *v.* Goschen, 1898, 1 Ch. 81.

(6) See Oh Ling Tee *v.* Aukinifee, 10 W. R. 86 (1868), in which the Court refused to transform the suit into one for general administration.

(7) Bombay and Persia S. N. Co. *v.* Shepherd, 12 B. 237 (1887).

The exercise of discretion must, of course, be of a judicial character, but will, as in other cases, not be interfered with on appeal, unless it is manifestly unjudicial and wrong.(1) It is independent of the restrictions imposed by law on the parties. So the Court may make the Government a party, even though the notice required by the Code has not been given, the absence of the notice not affecting the power of the Court in any case.(2) An application to strike out or change the parties on the record should not be made *ex parte*.(3) And before a person is added as a party, unless he is in Court and cognizant of the proceedings, a notice may be issued asking him to show cause why he should not be so added, and the notice should show the grounds on which either of the parties applies to have him added.(4) The defendant on record cannot object to the addition of any person as a defendant, even in a suit which has been instituted with special leave required on account of the accrual of only a part of the cause of action within the jurisdiction of the Court.(5)

"At any stage," etc.—The rule has been here simplified. The former section drew a distinction (6) between orders striking out and orders adding. The former could be made only on or before the first hearing, the latter at any time before the suit had actually terminated (7) (*vide post*). And, further, while orders of the first kind could only be made upon the application of the party, the latter orders might have been made at any time. Both the English rule and the present section contain the words "*at any stage of the proceedings*." Under the last Code the words were "*at any time*," and under the Code of 1859 "*at any hearing*." Under the English rule it has been held that there is jurisdiction to allow amendment, even after final judgment, as long as anything remains to be done in the action, though it be only assessment of damages, though whether or not the Court will exercise the jurisdiction will depend on the circumstances of each case.(8) Under the Code of 1859 also, in Vakat Chand *v.* Advocate-General,(9) parties were allowed to be added after a decree had been made whereby the suit was referred to the Commissioner's Office to have accounts taken and property sold. But when the plaintiff, after his case had been gone into and some of his witnesses examined, applied to have certain persons made co-defendants, the Court was held to have exercised its discretion properly in refusing to add them at that stage, even though "they were the parties from whom, if he got a decree, he would have to receive possession."(10) Under the Code of 1882, "though

(1) Gyaram Issur Chunder, 2 W. R. 158 (1865).

(2) Balmokoond Lall *v.* Jirjudhun Roy, 9 C. 271 (1882).

(3) Tildesley *v.* Harper, 3 Ch. D. 277.

(4) Ramnarain *v.* Monee Bibee, 9 C. 735 (1883). See 1876, Eng. W. N. 23.

(5) Foolibai *v.* Rampratab Samratrai, 17 B. 466 (1893).

(6) See Abbasi Begam *v.* Imdadi Jan, 18 A. 53, 54 (1895).

(7) Jotindra Mohan Tagore *v.* Bejoy Chand Mahatap, 32 C. 483 (1904).

(8) The Duke of Buccleugh (1892), P. 201, C. A. ; Annual Practice, 1905, p. 166, and cases there cited.

(9) 8 B. H. C. R., O. J. 96 (1871); see cases cited in Ahmedbhoy *v.* Vulleebhoy, 8 B. at p. 330 (1884).

(10) Poran Mundul *v.* Sham Chand, 1 W.R. 228 (1864).

sect. 34 limits the time during which the defendant may object as of right for want of parties, there is nothing in the Code to prevent his applying at any time to the Court to exercise its powers of adding persons who ought to have been joined, or to prevent the Court from exercising its power upon such an application." (1) An order allowing a co-widow, who was not a party to the suit, to be joined in execution proceedings as a joint decree-holder was not set aside, as the Court (2) was not prepared to say that the Subordinate Judge had not a discretionary power at any stage of the suit. They observed, however, that the power was restricted to the cases in which joinder might be necessary for the adjudication of questions raised in the suit, and that in that case that period had passed; and that "it is unusual and inconvenient to allow a person, who might have applied before decree, to be joined as co-plaintiff after decree, even if it be lawful to do so, where no interest has devolved and no interest has been created since the institution of proceedings." In Tikam Singh *v.* Thakur Kishore (3) the suit was for a sale of the property under the Transfer of Property Act, and defendant's minor brother and sons, who were members of a joint Hindu family, and interested in the property within the meaning of sect. 85 of the Act, were added as co-defendants, on an application by the plaintiff, presented even after a decree had been made against him, and set aside under sect. 108 of the former Code, corresponding with O. IX. r. 13 of this. If, however, it becomes necessary to enforce a judgment against persons who have acquired a title after it was made, this cannot be done by execution but an action must be brought for that purpose. (4)

"**Upon or without the application.**"—This is an application, if made, of either party, plaintiff or defendant. Though either party may apply, the result of such application may vary according as it is made by either the plaintiff or the defendant. Thus, a person may sometimes be made a co-defendant on plaintiff's application but not on the defendant's.(5) And, as a general rule, a person whose right to join as a plaintiff is denied by the plaintiff on the record should not be made a co-plaintiff, though he may be made a defendant.(6) The plaintiff is not bound to make the application, even in cases in which the Court will usually allow the addition of a person as a party. So while the Court will usually sanction the addition of assignees *pendente lite*, the plaintiff is not bound to implead them.(7) A person may, however, be made a party without the application of either party and on his own application, (8) the Court acting

(1) Kalo Khan *v.* Siva Ram, 1889, P. R. No. 156, p. 535, *per* Plowden, J.

(2) Lingammal *v.* Venkatammal, 6 M. 227 (1883); see also Sotish Chunder *v.* Nil Comul, 11 C. 45, 51 (1884).

(3) 1898, A. W. N. 12; s. c., 20 A. 188; and see Sotish Chunder *v.* Nil Comul, 11 C. 45, 51 (1884), in which it was suggested that a party might be added in execution proceedings. As to this case, see Hukm Chand, C. P. C. 443 *n.*

(4) Goodall *v.* Mussoorie Bank, 10 A. 97 (1887).

(5) See Horwell *v.* London Omnibus Co., 2 Ex. D. 365; Lereculey *v.* Harrison, 1876, Eng. W. N. 39.

(6) Googlee Sahoo *v.* Premlall, 7 C. 148 (1881).

(7) Umamoyi Burmoneea *v.* Tarini Prasad, 7 W. R. 225 (1867).

(8) Oriental Bank Corporation *v.* Charriol, 12 C. 642 (1886); Rabbaba *v.* Noorjehan, 13 C. 90 (1886). See also Ahmodbhoy *v.* Vullee-bhoy, 8 B. 323 (1884); Khadar Saheb *v.* Chotibibi, 8 B. 616 (1884); Vydianadayyan *v.* Sitaramayyan, 5 M. 52 (1881). It was said

itself on the information of a third party. The right to make the application contemplated arises with the necessity for making it.(1) A person may, however, be added as a defendant to an interpleader suit, even if the plaintiff does not recognize any right in the party who seeks to be added to share in the thing in respect of which the interpleader suit is brought.(2)

In representative suits falling within O. I. r. 8 of the Code, a person who is not a party on record is often made such on an application by himself; and, in fact, as O. I. r. 8 states, the course to be taken by any one of the class on behalf or against which a suit is brought, who desires to intervene, is by applying to be made a defendant in person.(3) There is a considerable difference between the position of a person who is made a defendant on his own application, and who is so made without any application of his. The former has to make out a *primâ facie* case before the plaintiff can be asked to meet it; (4) but against the latter, the plaintiff has to prove his case, as against the original defendant,(5) whose position as regards the burden of proof is not altered by a person being made a co-defendant on his own application.(6) It was held that when the name of a person who had been made a party was struck out, all the evidence produced by him ought to be excluded.(7) The order giving leave to strike out a defendant should provide for his costs.(8) If when a name is struck out the Court has not jurisdiction to try the case, the plaint should be returned to be presented in the proper Court.(9) In a suit (10) for possession of land between persons, each of whom claimed to be the lessee of it, and the lessors from whom they alleged having derived their right respectively had been made parties, it was held that that had been done unnecessarily, as there was no cause of action against either of them, and the Court ordered their names to be struck out. And where two persons in the same suit claim pre-emption in regard to the sale, but without having any joint right, the name of one of them ought to be struck out.(11)

in Mohindrobhoosun *v.* Shoshee bhoosun, 5 C. 882 (1880), that this section did not contemplate any application by the person desiring to be added, but the learned Judge (Wilson, J.) subsequently stated that he did not intend to lay down that a third party could not come in and apply. In the first case cited at p. 646, and the second case at p. 94.

(1) Oriental Bank Corporation *v.* Charriol, 12 C. 612 (1886).

(2) Rabbaba *v.* Noorjehan, 13 C. 90 (1886).

(3) See Watson *v.* Cave, 17 Ch. D. 19; Fraser *v.* Cooper, 21 Ch. D. 718; May *v.* Newton, 34 Ch. D. 347; and s. 30, *ante*.

(4) Juggodanund *v.* Hamid Russool, 10 W. R. 52 (1868); Bhyrubnath *v.* Mahesh Chunder, 13 W. R. 168 (1870); Balma Kundu *v.* Adikunda, 7 C. L. R. 560 (1880).

(5) Ram Taruck Ghosal *v.* Radha Bullab, 15 W. R. 97 (1871).

(6) Konjul Sahoo *v.* Guroo Buksh Kooer, 13 W. R. 362 (1870); Hukm Chand, C. P. C. 449; and see ib. as to application by foreigner, and Annual Practice, 1905, p. 167.

(7) Bucha Singh *v.* Mashook Ali, 15 W. R. 572 (1871); the name was struck out by the Appellate Court.

(8) Wymer *v.* Dodds, 11 C. D. 438. See also as to costs, Amos *v.* Herne Bay Pavilion Co., 54 L. T. 264.

(9) Shridhar *v.* Chima, 10 B. H. C. R. 17 (1873). As to striking out, see in addition to cases already cited, Sukhawat Ali *v.* Kestro Tewari, 6 N. W. P. 208 (1874); Syed Hossein Ali *v.* Abdur Rahim, 7 C. W. N. 529, 531 (1903).

(10) Nagur Chand *v.* Doorga Das, 11 W. R. 137 (1869).

(11) Buru Mul *v.* Radha Kishen, 1881, P.R. No. 3; Khawas Khan *v.* Rasal Khan, 1894, P. R. No. 29, cited in Hukm Chand, C. P. C. 443.

As to the exercise of powers under this section on appeal, *vide ante*, p. 551, "Court."

The terms will be such as the Court thinks just under the particular circumstances of the case. So the Court has imposed the term that the person added as a defendant should consent to be bound by all the previous proceedings in the suit in the Court, and by any order that the Court might make as to the costs of those proceedings; (1) as without such consent the evidence already existing on the record could not be used against him.(2) So also a party has been added who consented to be bound by the preliminary judgment which had already been passed, the Court directing that further proceedings were to be carried on against him in the same manner as if he had been an original defendant.(3) An order has been made for adding a Bank as defendant on its undertaking, if the Court should so direct, to pay its own costs and those of the other party to the action, to enter appearance at once, to appear on motion for judgment next day, and to waive questions of form.(4) And the Court has offered on the defendant's application to add a person as a co-defendant against the wish of the plaintiff, if the defendant would indemnify plaintiff against his costs.(5) A Court cannot of its own motion add a Receiver as a defendant, when the leave of the Court appointing the Receiver has not been obtained.(6)

Striking out.—Further, no name could be struck out by the Court *suo motu* without an application from a party, nor at the trial, but only on or before the first hearing. Thus, where a suit was dismissed against one of the defendants some time after the issues were settled, the order was set aside as illegal.(7) And the name of a person who had been added as a defendant after the first hearing could not be struck out in any case, even if a notice could not be served on him on account of the non-discovery of his whereabouts.(8) If persons improperly joined do not move to be struck out and take a part in the defence, they may be held liable jointly with the other defendant for costs of the action.(9) And where a defendant having put in a statement of defence applied to have his name struck out he was refused his costs, as he had not applied at the first possible moment.(10)

This distinction between orders striking out and orders adding parties has been abolished and either class of order may now be made before, on, or after the first hearing at any time, and either upon the application of the party or of the Court's own motion. It will be observed that the words in the second paragraph of the former section "*order that any plaintiff be made a defendant or that any defendant be made a plaintiff*" do not now appear; but the same

(1) Ahmedbhoy *v.* Vullcebhoy, 8 B. 323, at p. 338 (1884).

(2) Watson *v.* Hurgobind, 22 W. R. 35 (1874), *per* Mitter, J.

(3) *Re* Dracup, W. N. (1892) Eng. 43.

(4) Debenture Corporation *v.* Murrieta, 8 Times Rep. 496.

(5) *In re* Harrison, 2 Ch. 349 (1897).

(6) Jatindra *v.* Sarfaraj, 14 C. W. N. 653 (1910).

(7) Singa Reddi *v.* Madava Rau, 20 M. 360 (1896); and see Khadar *v.* Chotibibi, 8 B. 616 (1884).

(8) Abbasi Begam *v.* Imdadi Jan, 18 A. 53 (1895).

(9) Twinberrow *v.* Braid, W. N. (78), 169.

(10) Vallance *v.* Birmingham Land Corp., 2 C. D. 369.

power to order this remains, as in such a case a Court would strike the party off the side of the suit in which he had been placed and re-add him on the opposite side. Such a transposition is made frequently in, though not confined to, partnership suits.(1) Thus, in Edulji Muncherji *v.* Vulleebhoy,(2) the plaintiff wished to withdraw, and ten of the defendants supported his application; and on the application of two of the other defendants, the Court allowed them to be made plaintiffs, and the plaintiff to be made a defendant. A defendant who has assigned all his rights in the subject-matter of the suit, and has no longer any interest in it, has no right to be made a co-plaintiff.(3)

"Ought to have been joined;" "or whose presence may be necessary."—No provisions have been laid down in the Code as to the persons who ought to be joined, or whose presence may be necessary before the Court, and the question must be determined on general principles with reference to the object contemplated by the rule, which is "to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." Other sections may, however, be considered to furnish a guide to the Court in the exercise of its discretion under this rule.(4)

In the words of Lord Redesdale, "All persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the Court may be safely executed by those who are compelled to obey them, and future litigation may be prevented." (5) Lord Hardwicke observed that "the general rule is that you must have all parties before the Court who will be necessary to make the determination complete and to quiet the question." (6) Lord Lyndhurst, in Small *v.* Attwood,(7) said that "the general rule is that all persons who are interested in the question must be parties to a suit instituted in a Court of Equity." A similar principle is expressed in Comyn's Digest, namely, "that all concerned in the demand ought to be made parties in Equity. Not all concerned in the subject-matter, respecting which a thing is demanded, but all concerned in the very thing which is demanded, in the matter petitioned for, in the prayer of the bill, or, in other words, in the object of the suit." But a person who has no interest should not be added, but only those whose claims must necessarily be taken into consideration before deciding on the plaintiff's title.(8)

(1) See Krishna *v.* Jonubai, 2 B. H. C. R. 310 (1865).

(2) 7 B. 167 (1883).

(3) Sayad Abdul Huk *v.* Gulam Jilani, 20 B. 677 (1895).

(4) Naraini Kuar *v.* Durjan Kuar, 2 A. 738 (1880).

(5) Mitford on Pleading, 164.

(6) Poore *v.* Clark, 2 Att. 515.

(7) Yonge, 458. See Ram Taruck *v.* Radha Bullab, 15 W. R. 97, 98 (1871): "All persons are to be made parties who are either legally or equitably interested in the subject-matter and result of the suit;" Joy Gobind Das *v.* Gourceproshad Shaha, 7 W. R. 201 (1867); Rajendronath Dutt *v.* Shaikh Mahomed, 8 C. at p. 50 (1881).

(8) Khajah Abdul Gunnee *v.* Pogose, 12 W. R. 436, 438 (1869); Government *v.* Fergusson, 9 W. R. 159 (1868), nor of a person against whom no relief is sought: Surno Moyee *v.* Bykunt, 25 W. R. 17 (1876).

The rule refers to two classes of parties—those who are indispensable and necessary, that is, those who "ought" to have been joined; and proper parties. Necessary parties defendants are those without whom no decree at all can be rendered; proper parties defendants are those whose presence renders the decree more effectual; and *all* the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy.(1) As a general rule, if the plaintiff applies in proper time, he is entitled to have a person added as a defendant if he had been entitled to join him originally.(2)

Under the corresponding section of the Code of 1859, it was one of the essential conditions of a person being added as a party by the Court, that he should "be entitled to" or claim "some share or interest in the subject-matter of the suit." It was not easy to determine what was the character of the interest which would satisfy the requirement of the rule.(3) It was held in some cases (4) that only such a person might be added as a party under that section as should have with either of the parties a community of interest, such as that of a joint owner, or a superior interest, such as that of a landlord, or an inferior interest, such as that of a tenant, or a substituted interest, such as that of the next of kin after a Hindu widow; (5) and that the interest of the person should not be such as would exclude the parties altogether from any share or interest in the subject-matter of the suit, as in such a case it would of course be very unlikely that new issues—which do not concern the original parties—should not arise, and that the party so claiming should be "likely to be affected by the result," (6) and thus fulfil the second requirement of the rule under the Code of 1859, permitting the addition of persons as parties. Thus, when a person was made a party on his alleging that he was the real proprietor, and the plaintiff only his benamidar, his addition as a party was held to have been wrong; as the issue thus raised was foreign to the suit.(7) And it was held "that upon a suit brought by a person claiming as landlord for arrears of rent, a third person is not to be allowed to

(1) Keshavram *v.* Ranchhod, 30 B. 156, 161 (1905).

(2) Buddree Doss *v.* Hoare, Miller & Co., 8 C. 170 (1881).

(3) Hukm Chand, C. P. C. 456.

(4) See Kaliprashad Singh *v.* Jai Narayan Roy, 3 B. L. R., A. C. 23 (1869).

(5) See as to addition of parties claiming under the defendant, Saroda Pershad *v.* Kylash Chunder, 7 W. R. 315 (1867); Gudadhur Chatterje *v.* Raj Kristo Roy, 13 W. R. 73 (1870).

(6) As to the meaning of this term, see Nga Tha Ya *v.* Mi Khan Mhaw, 5 B. L. R. 371; Fergusson *v.* Government, 9 W. R. 159 (1868); Kalee Pershad Singh *v.* Joy Narain Roy, 11 W. R. 361 (1869); Ahmed Hossein *v.* Khadija, 3 B. L. R., A. C. 28 *n.*; Konjul Sahoo *v.* Guroo Buksh Kooer, 13 W. R. 362 (1870); Ram Taruck *v.* Radha Bullab, 15 W. R. 97 (1871); Dukheena Mohun Roy *v.* Ameeroddeen, 12 W. R. 247 (1869).

(7) Rughoo Nath *v.* Byjnath, 24 W. R 349 (1875); and generally as to a person claiming adversely to the parties not being made a party, see Joy Gobind Das *v.* Gourceproshad, 7 W. R. 201 (1867); Puddolochun *v.* Lall Chand, 10 W. R. 283 (1868). In Joy Kishen *v.* Roy Kishen, 16 W. R. 101 (1871), the parties' interest was held not to be adverse to plaintiff and defendant; see *post*. Persons should not be made co-plaintiffs unless their cause of action is the same as that of the other plaintiffs: Government *v.* Bowrie Bhoomiz, 2 W. R. 280 (1865).

intervene, and by setting up a superior claim to the landlord's title, to raise, as between himself and the original plaintiff, an entirely distinct question between new parties." (1) In a suit for ejectment against a certain person, other persons not claiming through him should not be added as parties, as they cannot be affected by the decision against him, and their addition would lead to issues altogether foreign to those between the original parties to the suit.(2)

In an ejectment suit by a landlord against his tenant, the Court should not bring on to the record the person from whom the plaintiff holds the land, nor persons claiming to hold it from a third party, nor any such third party himself; (3) the Court observing that "the case ought not to have been converted from a suit of one character into a suit of an entirely different character." In short, a person claiming adversely to both the parties should not be added as a party.(4)

In an ejectment suit, the person from whom the party in actual possession claims the holding may be, and is generally, made a party; but he is not a necessary party, and it is wrong for an Appellate Court for the first time to direct the plaintiff to make him a defendant.(5)

As to the interpretation put upon the expression "likely to be affected," see the corresponding section of the Code of 1859, and *ante*. The expression is not used in the present Code, but under the corresponding English rule it has been held that it is only of persons who or whose property will be directly and legally affected by the decision, that the presence may be said to "be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter;" and that a person whose interest will be affected only indirectly and commercially cannot be made a party.(6)

The words "*whose presence before the Court may be necessary*" are very wide, but every person who is in any way connected with the transaction to which the suit refers has not necessarily such interest in or in connection with the suit that his presence must be considered to be necessary for the complete determination of it.(7) These words in the English rule have

(1) Protap Chunder *v.* Jogendro Chunder, 4 C. L. R. 168, 171 (1878); and see Lodai Mollah *v.* Kally Dass Roy, 8 C. 238 (1881); Choolie Lal *v.* Kokil Singh, 19 W. R. 248 (1873). In the following cases the intervenor was held to have been properly made a party: Doyal Chand *v.* Nabin Chandra, 8 B. L. R. 180 (1891); Kanhye Roy *v.* Hyder Buksh, 25 W. R. 29 (1875); Chourasee *v.* Bokhooree, 24 W. R. 350; Radhamonee *v.* Ram Narain, 22 W. R. 440; Tarini Kant *v.* Krishna Moni, 5 C. L. R. 179 (1879).

(2) Kartic Nath *v.* Chummun Roy, 21 W. R. 51 (1873), the headnote of which is incorrect: Ganu *v.* Moro, 10 B. H. C. R. 429 (1873).

(3) Sankaran *v.* Ananthanarayanayyan, 20 M. 375 (1892).

(4) Gooroo Prosunno Banerjee *v.* Guggun Chunder, 20 W. R. 383 (1873); Biressur *v.* Jogendro Chunder, 24 W. R. 261 (1875).

(5) Kashi *v.* Sadashiv, 21 B. 229 (1895); dist. in Bhima Rout *v.* Durga, 17 C. L. J. 183 (1912); Sheikh Chand Pramanik *v.* Romoni Mohan Roy, 17 C. W. N. 1105 (1913).

(6) Moses *v.* Marsden, 1 Ch. 487 (1892).

(7) Hukm Chand, C. P. C. 452. See Sheva Koer *v.* Kuldip Sahay, 1 C.W.N. xcx. (1897); Bhima Rout *v.* Durga, 17 C. L. J. 183 (1912).

been held not to authorize a plaintiff, who has no right to sue, to amend by joining as co-plaintiff a person who has such right.(1) The object is only to improve the position of the plaintiff on record, and not to allow the suit instituted by one person to be converted in a new suit by another proper person. The same view has been taken in this country, it being held that a person can be added as plaintiff only in a suit which, though partially defective, is to some extent properly instituted, and in which the original plaintiff has some title to sue.(2) The Court should not add persons so as to introduce a right of action which previous thereto did not exist.(3) The rule under the Code of 1859 also was the same; and it was often held that when the plaintiff had no right of action against the defendants, he could not mend his case by joining as parties to the suit other persons who had a right of action against them.(4) In a suit by a purchaser of goods against the vendors for damages, on the ground that the bulk did not correspond with the sample, the persons who had agreed to sell the same to them cannot be made parties, as, though their presence would save great expense, and prevent further litigation, it could not be said to be necessary to an effectual and complete adjudication.(5) In the case cited, Pontifex, J., observed that the first vendor might be made a party under r. 18 of English O. 16, but that had not been embodied in the Code, and that he was not at liberty to construe this section as giving the power under clause 18 of O. XVI.

In accordance with the principles regulating the joinder of parties, it is a general rule that every person who has an interest in the subject of a suit may be added as a party. The interest must, however, be an existing one. Thus, in a suit by an adopted son against the widow for his father's property in her possession, it was held that a reversioner should not be made a co-defendant, as he had no interest at the time in the property, and his interest being contingent upon the death of the widow, it was a question whether he would ever have any interest at all.(6) But it is sufficient that the interest is in existence at the time of the addition, it not being necessary that the party added should have had a right at the time of the suit, or should have derived a right from an original plaintiff.(7) There can thus be no ground for adding those persons as parties who, according to the original defendants, should be interested in a portion of the property claimed, if the plaintiff withdraws his claim to that portion as against them.(8) It is on this principle that assignees *pendente lite* are in England,

(1) Wacott *v.* Lyons, 29 Ch. D. 585.

(2) Chunder Coomar Roy *v.* Gocool Chunder, 6 C. 370 (1879); Dwarkanath *v.* Grish Chunder, 6 C. 827 (1881); Bhanu Tukaram *v.* Kashinath, 20 B. 537 (1895).

(3) Dwarkanath *v.* Grish Chunder, *supra.*

(4) See Gopal Kashi *v.* Ramabai, 12 B. H. C. R. 17 (1875); Subbaiyar *v.* Kristnaiyar, 1 M. 383 (1878). But though an action to restrain a nuisance of a temporary nature must be brought by the occupier: Jones *v.* Chappell, L. R. 20 Eq. 539; where the action is brought by the reversioner, permission has been given to add the former as co-plaintiff: Broder *v.* Saillard, 2 Ch. D. 692.

(5) Mahomed Badsha *v.* Nicol, 4 C. 355 (1878).

(6) Hukm Chand, C. P. C. 453; Kristo Sunkur Dutt *v.* Koylasnath Dutt, 15 W. R. 6 (1871).

(7) Bhola Pershad *v.* Ram Lall, 24 C. 34 (1896); as to addition of adopted son, see Paravaitani *v.* Ambalavana, 1 M. H. C. R. 197 (1863).

(8) Latoree Bibee *v.* Buksh Ali, 24 W. R. 101 (1875).

as well as in this country, generally added as parties.(1) In a recent Privy Council decision where a party had been joined as co-plaintiff, being, by virtue of an agreement with the other plaintiffs, a co-owner in an undivided share of the property claimed by them, it was held that he could not maintain the suit after the other plaintiffs had compromised their claim, for he had no present existing interest.(2) The necessity of the presence of persons other than the actual litigants on account of their interest in the subject of a suit generally arises in suits by or against co-owners, including members of joint families, and specially in suits for partition.(3) In suits against the *karnavan* by any member of the *tarwad* affecting the property or the rights of the *tarwad*, all the members of the *tarwad* must be parties actually or constructively.(4) On a similar principle in suits for partition of any property all the co-sharers must be parties.(5) The same principles apply to a dissolution of partnership, and in case of the death of one of the partners, his representatives must be impleaded as parties in a suit between the remaining partners for the taking of the accounts.(6) In a suit by a benamidar the real owner or his assignee may be added.(7) A mortgage bond was executed ostensibly in favour of R, but J was the real mortgagee. A suit was brought by R, the benamidar, to enforce the bond; J, the

(1) Hukm Chand, C. P. C. 454; Ahmedbhoy *v.* Vulleebhoy, 8 B. 323 (1884); Bhola Pershad *v.* Ram Lall, 24 C. 34 (1897); Chunderkant Mookerjee *v.* Ramcoomar Koondu, 13 B. L. R. 530 (1874) [assignment of share in proceeds of suit]; as to limitation in the case of substitution of assignees, see Harak Chand *v.* Deonath Sahay, 25 C. 409 (1897); Mahadev *v.* Bali, 26 B. 730 (1902); Mitra's Limitation, 4th ed. p. 761; the proper practice is to add and not substitute the assignee: Juddooputtee *v.* Chunder Kant, 9 W. R. 309 (1868); Shushee Bhoosun *v.* Muddan Mohun, 2 C. L. R. 297 (1878).

(2) Basant Singh *v.* Mahabir Prasad, P. C., 35 A. 273 (1913); distinguishing Achal Ram *v.* Hazim Husain Khan, 32 I. A. 113 (1904); 27 A. 271.

(3) Mammah *v.* Pukki, 7 M. 428 (1884); Moidin Kutti *v.* Krishnan, 10 M. 322 (1881).

(4) Hukm Chand, C. P. C. 454, and see rr. 4, 9, *ante* and *post*.

(5) Chudasama *v.* Partapsang, 28 B. 209, 214 (1903); Lakhmichand *v.* Kachu Bhai, 35 B. 393 (1911); Kali Kanta *v.* Gouri Prosad, 17 C. 906 (1890) [all the shares must be before the Court]; Torit Bhoosun *v.* Taraprosonno, 4 C. 756 (1879); Pahaladh Singh *v.* Luchmunbutty, 12 W. R. 256, 259 (1869); Parbati Churn Deb *v.* Am-ud-deen, 7 C. 577 (1881); Pandurang *v.* Bhaskar, 11 B. H. C. R. 72 (1874); Udaram *v.* Ranu, *ib.* 76 (1875); Ishwar Chunder *v.* Ram Krishna Das, 5 C. 902 (1880) [apportionment of rent; co-sharers parties]; Obhoy Gobind *v.* Hurychurn, 8 C. 277 (1882) [suit for enhanced rent; co-sharers parties]; Timappaya *v.* Lakshminarayana, 6 M. 284 (1883); Chandu *v.* Kunhamed, 14 M. 324 (1891) [suit for possession of share in property of a Mahomedan family]; Sreenath Chunder *v.* Mohesh Chunder, 1 C. L. R. 453 (1878); Annoda Churn Roy *v.* Kally Coomar Roy, 4 C. 89 (1878) [apportionment of rent; co-sharers parties]; Mohindrobhoosun *v.* Shosheebhoosun, 5 C. 882 (1880); Sadu *v.* Ram, 16 B. 608 (1892) [mortgagee; purchaser].

(6) Ramlal *v.* Lakhmichand, 1 B. H. C. R. App. 51 (1861). As to parties in a suit to recover a partnership debt, see Motilal *v.* Ghellathai, 17 B. 6 (1892); Vaidyanatha *v.* Chumasami, 17 M. 108, 117 (1893); Devi Das *v.* Nerpat, 20 A. 365 (1898); Ram Narain *v.* Ram Chunder, 18 C. 86 (1890); Lutchmanen *v.* Siva Prokasa, 26 C. 349 (1899) [joint family business]; Imam-ud-din *v.* Liladhar, 14 A. 524 (1892) [suit for damages for breach of contract of service]; Alagappa *v.* Vellian, 18 M. 33 (1894) [release of certain partners: suit by creditor against others]; Murlidhar *v.* Ram Pratab, 1 C. W. N. xii. (1896).

(7) See notes to r. 1, *ante*.

real mortgagee, made over the debt on a date previous to the suit, but executed the formal deed of assignment on a date subsequent thereto. The assignees were then added as plaintiffs to the suit. *Held*,(1) that a benamidar may sue, and that the assignees were rightly added as plaintiffs under this section. *Held*, also, that the section corresponding to this rule was wide enough to meet every case of defect of parties; and, further, that the power to add parties must be exercised with reference to the interests which those parties have at the time when the addition is being considered.(2)

In the following cases joinder was said to be necessary or proper,(3) or

(1) Bhola Pershad *v.* Ram Lall, 24 C. 34 (1896); distinguishing the case of Chunder Coomar Roy *v.* Gocool Chunder Bhuttacharjee, 6 C. 370 (1879).

(2) Ib.

(3) *Suits by and against Hindus as such:* Paravartani *v.* Ambalavana, 1 M. H. C. R. 197 (1863) [suit by widow; subsequent adoption; adding of adopted son]; Byreddi *v.* Chinna, 6 M. 331 (1883) [suit by father; his transportation; sons added]; Dayabhai *v.* Gopalji, 18 B. 141 (1893) [who should sue after death of manager; addition of co-sharers]; Gokool Pershad *v.* Etwaree, 20 W. R. 138 (1873); Nundun Lall *v.* Lloyd, 22 W. R. 74 (1874); Balkrishna *v.* Municipality of Mahad, 10 B. 32 (1885); Hari Gopal *v.* Gokaldas, 12 B. 158 (1887); Chunder Chowdhry *v.* Macnaghten, 23 W. R. 386 (1875) [members of joint Hindu family or other co-owners must join in suit to recover joint property]; Rajendronath Dutt *v.* Shaikh Mahomed, 8 C. 42 (1881); Bechu Lal *v.* Oliullah, 11 C. 338 (1885) [as also all sebaits and mutwallis]; Gurulingaswami *v.* Ramalakshamma, 18 M. 53 (1894) [suit by remote reversioner; nearer reversioner added]; Mammali *v.* Pakki, 7 M. 428 (1884); Moidin *v.* Krishnan, 10 M. 322 (1887) [suit by member of Malabar Tarwad against Karnavan]. *Suits in respect of mortgages:* Sorabji *v.* Rattonji, 22 B. 701 (1898) [suit for foreclosure; prior mortgagee necessary]; Sukhawat Ali *v.* Kesho Tewari, 6 N. W. P. 208 (1874) [suit for redemption; persons interested in accounts necessary parties]; Ragho Salvi *v.* Balkrishna, 9 B. 128 (1884); Bhandin *v.* Shekh Ismail, 11 B. 425 (1887); Dattaram *v.* Gangaram, 23 B. 287 (1898) [suit for redemption; all persons interested in equity should be parties]; Att.-Gen. *v.* Sittingbourne, L. R. 1 Eq. 636 [as also in case of foreclosure or enforcement of vendor's lien]; Hughes *v.* Delhi Bank, 15 C. 35 (1887) [or to determine rights of contending mortgagees]; Ibn Husain *v.* Ramdai, 12 A. 110 (1889) [or for contribution]; Parsatam Saran *v.* Mulu, 9 A. 68 (1886) [death of sole mortgagee leaving several heirs; who can sue]; *suit for mutation of names*, Virasami *v.* Rama Doss, 15 M. 350 (1891) [collector necessary]. *Rent Law; suits by co-sharers:* Manohar Das *v.* Manzur Ali, 5 A. 40 (1882); Murlidhar *v.* Ishri Prasad, 6 A. 576 (1884); Tara Chunder *v.* Ameer Mundal, 22 W. R. 394 (1874); Guru Mahomed *v.* Moran, 4 C. 96, F. B. (1878) [suit for fractional proportion of rent]; Bindu Bashini Dasi *v.* Peari Mohun Bose, 20 C. 107 (1901) [adjustment of proportionate share of rent]; Ishwar Chunder Dutt *v.* Ram Krishna Dass, 5 C. 902 (1880), F. B.; Obhoy Gobind Chowdhry *v.* Hurychurn, 8 C. 277 (1882) [apportionment]; Bheekoo *v.* Oomarkhan, 1 N. W. P. 236 (1869); Doorga Prosad Mytee *v.* Joynarain Hazrah, 2 C. 474 (1877); Rashbhari Mukherji *v.* Sakhi Sundari, 11 C. 644 (1885); Jogendro Chunder Ghose *v.* Nobin Chunder, 8 C. 353 (1882) [enhancement]; Abdool Hossein *v.* Lall Chand, 10 C. 36 (1883); Santie Ram *v.* Bykunt Parya, 19 W. R. 280 (1873) [measurement]; Tulsi Panday *v.* Lala Bachu Lal, 12 C. L. R. 223 (1883), F. B.; Doli Sati *v.* Syed Ikram, 4 C. L. R. 63 (1879); Harendro Narain *v.* Moran, 15 C. 40 at p. 46 (1887); Ebrahim Pir *v.* Cursetji, 11 B. 644 (1887); Balkrishna *v.* Moro, 21 B. 154 (1896) [measurement]; Hridoy *v.* Mohobutnessa, 20 C. 283 (1892) [when patnidars proper parties]; Moheeb Ali *v.* Ameer Rai, 17 C. 538 (1890) [application under s. 158 of Bengal Tenancy Act]. *When Government a necessary or proper party:* Krishno Lall *v.* Bhyrub Chunder, 22 W. R. 52 (1874) [to obtain settlement of Chur]; Cannon *v.* Bissonath, 5 C. L. R. 154 (1879) [to recover Chur Land

unnecessary.(1) As regards the effect of the absence of parties, if the suit cannot properly go on without adding a party and the plaintiff proceeds notwithstanding objection, the suit must be dismissed.(2)

"Questions involved in the suit."—It has been said that in deciding on the necessity of the presence of a person before the Court and adding him as a party, it is useful in ordinary cases to see whether there were questions directly arising out of and incidental to the original cause of action in which such person had an identity or community of interest with the original

settled with defendant]; Sardarsingji *v.* Ganpatsingji, 14 B. 395, 399 (1899) [suit regarding Talukdari settlement in Bombay]; Nilkanthapa *v.* Magistrate, 6 B. 670 (1880); Balaram *v.* Magistrate, 6 B. 672 (1882) [order for removal of obstruction from public road]; Mahomed Israilo *v.* Wise, 13 B. L. R. 118, F. B. (1874) [suit to set aside settlement]; Gobinda Chandra Shaha *v.* Hemanta Kumari, 8 C. W. N. 657 (1903) [suit to set aside sale under Public Demands Recovery Act]; *suit on obligation by heirs of obligee:* Kandhiya Lal *v.* Chandar, 7 A. 313 (1884). *Partnership; suit by surviving partner:* Gobin Prasad *v.* Chandar Shikhar, 9 A. 486 (1887); Ram Narain Nursing Doss *v.* Ram Chunder, 18 C. 86 (1890), *vide ante*, p. 564; *Agency:* Nga Tha Yah *v.* Mi Khan Mhaw, 13 W. R. 443 (1870); Buddree Doss *v.* Hoare Miller, 8 C. 170 (1881). *Suit by legatee:* Purshottam *v.* Kala Govindji, 26 B. 301 (1901) [addition of other legatees]. *Suit to declare property not liable to attachment:* Durga Charan Sarkar *v.* Jotindra Mohan Tagore, 27 C. 493 (1899) [other but absent decree-holders]. *Suit for removal of trustee:* Sailajananda *v.* Umeshananda, 4 C. W. N. 462 (1899). *Benamidar;* as to a benamidar's right of suit in his own name, see the matter discussed in Hukm Chand, C. P. C. pp. 373–375, and in notes to r. 1, *ante;* but whatever view may be taken of this right, any objection may be met by the addition of the real owner as beneficiary.

(1) See following cases: *Government not necessary party:* Chuni Lall *v.* Ram Kishen Sahu, 15 C. 460 (1888), F. B. [obstruction to alleged highway]; Goswami Ranchor *v.* Sri Girdhariji, 20 A. 120 (1897) [Civ. Pr. Code, s. 146; suit for possession of attached property]; Bal Mokoond Lall *v.* Jirjudhun Roy, 9 C. 271 (1882); Jahnncvi Chowdhârani *v.* Secretary of State, 7 C. W. N. 377 (1902); Balkishen Das *v.* Simpson, 25 C. 833 (1898) [suit to set aside, sale for arrears of revenue]; Isapa *v.* Apasaheb, 16 B. 649 (1891) [suit for declaration that plaintiff is Kadim Naik of a village]. *Suits against corporations:* Nubeen Chunder Paul *v.* Stephenson, 15 W. R. 534 (1871); Syed Ameer Sahib *v.* Venkatarama, 16 M. 296 (1892); Harsabai Mal *v.* Maharaj Singh, 2 A. 294 (1879); Krishnayya *v.* Bellary Municipal Council, 15 M. 292 (1891). *Hindu family,* Hari Vasudev *v.* Mahadu, 20 B. 435 (1895) [loan from joint family funds]. *Rent Suit: intervenors, vide ante,* p. 561, and as to *N.W.P. Rent Act,* 1881, see Madho Prasad *v.* Ambar, 5 A. 503 (1883); Gobind Ram *v.* Narain Das, 9 A. 394 (1887). *Separate Registration:* Fischer *v.* Secretary of State, 26 I. A. 16 (1898) [suit against Government, cancelling order of; zemindar and lessees not necessary parties]. *Specific performance:* Luckumsey *v.* Fazulla, 5 B. 177 (1880); Mokund Lall *v.* Chotay Lall, 10 C. 1061 (1884); Purushattama *v.* Raju, 11 M. 11 (1887). *Probate:* Ward *v.* Huckle, 12 P. D. 110 [citing of person interested in intestacy]. *Divorce:* Ramsay *v.* Boyle, 30 C. 489, 497 (1903) [intervention of alleged adulterers]. *Administration:* Dhunraj *v.* Broughton, 15 B. L. R. 296 (1875); Oriental Bank *v.* Gobind Lall Seal, 10 C. 713 (1884) [misjoinder of third parties in possession of assets].

(2) Ramsebuk *v.* Ram Lall Koondoo, 6 C. 815 (1881) [suit on joint contract; all contractors not parties]; Rajendronath Dutt *v.* Shaikh Mahomed, 8 C. 42 (1881) [suit for possession of property by trustees in which complete justice could not be done in absence of one trustee]; Durga Charan Sarkar *v.* Jotindra Mohan Tagore, 27 C. 493 (1899); objection should be taken: Shirekuli *v.* Ajjibal, 15 B. 297 (1890), and a person who refuses to join as plaintiff may be made defendant: Juggodumba *v.* Haran Chunder, 10 W. R. 108 (1868).

plaintiff or defendant.(1) The rule expressly provides for the addition, as parties, of persons "whose presence before the Court may be necessary in order to enable the Court to adjudicate upon and settle all the questions involved in the suit." It has been held in some cases, that only those questions are deemed to be involved in the suit which arise between the original parties; and that where new questions will arise between them and any other person there is no justification for his joinder as a party.(2) On the same principle, it has even been held that if in an appeal a respondent dies, and on the appellant's application the name of a person is entered on the record as the respondent's representative, another person claiming to be such representative in lieu of him cannot be impleaded as a party under this section and sect. 107, as the question of representative title between the two persons is not a question involved in the suit.(3) In the case first cited it was held that the questions referred to in the section must be questions between the plaintiff and the defendant, and not such as may arise between co-plaintiffs and co-defendants *inter se*. In the second case the majority of the Full Bench held that a person who is not, in fact, the legal representative is not a person who ought to be joined, and that if the section applied it would be the duty of the Court to decide on the representative title. Mahmood, J., dissented from the decision of the majority of the Court, and held that the applicant had "shown a sufficient case to entitle her to be made a respondent without the condition precedent of any decision" as to her representative title to the deceased. The same view had been taken by the Madras High Court,(4) in which Turner, C.J., observed "that where there appears a substantial doubt whether the person indicated by the appellant is the representative of a deceased respondent or a representative for all purposes connected with the matters in litigation, and if a person other than the person indicated by the appellant lays claim to the representative character and on good *primâ facie* grounds, and where, if he be not allowed to join, the interests of the person entitled to the estate of the deceased may be prejudiced, we consider the Court ought to proceed under sect. 32 to make him a party to the appeal." The Madras High Court has in other cases also construed the expression under comment in a broad sense.(5) Thus,(6) a person who claimed to be jointly interested with the plaintiff in a bond on which the suit was brought was held to have been rightly made a party; the Court observing that the acceptance of a construction of the words restricting them to questions between the parties to the suit would involve the addition of the

(1) Naraini Kuar *v.* Duyan Kuar, 2 A. 738, 742 (1880).

(2) Hukm Chand, C. P. C. 461; see following cases, in which addition disallowed: Kalian Rai *v.* Ram Ratan, 18 A. 306 (1896), of person who claimed by a title distinct from that under which parties to the suit claimed: Hira Nand *v.* Maya Das, 1894, P. R. No. 83, cited in Hukm Chand, C. P. C. 461; of a person who in a suit of one who claimed to be entitled to an interest in the property in preference to the judgment-debtor.

(3) Hur Narain Singh *v.* Kharag Singh, 9 A. 447 (1887); Muhammad Husain *v.* Khushalo, 10 A. 223 (1888); and Vithu *v.* Bhima, 15 B. 145 (1890), in which there was a dispute as to who was entitled to represent a deceased plaintiff.

(4) Athiappa *v.* Ayanna, 8 M. 360 (1884); *vide ante*, p. 551.

(5) Hukm Chand, C. P. C. 462.

(6) Vydianadayyan *v.* Sitaramayyan, 5 M. 52 (1881).

words "between the parties to the suit," and that "there can be few, if any, questions which cannot be determined between the parties to the suit one way or the other, and of which the determination, if they be material, will, as between the parties to the suit, not be final;" and "on the other hand, the interpretation warranted by the terms would enable the Court to avoid conflicting decisions on the same question which would work injustice to a party to the suit, and finally and effectually to put an end to litigation respecting them." In a suit against the personal representatives of the obligor of a bond, who was also the manager of a *mutt*, it was contended that the bond debt had been incurred for the *mutt*, and the successor in the management was held to have been properly made defendant.(1) The Calcutta High Court also took a broad view (2) of the expression in a case (3) in which certain lands belonging to a joint estate were held by one of the co-sharers under a private arrangement and let out by him to *patnidars*, and on partition they were allotted to another co-sharer, who, in a suit brought by him against the tenants for rent, impleaded the *patnidars* as defendants in order that the question of the tenants' liability might be decided in their presence; and the Court held "that they were properly made defendants in the suit and that the Courts were justified in trying the question of the right to receive the rent as between the plaintiffs and the *patnidars*," and that "the trial of that question was in truth necessary, in order to ascertain whether the relationship of landlord and tenant between the plaintiff and the tenant-defendants existed or not." The expression as used in the corresponding English rule also has received a broad but still a limited interpretation.(4) Thus it was said that the term "involved" was somewhat elastic, and might be so construed as to include a great number of subsidiary or collateral rights, but though it was difficult to define the meaning of it, there must be some reasonable limit.(5) Esher, M.R., said: "I can find no case which decides that we cannot construe the rule as enabling the Court under such circumstances to effectuate what was one of the great objects of the Judicature Acts, namely, that, where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials." (6)

Sub-rule (3). Consent of person added as plaintiff.—In the case of the addition of a person as plaintiff or as next friend, their consent is

(1) Thirthasami *v.* Gopala, 13 M. 32 (1889).

(2) See Hukm Chand, 462.

(3) Hridoy Nath *v.* Mohobutnessa, 20 C. 285 (1892).

(4) See Hukm Chand, C. P. C. 463.

(5) Norris *v.* Beazley, 2 C. P. D. 86.

(6) Montgomery *v.* Fry, 2 Q. B. 321 (1895); and in Byrne *v.* Brown, 22 Q. B. D. 657, it was held to be one of the chief objects of the rule "to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it and determine the rights of all in one proceeding." See Hukm Chand, C. P. C. 464.

necessary.(1) The section does not, however, require, as does the English rule,(2) that the consent should be in writing. The Court, if it thinks it necessary to add a plaintiff, may stay the action until his consent is obtained.(3) *Vide ante.*

Representative suits.—See notes to O. I. r. 8.

Sub-rule (4).—Defendant added; amendment of plaint.—This rule, which corresponds with sect. 33 of the last Code, is taken from O. XVI. r. 13 of the Rules under the Judicature Act, but some confusion crept into the wording of that section in its modification with reference to the Indian law. The words "*if previously filed*" thus appeared to be unnecessary; and what was intended to be served on the new and the original defendant was evidently not only "*an amended copy of the summons,*" but an amended copy of the plaint.(4) The rule has now been amended so as to include service of a copy of the plaint. The rule does not contemplate that, upon the addition of defendants to a suit, a cause of action different from that upon which the suit was founded, which may have occurred to the plaintiff against the added defendants, should be added to the claim. All that it requires is, that when a defendant is added the plaint should be amended in such manner as may be necessary, and that an amended copy of the summons and plaint be served on the defendants. The amendment there referred to is such amendment as is necessitated by the addition of a defendant, and not such an amendment as would add to or alter the nature of the suit as originally brought.(5)

Sub-rule (5).—"Subject to the provisions."—This clause formerly commenced with the words "*All parties whose names are so added,* etc." According to a strict construction of the section, these words referred to all the previous clauses of the section, and therefore also to cases in which the Court had made a person a defendant of its own motion. The power of a Court to add a party and the duty of that Court to dismiss the suit as barred by limitation are two different questions, and a Court may under this section add a party necessary to a suit, although it may be obliged by the Limitation Act to dismiss such suit after such party has been added.(6) It had, however, been held (it is submitted erroneously) that no question of limitation could be raised by a defendant who has been added by order of Court after the period of limitation. But it has been held by a Full Bench of the Calcutta High Court that a Court acting under the second paragraph of sect. 32 of the last Code is bound by the provisions of sect. 22 of the Limitation Act.(7) Sect. 22 of the Limitation Act, which is the section generally applicable, does not apply where really new persons are not made defendants, but only the names of those already so are

(1) Umasundari *v.* Ramji, 7 C. 242 (1882); if objection is taken the proper course is to make the party defendant, ib.; and see Beharee Lall Doss *v.* Radha Nath Doss, 22 W. R. 229 (1874).

(2) See cases cited in Annual Practice, 1905, pp. 167, 168; and Cox *v.* James, 19 Ch. D. 55.

(3) See Gandy *v.* Gandy, 30 Ch. D. p. 71, C. A.; Roberts *v.* Holland, 1 Q. B. p. 669 (1893).

(4) Hukm Chand, C. P. C. 468.

(5) Hingu Lal *v.* Baldeo Ram, 24 A. 553, 555 (1902).

(6) Imam-ud-din *v.* Liladhar, 14 A. 524 (1892).

(7) Ram Kinkar *v.* Akhil, 35 C. 519 (F. B.) (1907); 11 C. W. N. 350.

expressly mentioned, as where a clerical error is corrected,(1) or where the persons are comprised in the designation given.(2)

"Shall be deemed to have begun."—It has been pointed out (3) that it is peculiar that this provision is different from that in sect. 22 of the Indian Limitation Act, under which the suit is deemed to have been instituted in regard to a person when he is made a party. The effect of the law of limitation in regard to the joinder of defendants under the present section is, that if the period of limitation for a suit against the added defendant shall have expired before the service of summons, and the claim against the original defendant is such as cannot proceed without joining as defendant the person against whom the claim is barred, the entire claim will fail even as against the original defendant. Thus a pre-emption claim against one of the joint vendees will fail if the summons is not served on his co-vendee till after the expiry of the period of limitation for a suit for the claim,(4) even though the delay in the service may not be due to the plaintiff. Where in a suit a person is added as a party defendant at the instance of the Court after the period of limitation, sect. 22 of the Limitation Act applies, and bars the plaintiff's remedy as against the added defendant.(5)

There is no reference in this section to the Indian Limitation Act in regard to persons joined as plaintiffs, but sect. 22 of the Act applies also to the case of joinder of a plaintiff, where the joinder is under clause 2 as well as when it is under clause 1.(6)

Appeal.—See sect. 104 and O. XLIII. r. 1, and notes thereto. The Code of 1882 gave an appeal from certain orders under sect. 588, clause 2. All orders under sect. 32 were not appealable; but where there was no appeal the order might have been attacked under sect. 591 of the former Code on appeal from the final decree.(7) An order based on an erroneous construction of the section was held not subject to revision under sect. 622, corresponding with sect. 115, *post*.(8) A party who had assented to an order could not, of course, complain of it in appeal.(9) Where an order adding a defendant under this section was not appealed against, and no objection was taken thereto in the memorandum of appeal, an oral objection taken on appeal to such order was disallowed.(10)

(1) Manni *v.* Crooke, 2 A. 296 (1879): Peary *v.* Norendra, 37 I. A. 27 (1909); 37 C. 229.

(2) Pragi Lal *v.* Maxwell, 7 A. 284 (1885).

(3) Hukm Chand, C. P. C. 466.

(4) Habibul Ali *v.* Achaibar, 4 A. 145 (1881).

(5) Ramkinkar Biswas *v.* Akhil Chandra Chowdhuri, 11 C. W. N. 350 (1907); 35 C. 519, F. B.

(6) See Fatmabai *v.* Pirbhai Virji, 21 B. 580 (1897); Krishna *v.* Mekamperuma, 10 M. 44 (1886); Jibanti Nath *v.* Gokool Chunder, 19 C. 760 (1891) [defendant cannot be made co-plaintiff after limitation period]; Harak Chand *v.* Deonath Sahay, 25 C. 409 (1897) [limitation applies to assignment after suit, *vide ante*, p. 562].

(7) Googlee Sahoo *v.* Premlall Sahoo, 7 C. 148 (1881); see Ridhnath Sahoy *v.* Gopee Sahoo, 14 W. R. 90 (1870).

(8) Rabbaba *v.* Noorjehan, 13 C. 90 (1886). As to action under the Charter Act, see Judooputtee *v.* Chunder Kant, 9 W. R. 309 (1868).

(9) Rakhal Doss *v.* Protap Chunder, 12 W. R. 455 (1869); Beer Chunder Roy *v.* Shaikh Tumeezooddeen, 12 W. R. 87 (1869); Shaikh Lall Mahomed *v.* Shaikh Peer Nazur, 18 W. R. 112 (1872).

(10) Bansi Lal *v.* Ramji Lal, 20 A. 370 (1898).

Under the present Code no direct appeal is given and the same rule as to revision will apply. The Code may, however, be objected to in the appeal from the final decree under sect. 105, *post*.

11. The Court may give the conduct of the suit to such *person* as it deems proper.

Conduct of suit.

Conduct of suit.—This rule was originally part of sect. 32 of the last Code which referred to conduct of suit by the plaintiff. The word "suit" does not ordinarily include defence, but, according to the English practice, the conduct of the defence also is often given to one of the defendants; as for instance when a surviving partner of a partnership was made a co-defendant as one of the executors of a deceased partner, the conduct of the defence was given to the other executor on the ground that the interests of the surviving partner might conflict with those of the estate of the deceased partner.(1) Apparently with a view to adopt that practice, the word "person" has been substituted for plaintiff.

12. (1) *Where* there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, *where* there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

Appearance of one **of several plaintiffs or defendants** *for others.*

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

Appearance by one of several plaintiffs or defendants.—O. III. r. 1 enacts that parties may appear and act themselves personally in all suits. The present rule provides for the actual representation of a party to a suit in the course of its progress by another party on the same side, and O. III. r. 1 lastly enacts that a party may, unless the Court otherwise directs, be represented by a stranger to the suit, namely, by a professional adviser or by certain recognized agents specified in O. III. r. 2, *post*. It was held under the corresponding section of the Code of 1859 (sect. 115), that it was sufficient if the authority was in writing, and that no general power of attorney was necessary.(2)

13. All objections *on the ground of non-joinder* or misjoinder *of parties* shall be taken at the earliest possible opportunity and, in all cases *where issues are settled, at or* before *such settlement, unless the ground of objection has subsequently arisen*, and any such objection not so taken shall be deemed to have been waived.

Objections as to non-joinder or misjoinder.

"**Objections.**"—The objection dealt with by this rule is one for joinder

(1) Peek *v.* Ray, 3 Ch. 282 (1894).

(2) Ambaram *v.* Himatsing, 2 B. H. C. R. 103 (1865).

or misjoinder of parties. It does not refer to objections on the ground of want of a cause of action or right of suit in the plaintiff, which may not be disclosed until the case has been proceeded with and evidence has been taken.(1) In the case of objections with which the rule does deal, the question whether there is or is not a want of parties in any particular case will depend on the substantive law applicable to it. The rule of procedure does nothing more than provide that certain rules of substantive law can only be enforced or given effect to in a particular way or under particular limitations. So while sect. 45 of the Contract Act is a matter of substantive law, the rule includes an objection for want of a co-promisee as a plaintiff, it being intended to be a restriction on the right or necessity, as the case may be, of joint-promisors or promisees to sue or be sued together, just as other limitation and procedure rules are virtually restrictions on the exercise of rights which, but for them, would exist and be enforceable.(2) O. II. r. 7 enacts a similar rule as regards causes of action.

"**At the earliest possible opportunity.**"—The necessity for this provision and that in O. II. r. 7 is founded on the fact that if the objection is taken in time, the plaintiff may take steps to join the persons whose non-joinder may be objected to,(3) or remedy the misjoinder of claims objected to. The first hearing of a suit may, however, be the earliest opportunity a defendant may have of raising the objection, which, if taken in the defendant's written statement, cannot be considered too late.(4) But the grounds of objection must have existed before the first hearing, otherwise an objection could not have been made or waived. If it did not so exist an objection may be made after the first hearing at the earliest opportunity after it came into existence.(5) The time now fixed is the settlement of issues. As pointed out in the first of the cases last cited, "cases might occur in which sect. 34 would not prevent the defendant from objecting to the want of a proper party even after the first hearing, viz. where, after the first hearing and before decree, a co-parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing, and therefore could not have been made or waived by the defendant, and if he made it at the earliest opportunity after it came into existence, he would have satisfied the spirit of sect. 34." The section has been amended accordingly.

If the objection is admitted by the plaintiff, the Court should, in the case of parties; act under O. I. r. 10, and not dismiss the suit,(6) and the Court may,

(1) Heiniger *v.* Broz, 25 B. 433, 467 (1900), in which case the defect was in the plaintiff's title and not merely in the omission to add the real owner whose interest entirely excluded his own.

(2) *Per* Powell, J., in Kale Khan *v.* Seva Ram, 1889, P. R. No. 156; and in Jadulla Khan *v.* Bhana Mal, 1882, P. R. No. 58; cited in Hukm Chand, C. P. C. 468, 469.

(3) Rajnarain *v.* Universal Life Assurance Co., 7 C. 594, 603 (1881).

(4) Imam-ud-din *v.* Liladhar, 14 A. 524 (1892).

(5) Modhe *v.* Dongre, 5 B. 609 (1881), cited *post.* See also Imam-ud-din *v.* Liladhar, *supra*, at p. 526, where the Court referred to but did not decide upon the question of the effect of ignorance of the facts on which the objection depends.

(6) See Van Gelder *v.* Sowerby, 44 Ch. D. 374, and *ante*, p. 544.

where it is possible, whether the defendant omits to object (1) or objects and the plaintiff refuses to admit the objection, exercise of its own motion the powers given by that rule. If the objection when taken is not admitted by the plaintiff, and he does not apply to amend, but maintains the correctness of the plaint, and the Court, without immediately deciding the point, tries the case, and at its conclusion finds that the objection is good on facts proved by the defendant, the suit must be dismissed.(2)

"**Waived.**"—Where an objection as to misjoinder (3) or of non-joinder (4) is not taken in the Court of first instance it will be disallowed in appeal, and the claim will be disposed of on the merits. In Dhirm Das *v.* Shama Soondri,(5) the plaintiff widow made an adoption pending the suit, but the son was not made a party, and on an objection being taken as to that before the Privy Council, Lord Campbell spoke of it as "a safe maxim for a Court of Appeal to be governed by, that an objection, which, if taken, might have been cured, and which has not been taken in the Court below, shall not be taken in the Court of Appeal." And see now sect. 99, which amends the former sect. 578 so as to include cases of misjoinder. The former section concluded with the words "by the defendant." It was pointed out (6) that these words showed that the section did not limit the right of the plaintiff to add parties at any stage of the proceedings. Thus, in the case cited it was said: "Often a defendant may be indifferent to the absence of persons who ought to be parties; but it, nevertheless, may be most important for the plaintiff to add them in order that they may be bound by the decree in the cause. The plaintiff may not, until an advanced stage in a cause, become aware that persons ought to be made parties who have not been so made. The defendant may be well aware that those ought to be made parties, but purposely lets the first hearing pass without objecting to their absence from the suit, and thus, so far as he is concerned, waives the right to object. But his waiver of that objection would not affect the absent parties, and a decree made in their absence would not bind them. Hence it is that, although sect. 34 limits the defendant's right to object, the second passage of sect. 32 (corresponding with sect. 29), leaves it open to the plaintiff 'at any time' before decree to obtain permission to make new parties." The words have now been omitted as unnecessary.

(1) Imam-ud-din *v.* Liladhar, 14 A. 524 (1892), at p. 526.

(2) Boydonath Bag *v.* Grish Chunder, 3 C. 26, at p. 29 (1877); Ramsebuk *v.* Ramlall, 6 C. 823 (1881); Badri Das *v.* Jawala Pershad, 1891, P. R. No. 86, F. B.; cited in Hukm Chand, C. P. C. 469; Kalidos *v.* Nathu, 7 B. 217 (1883); in Arumugam *v.* Sundarajev, 8 M. L. J. R. 3, the non-joinder in the particular case was held not sufficient to justify dismissal.

(3) Fakirapa *v.* Rudrapa, 16 B. 119, 122 (1891); Tulsha *v.* Gopal Rai, 6 A. 632 (1884) [misjoinder both of parties and causes of action]; Magaluri *v.* Narayana, 3 M. 359 (1881).

(4) Paramasiva *v.* Krishna, 14 M. 498 (1891); Moidinkutti *v.* Krishnan, 10 M. 322, 329 (1887); Hira Lal *v.* Ramju, 6 A. 57 (1884); Purshottam *v.* Kala Govindji, 26 B. 301 (1901); Uma Sundari Dasi *v.* Ramji Haldar, 7 C. 242, 244 (1881).

(5) 3 M. I. A. 229, 242 (1843); foll., Hari Saran *v.* Bhubaneswari, 15 I. A. 195 (1888).

(6) Modhe *v.* Dongre, 5 B. 609, 612 (1881), *per* Westropp, C.J., though such application may be refused if made at a late stage and if inconvenient. See Mokha Harakraj *v.* Biseswar, 5 B. L. R. App. 11, 12 (1870).

ORDER II.

Frame of Suit.

Frame of suit.

1. Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

Suit to include the whole claim.

2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.

(2) *Where* a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several *reliefs*.

(3) A person entitled to more than one *relief* in respect of the same cause of action may sue for all or any of *such reliefs;* but if he omits, except with the leave of the Court, to sue for *all* such *reliefs*, he shall not afterwards sue for *any relief* so omitted.

Explanation.—For the purposes of this *rule* an obligation and a collateral security for its performance *and successive claims arising under the same obligation* shall be deemed *respectively* to constitute but one cause of action.

Illustration.

A lets a house to B at a yearly rent of Rs.1,200. The rent for the whole of the years *1905, 1906 and 1907* is due and unpaid. A sues B *in 1908* only for the rent due for *1906*. A shall not afterwards sue B for the rent due for *1905 or 1907*.

Previous provisions.—The terms of sect. 7 of the Code of 1859, and of sect. 43 of the last Code, so far as regards the first two paragraphs, did not vary materially. The former declared that "every suit shall include the

whole of the claim *arising out* of the cause of action." The last Code substitutes the words "*which the plaintiff is entitled to make in respect of,*" (1) and the clause "*but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court*" were added. The cases therefore decided under the Code of 1859 were in point,(2) so far as these two paragraphs were concerned. The last two paragraphs were, however, new, and were introduced to do away with the view taken under the Code of 1859, that the plaintiff, though prohibited from splitting his claim, was not bound to pursue all his remedies at once.(3) This section in the Code of 1882 was therefore, in this respect, more comprehensive in that it provided that a person entitled to more remedies than one in respect of the same cause of action must combine all his remedies in the first suit, unless he obtained the leave of the Court to reserve some of his remedies for a subsequent suit.(4) The present rules are in substantially the same terms as the corresponding sections in the last Code, with the exception of the omission in clause 3 of r. 2 of the words "*obtained before the first hearing,*" as to which, see *post*.

The section enacts the general rule that "contestants are not allowed to split up a cause of action, even where they have an election of different remedies, into different actions, or to supplement an incomplete remedy they may have selected at the first by availing themselves subsequently of another." (5)

Principle and scope of the two rules.—R. 1 contains provisions of a positive and directory character as to the framing of the suit with a view to procure finality of decision.(6) Where, however, it was argued that the phrase "*the subjects in dispute*" in the former section connoted the *corpus* or object-matter of the claim, and that therefore all possible claims to the same should necessarily be offered for decision in the suit, the Madras High Court (7) said: "In our opinion the expression '*the subjects in dispute*' signifies the general relation between the parties to the suit for the determination of which the suit is brought. In other words, the object of sect. 42 (now r. 1) is to require the plaintiff to bring forward his whole case as to the matter of litigation on the question of right involved in the suit, and not to require him to unite all the causes of action which he may have against the defendant in respect of the *corpus* or object-matter of the suit." In this respect, therefore, r. 1 bears the same construction as r. 2, in which there is nothing to warrant the inference that all causes of action ought to

(1) As to these words "in respect of," and "arising out of," see Venkoba *v.* Subbanna, 11 M. 151, at p. 153 (1887).

(2) Duncan Bros. *v.* Jeetmull Greedharee Lall, 19 C. at p. 378 (1892).

(3) See Muluk Fuqueer Buksh *v.* Monohur Doss, 2 N. W. P. 90 (1870); Jebunti Nath Khan *v.* Shib Nath Chuckerbutty, 8 C. at p. 821 (1882); Sabeer Khan *v.* Kali Doss, 1 W. R. 199 (1864). A plaintiff was, however, then, as now, bound to include in his plaint all the grounds upon which his suit was based: Abhiram Das *v.* Sriram Das, 3 B. L. R., A. C. J. 421 (1869).

(4) Ramaswami Ayyar *v.* Vythinatha Ayyar, 26 M. at p. 770 (1902); and see Govind *v.* Parashram, 25 B. at p. 167 (1900), and *post*.

(5) Wells, Res Judicata, § 228.

(6) See *e.g.* Lala Surja Prosad *v.* Golab Chand, 27 C. 724, 761 (1900).

(7) Ramaswami Ayyar *v.* Vythinatha Ayyar, 26 M. 760, 763 (1902), and see p. 766, ib.

be included in the alternative, or otherwise, in one and the same suit.(1) The penalty for non-compliance with r. 1 is provided for partly in r. 2 and partly by Explanation IV. to sect. 11. The former provides that if the plaintiff omits to include a portion of the entire claim, which has arisen at the date of the suit, out of the cause of action on which the suit is based, he shall be precluded from suing again in respect of such portion; and the latter provides that the matter of every ground which the plaintiff might and ought to urge in support of the cause of action on which the suit is founded shall be deemed to be a matter directly and substantially in issue in the suit, and decided therein whether such ground was actually relied upon or not in the suit. In other words, r. 2 requires that the whole claim which has arisen, at the date of the suit, out of the cause of action shall be included in the suit so as to avoid splitting of a claim or claims arising out of one and the same cause of action. And Explanation IV. to sect. 11 enjoins that every ground which could and ought to have been urged in support of the claim actually made in the suit, shall be deemed to have been adjudicated upon therein, whether it was actually urged or not.(2) The rule embodied in r. 2 does not operate to give the defendant a ground of exception to the first suit, but by prohibiting a second suit it indirectly compels the plaintiff to include his whole demand in the first suit,(3) and is thus a complement to r. 1. To illustrate the operation of r. 2 over the second suit and not the first: where the plaintiff claimed, by right of inheritance, for partition of one out of a number of villages left by his ancestor, and the lower Court dismissed the claim as untenable under the corresponding section of the Code of 1859, the Appellate Court held that though that section might operate as a bar to any future claim by plaintiff for partition of the remaining villages by right of inheritance it could not be taken to be a bar to the then present claim.(4)

R. 2, which provides against what is called the splitting of a cause of action, is founded on the maxim that no one shall be twice vexed for one and the same cause.(5) It is directed against two evils, the splitting of claims and the splitting of remedies in respect of one cause of action. If a man omits from his suit a portion of his claim he shall not afterwards sue in respect of it; if he omits one of his remedies he cannot afterwards pursue it.(6) It has been said that there is no rule of procedure which is founded on better reason and good sense.(7) At the same time, it has been pointed out

(1) Ramaswami Ayyar *v.* Vythinatha Ayyar, 26 M. 771 (1902); *vide* also *post.*

(2) Ib. at pp. 769, 767.

(3) Ittappan *v.* Manavikrama, 21 M. 153, at p. 156 (1897). There are, however, cases in which the nature of the right is such that independently of the rule the plaintiff is prohibited from severing his claim, ib. See also Musumat Soonder *v.* Khilloo Mull, 2 N. W. P. 90 (1870).

(4) Choe Singh *v.* Buhadoor Singh, 1 Agra, 55 (1866).

(5) Balmakund *v.* Sangari, 19 A. at p. 383 (1897); Umed Dholchand *v.* Pir Sahob, 7 B. 134, 136 (1883). See Whitley Stokes, ii. Anglo-Indian Codes, 397; Sadho Saran *v.* Hawal Pande, 19 A. 98, 99 (1893); Narayan *v.* Shamrao, 27 B. 379, 382 (1903).

(6) Govind *v.* Parashram, 25 B. 161, at p. 167 (1900); Chhabil Das *v.* Massu, 4 P. R. vol. 49, p. 4 (1914); Trimbak *v.* Bhagwan Das, 23 B. 348 (1898).

(7) Hikmatulla Khan *v.* Imam Ali, 12 A. 203, at p. 206 (1890).

that while in order to effect the good object of preventing unnecessary litigation, suitors are deprived of rights to which they would otherwise be entitled under the general law, the Courts should be careful in carrying out these provisions to confine their scope and construction within certain recognized limits and principles so as not to take suitors unfairly by surprise and to do as little injustice as possible in individual cases.(1) So far as regards the party sought to be barred, the principle is that where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering and procuring what he seeks to recover in the second, the latter suit is barred.(2) The distinction between this rule and that of *res judicata* is that whereas the latter rule prescribes that what has been decided or is deemed to have been decided cannot be raised again, the present rule prohibits that being put forward which should have been, but was not, offered for the Court's decision, and in respect of which in consequence of such omission no decision has been given. The present rule depends entirely on the identity of the cause of action, the bar being created by the institution of the suit and not by the judgment.(3) The bar exists not because the point has been decided but because it should and would have been decided if the plaintiff had put it forward.

The plea under r. 2, it has been held,(4) does not involve a question of jurisdiction, and no Court is bound to take it up *proprio motu*. As it is introduced simply for the benefit of a defendant, to prevent him being harassed by numerous suits, he should expressly plead it before judgment, if he wishes to take advantage of it. Further, where objection is taken to the suit the onus is on the defendant to show that the causes of action are identical and that the suit is therefore barred ; (5) and he cannot in this, any more than in any other matter, plead his own wrong.(6)

The former section has been held applicable to suits under the N.W.P.

(1) Anderson, Wright & Co. *v.* Kalagarlu, 12 C. 339, at p. 345 (1885), *per* Garth, C.J. The same learned Judge, in Pramada Dasi *v.* Lakhi Narain Mitter, 12 C. at p. 63 (1885), said : "Now speaking for myself, I am one of those who believe that, however construed, s. 43 has done, and will do, a vast amount of injustice, and I am therefore particularly careful to give it a construction no larger than it will reasonably bear." There cannot, however, be any doubt that the rule, if applied properly, is one of justice and not mere technicality. In this as in other respects, if injustice ensue, it must be laid not to the rule but to its improper application to cases not falling within it, as pointed out in Herm. Comm., § 220, cited in Hukm Chand, C. P. C. 499. If a party may divide a single and entire cause of action once, there can be no limit but the caprice and the will of the party to endless divisions, and the rule therefore is designed to suppress a serious grievance. Banku *v.* Gopal, 14 C. L. J. 589 (1911).

(2) See Nelson *v.* Couch, 15 C. B. N. S. 99 ; Serrao *v.* Noel, 15 Q. B. D. 549, 556.

(3) Monsharam *v.* Gonesh, 17 C. W. N. 521 (1912).

(4) Muhammad Nur *v.* Mahrvia, 1885, P. R. No. 37.

(5) Upendra Lal Mookerjee *v.* Secretary of State, 20 C. 716 (1893).

(6) Subbayya *v.* Venkatesappa, 6 M. 49, 53 (1883). In Shaikh Punja *v.* Shaikh Oodoy, 18 W. R. 337 (1872), the plaintiff was held to be prohibited from raising the question of the validity of the decree which he held. As to inconsistent contentions, see Gandy *v.* Gandy, L. R. 30 Ch. D. 57, where it was held that a party was not at liberty to retain the benefit of a decision given on the footing that his liability under a covenant continued, and at the same time to insist that his liability under it had determined.

Rent Act,(1) as also to suits under Act X. of 1859, the principle on which it is based being one of general equity; (2) but not to suits under the Dekkan Agriculturists Relief Act, that Act having been amended so as to remove the bar created by this rule.(3) The Act of a guardian binds a minor unless unreasonable or improper, and the rule is therefore a bar to a suit by a minor who has attained majority and whose guardian had previously relinquished a claim.(4) The rule does not apply where there has been no adjudication and leave has been specially granted to bring a fresh suit.(5)

"**Suit.**"—The word does not here apply to execution proceedings. R. 2 deals with the frame and initiatory stages of a suit, and is not applicable after judgment and after the rights of the parties have been decided by a decree, in which the cause of action has merged, to proceedings in execution, any more than, for example, sect. 44 of the last Code (or O. II. rr. 4, 5 of this) would be applicable.(6) The question as to the applicability of the principle embodied in the section might arise in two ways. Firstly, where the decree gives reliefs of a different character, such as a decree for possession and a decree for costs. There is nothing in the Code to prevent separate and successive applications for execution as regards each of them.(7) Secondly, relief of a single character may be given by a money decree for, say, Rs.1000. The Full Bench in the first-mentioned case reserved its opinion whether in such a case the plaintiff would be entitled to split up the execution of the decree by successive applications to execute to the extent, for instance, of Rs.10. The rule has been held not to apply in a case where there were two suits, and where one being struck off on the objection of the defendant, the plaintiff applied and was allowed to amend his claim in the other suit.(8) An application to file an award is in many respects analogous to a suit, and therefore the privilege given to a plaintiff in a suit to abandon portion of the claim in order to bring the suit within the jurisdiction of the Court has been held to apply also to a case where the party comes in with an application to cause an arbitration award to be filed.(9) As to whether a proceeding for revocation of probate is a suit or not, see case cited.(10)

"**Shall include.**"—Ordinarily a claim is expressly specified. In some cases, however, the claim in the prior suit will be construed to include a claim which, though not specially stated, is naturally implied in it. So a prior suit for redemption of land was held to have included the trees on the land, and the Court having failed to adjudicate upon the portion of the claim relating to

(1) Madho *v.* Murli, 5 A. 406, F. B. (1883).

(2) Adhirani *v.* Raghu, 12 C. 50 (1885); Purbhoo *v.* Ramjeawan, 1 A. H. C. R. 119 (1869). See Ram Sunder *v.* Krishno, 17 W. R. 380 (1872).

(3) Laluchand *v.* Girjappa, 20 B. 469 (1895).

(4) Gopal *v.* Narasinga, 22 M. 309 (1899).

(5) Venkata *v.* Ranga, 10 M. 160 (1887); Behari Lal Pal *v.* Baran Mai, 17 A. 53 (1894); see *post*, p. 599.

(6) Sadho Saran *v.* Hawal Pande, 19 A. F. B. 98, 100, 101 (1893); foll., Radha Kishen Lall *v.* Radha Pershad Singh, 18 C. 515 (1891).

(7) Ib.

(8) Ram Tarun Koondoo *v.* Hossein Buksh, 3 C. 785 (1888).

(9) Grish *v.* Brojonath, 20 W. R. 56 (1873).

(10) Khirodamoyi Barmani *v.* Bagala Sundari, 4 C. L. J. 492 (1906).

the trees, a fresh suit based on it was competent to the plaintiff.(1) If a mortgagor in a suit for redemption of an usufructuary mortgage omits to claim surplus profits, a subsequent suit for the recovery of such profits is barred by this section.(2) The omission in a prior suit against one of several joint promisors of a part of the cause of action is no bar under sect. 43 of the last Code (now represented by this rule) to a subsequent suit against another joint promisor for the portion so omitted.(3) A plaintiff who omits to sue for a portion of his claim, stating that he does not relinquish it but means to sue again for it, can gain nothing by such statement; but, on the other hand, neither can such a statement furnish a reason for holding the first suit to be barred.(4) As regards a plaintiff's claim for relief, he must either include it or obtain the leave of the Court to omit it, if he does neither he is barred.(5)

"The plaintiff."—It has been held that a defendant's claim to set-off stands in the position of a claim by a plaintiff in a separate suit, and that he may, in relation to his cross-claim, be rightly regarded as a plaintiff within the meaning of the section.(6)

Conditions of applicability of the rule.—The main conditions, the existence of which is necessary for the applicability of the rule, and which are dealt with in detail hereafter, are: (*a*) the existence of a cause of action in the prior suit; (*b*) which was known to the party; (*c*) and which the Court had jurisdiction to try; and (*d*) the identity of parties; and (*e*) of the cause of action, the meaning of which last-mentioned term in connection with the subject is subsequently defined and exemplified by reference to cases of tort, contract, and of a miscellaneous character.

(*a*) **Existence of cause of action in prior suit presupposed.**—The first thing to be considered is whether the cause of action in the second suit is the same as in the first. If so, but not otherwise, the second suit is barred in respect of any portion of the claim which was omitted from the first suit.(7) Where there is an infringement of one right and one cause of action has arisen, the plaintiff must make his whole claim once for all in one suit. If the plaintiff had thus an opportunity in the former suit of recovering what he seeks in the second, the former suit is a bar to the latter action.(8) But this rule, which requires the whole claim to be put forward, presupposes the existence of a cause of action and will have no application where it is found that the former suit had no cause of action. This will generally be the case when the former suit was dismissed as premature, in which case the claim may be put forward in a suit brought on the maturing of the cause of action.(9)

(1) Bakshiram *v.* Darku, 10 B. H. C. R. 369 (1873).

(2) Ram Din *v.* Bhup Singh, 30 A. 225 (1908).

(3) Ramanjulu *v.* Arava Mudu, 33 M. 317 (1909).

(4) Musumat Soonder Bibee *v.* Khilloo Mull, 2 N. W. P. 90 (1870); and see Maksud Ali *v.* Nargis Dye, 20 C. 322 (1892).

(5) Maksud Ali *v.* Nargis Dye, 20 C. 322, at p. 325 (1892).

(6) Nawbut Pattak *v.* Mahesh Narayun Lal, 32 C. 654 (1905).

(7) Kakaji *v.* Bapuji, 8 B. H. C. R. 205, 209 (1871); Ittappan *v.* Manavikrama, 21 M. at pp. 156, 158.

(8) Ib., at p. 156.

(9) Hukm Chand, C. P. C. 500, citing Ahmad Khan *v.* Mehr Khan, 1893, P. R. No. 35.

There is no bar if the plaintiff had in fact no cause of action in respect of his claim at the date of the institution of the prior suit and so could not have sued or properly sued,(1) and where nothing is decided but that should he sue again.(2) In short, only the claim which the plaintiff is able to make must be put forward, and only so much of the claim is required to be included as the plaintiff may be able to make at the time of institution of the suit.(3) If, further, a person has a claim by reason of the defendant's default, but is entitled to waive it and does so, he is not precluded by such waiver from enforcing his claim in the case of a subsequent default, the cause of action not being the same.(4)

(*b*) **Which was known to the party.**—An omission to sue can only be a bar when the claim was known at the date of the institution of the first suit. A right which a litigant possesses without knowing or ever having known that he possesses it can hardly be regarded as a "portion of his claim" within the meaning of the section.(5) A person cannot, moreover, omit or relinquish that of which he has no knowledge. The provision as to omitting a claim clearly involves the idea that the plaintiff so omitting was, at some time prior to the suit, aware or informed of the claim, or aware of the facts which would

(1) Venkoba *v.* Subbanna, 11 M. 151, 153 [claim must have been enforceable at date of former suit]; Shadi *v.* Gainda, 1890, P. R. No. 127; Raja Nilmani Singh *v.* Annadaprasad Mookerjee, 1 B. L. R., P. B. 97, 100 (1868) [the plaintiff could not in the prior suit have recovered damages]; Balkrishna *v.* Hari Shankar, 8 B. H. C. R. A. C. J., 64; foll. in Narayan Babaji *v.* Pandurang Ramchandra, 12 B. H. C. R. 148, 155 (1875) [suit for partition held not barred, as the property being mortgaged was not available for actual partition at the time of the former suit]; *aliter* if the property was available for partition; Ukha *v.* Daga, 7 B. 182 (1882); disapproved in Monsharam *v.* Gonesh, 17 C. W. N. 521 (1912); Nund Lall Bose *v.* Meer Aboo Mahomed, 5 C. 597, 601 (1879) [the compensation money, subject of the second suit, had not been drawn from the Collector's Court until after the institution of the former suit]; Mayi *v.* Avuthraman, 22 M. 197 (1898); Chaladom *v.* Kakkath, 25 M. 669 (1902) [conversion complained of was subsequent to date of former suit].

(2) Kakaji *v.* Bapuji, 8 B. H. C. R. at p. 208 (1871); this case was cited with approval in Becharji *v.* Pujaji, 14 B. 31, 55, 56 (1889), where the Court in the first case had refused to adjudicate upon a particular question.

(3) See Hukm Chand, C. P. C. 503, and cases cited in n. (8), p. 554.

(4) See Ram Bhaj *v.* Devia, 1881, P. R. No. 123 [provision in mortgage that principal should be paid without interest within one year; if not paid monthly, interest payable; in default of payment of interest mortgagee entitled to sue for both principal and interest. Held, no one was obliged to take advantage of forfeiture, and suit for interest did not bar second suit for principal and interest accrued due subsequent to former suit]; Raman *v.* Wazira, 1886, P. R. 79. Mortgage provided that in default of payment mortgagee might sue for possession. On default suit brought for interest due held not to bar suit for possession in case of subsequent default]; Badi Bibi *v.* Sami Pillai, 18 M. 257 (1892); and Hukm Chand, C. P. C. 501-503.

(5) Amanat Bibi *v.* Imdad Husain, 15 C. 800, 808 (1888); s. c., L. R. 15 I. A. 106, 112. Following this decision, the Punjab Chief Court held that to constitute the bar the plaintiffs must have been "aware of the facts which would have enabled them to make the claim;" Shadi *v.* Gainda, 1890, P. R. No. 127; Batul Kunwar *v.* Muni Lal, 32 A. 625 (1910). Gorachand *v.* Basanta, 15 C. L. J. 260 (1911).

ive him a cause of action.(1) It has also been held that where the facts have een fraudulently concealed, the fraud gives a new cause of action on which the econd suit may be brought (2) Where, however, a person knows of the facts efore the institution of the suit and omits to make a particular claim by an versight, it is no answer to say that such omission was due to mere mistake, nd was not actuated by any fraudulent or dishonest motive. If the words f a law are clear and positive, they cannot be contested by any con- ideration of the motives of the party to whom it is to be applied, nor limited y what the Judges who apply it may suppose to have been the reasons or enacting it.(3) Nor, where the plaintiff is aware of his cause of action, s it necessary that the amount of damages resulting therefrom should e known or even be capable of being known. So it is a general principle n cases of breach of contract or tort, that where there is but one cause f action damages must be assessed once for all.(4) In some cases of wrong the ause of suit is not complete until actual damage has ensued; but when once ne cause of suit is matured, the subsequent occurrence of further damage, hether after or before this has been adjudicated upon, does not originate fresh cause of suit; were it otherwise, litigation might have no end, for in few ases does the damage flowing from a wrong or breach of contract cease with ne event.(5) Therefore, as regards damage actually incurred, all must be laimed, and as regards those which have not actually accrued at date of suit, that , future or prospective damage, those not known may be estimated, and are erefore, in contemplation of law, deemed to be known, and must be claimed or once for all.(6)

(*c*) **And which the Court had jurisdiction to try.**—It is obvious at a plaintiff is not debarred from having a matter tried in a second suit if y reason of the absence of necessary jurisdiction it could not be heard in the rst. He is entitled to have his claim adjudicated. All that the section says that if he had an opportunity of having it adjudicated, which he neglected

(1) Viraragava *v.* Krishnasami, 6 M. 344, 50 (1882); Ambu *v.* Kettilamma, 14 M. 23, 3 (1890); Manathode *v.* Appu, 15 M. 296, 97 (1892); Sankaran *v.* Parvathi, 19 M. 145, 48 (1885). And see observations in Doorga ath *v.* Kalee Narain, 24 W. R. 212, 213 875).

(2) Lachman Singh *v.* Sanwal Singh, 1 . 543 (1878); Bulwant Singh *v.* Chittan ingh, 3 N. W. P. 27, 30 (1871).

(3) Moonshee Buzloor Ruheem *v.* Shum- onnissa Begum, 8 W. R. P. C. 3, 12, 13 1867); s. c., 11 Moo. I. A. 551, 605; ref., ulwant Singh *v.* Chittan Singh, 3 N. W. P. 7 (1871), which understood the P. C. ruling s applying to knowledge as well as motive; ll. in Ganes Chandra *v.* Ram Kumar, 3 . L. R., A. C. J. 265 (1869), a case of *bonâ de* mistake; ref., Ram Churn *v.* Sm. Dropo loye, 17 W. R. 122, 127 (1872), where the decree in the first litigation disclosed to the party that she had a larger interest than she thought; foll. Syed Abdulla *v.* Hurkishen Singh, 2 C. L. J. 190 (1905). In Meer Mahomed *v.* Forbes, 5 W. R. Act X., 90 (1866), a person having sued for an amount in a certain coin, when it was due in a higher coin, was held barred from suing for the difference.

(4) Serrao *v.* Noel, 15 Q. B. D. 559; Darley Main Colliery *v.* Mitchell, 11 App. Cas. 127.

(5) Rajah Nil Monee Singh *v.* Issur Chunder Ghoshal, 9 W. R. 121, 122 (1868); for an instance in which the cause of action is not complete until damage has accrued, see Darley Main Colliery *v.* Mitchell, 11 App. Cas. 127.

(6) See cases cited *ante*, and Bennett *v.* Hood, 1 Agra, 47 (1866); Brunsden *v.* Humphrey, 11 Q. B. D. 141.

to avail himself of, he cannot sue again. A reasonable construction must be put upon the section, and the words "whole" claim must be understood with the qualification, "in so far as it is cognizable by the Court in which the suit can be lawfully entertained."(1) It was intended to prohibit a second suit when the whole claim arising out of the cause of action was within the ordinary jurisdiction of the Court in which the plaintiff had brought his first suit, or such suit had been made cognizable by the Court in point of pecuniary value by the relinquishment of a portion of the plaintiff's claim under the express provision in the same section.(2) If the first Court had, in fact, no jurisdiction in respect of the claim, or any portion of it, the plaintiff need not, and indeed could not, have sued. If, in the same circumstances, and in the belief that a Court has jurisdiction, a party does sue, he cannot be said to relinquish or omit a claim which is put forward, even though erroneously. If, therefore, as in the first case next mentioned, a party sues and obtains a decree which is infructuous for want of jurisdiction, or, as in the second case, he is refused a decree, he is not precluded from suing again. Where the cause of action was not split because the plaintiff did not in the first case either relinquish or omit to sue for any portion of his claim, and the necessity for the second suit arose out of the fact that the decree in the first suit was infructuous so far as regarded a certain portion of the property, in consequence of its having been made without jurisdiction, the section was held not to apply.(3) And where a plaintiff had a right to sue his mortgagor for the mortgage debt in the Court within whose jurisdiction the mortgagor resided, the fact that he erroneously claimed in that suit relief against the lands which that Court had no jurisdiction to give, and therefore refused, did not bar a subsequent suit in the proper Court to enforce the mortgage by sale of the mortgaged property.(4) The principle has been held to apply even where the jurisdiction might have existed with a permission, which was never applied for. So, where at the date of the former suit the land in respect of which the subsequent suit was brought was subject to provisions which deprived the Courts of jurisdiction, except where authority was given by Government to entertain a particular suit, it was held not obligatory on a plaintiff to obtain the permission of Government. The latter was not bound to give the Courts jurisdiction, and might possibly refuse it, or might give it after such a lapse of time as would be a bar to a party proceeding with the rest of his claim. Innes, J., said: "If at the time of a cause of action so arising to a plaintiff, or in the interval between that and a subsequent date, any part of his claim is not cognizable by the Court, it cannot, I think, be intended that he must postpone his suit for the cognizable portion of his claim until the Court acquires jurisdiction over the portion at present uncognizable,

(1) Pattaravy Mudali *v.* Audimula Mudali, 5 M. H. C. R. 419, 422 (1870).

(2) Subba Rau *v.* Rama Rau, 3 M. H. C. R. 376 (1867) [ref., Pattaravy *v.* Audimula, 5 M. H. C. R. 419; Nihal Singh *v.* Jowaya Singh, 1884, P. R. No. 162; Grish Chunder *v.* Ramessuree, 22 W. R. 308 (1874)].

(3) Bungsee Singh *v.* Soodist Lall, 7 C. 739, 747 (1881); Grish Chunder *v.* Ramessuree, 22 W. R. 308 (1874).

(4) Narasinga *v.* Venkatanarayana, 16 M. 481 (1892). See Ram Soondur *v.* Krishno, 17 W. R. 380 (1872) [where a former judgment decided that the plaintiff had no cause of action there was no cause of action used and determined].

or be barred of all future remedy for the recovery of that portion." (1) Under the Code of 1859, where property was in two districts, it was necessary to apply to the High Court under sect. 12 of that Code for sanction of the trial. It was held in some cases that a plaintiff was not bound to include all such properties in one suit, and to apply for sanction, and that he might sue separately in each district.(2) The Calcutta High Court, however, held that a plaintiff should include all properties and apply for sanction.(3) Sanction, however, is no longer necessary for the exercise of jurisdiction over the whole property by a Court in which any portion of it is situate, and the plaintiff has now an absolute right to sue for the whole of the property situate in several districts, in any one of such districts. A suit, therefore, for partition must include the property in all the districts, and a suit for partition of property in any one district will not be allowed.(4) The principle applies to defect of material as of local jurisdiction. The former Court must have had jurisdiction to try the particular question raised in the second suit. Where the former suit was instituted in the Revenue Court, a subsequent suit in the Civil Court is not barred in respect of a matter not triable by the Revenue Court.(5)

(*d*) **Parties must be the same.**—Not merely must both suits arise out of the same cause of action, but they must be between the same parties, or between parties under whom they, or any of them, claim.(6) This rule bars a second suit only when the plaintiff in that suit was also the plaintiff in the first.(7) But if a person would have been barred, so will a person claiming through him as heir,(8) or assignee. And as a plaintiff having an entire demand cannot divide it into distinct parts, and maintain separate actions upon each: by parity of reason he cannot by an assignment enable others to do it.(9) In the under-mentioned case (10) it was held that the Advocate-General as plaintiff in that suit was barred by a decree in a previous suit under this section. The trustees in that suit, having then omitted to ask for an account, could not sue again. The Advocate-General represented the same interests as they did, and was therefore equally bound. It was, however, held that even if that were not the case, the Court, in the exercise of its discretion, would

(1) Pattaravy *v.* Audimula, 5 M. H. C. R. 419, 422 (1870).

(2) Subba Rau *v.* Rama Rau, 4 M. H. C. R. 376 (1867); ref., Pattaravy *v.* Audimula, 5 M. H. C. R. 419 (1870); Nihal Singh *v.* Sowaya Singh, 1884, P. R. No. 162; dist., Hari Narayan *v.* Ganpatrav Daji, 7 B. 272, 279 (1883).

(3) Jumoona *v.* Bamasoondery, 2 W. R. 148 (1865).

(4) Anup Shah *v.* Jaswant Shah, 1891, P. R. No. 10. See Hukm Chand, C. P. C. 507, and s. 20, *ante*.

(5) Hakim *v.* Nadim Gul, 1898, P. R. No. 30; Banda *v.* Abadi, 4 A. 180 (1880); Imami *v.* Gobind, 4 A. 318 (1882); Chunni Lal *v.* Banaspat Singh, 9 A. 23 (1886).

(6) Balmakund *v.* Sangari, 19 A. at pp. 383, 384 (1897); and see Hingu Lal *v.* Baldeo Ram, 24 A. 553, at p. 551 (1902), in which it was held that as regards the defendant Ganeshi, who was not a party to the former suit, s. 43 had no application.

(7) Dhani Ram Shaha *v.* Bhagnath Shaha, 22 C. 692, at p. 707, in which case the plaintiff had been defendant in the former suit. As regards minors, *vide ante*, p. 577.

(8) Sooruj Pershad *v.* Saheb Lal, 3 W. R. 25 (1865).

(9) Grain *v.* Aldrich, 38 Cal. 514 (Amer.); cited in Hukm Chand, C. P. C. 516.

(10) Advocate-General of Bombay *v.* Bai Punjabai, 18 B. 551 (1894).

not direct the account asked for. As regards defendants, however, it is to be observed that this rule has reference to the *subject-matter* of the claim, and *not to the persons* against whom it may be made.(1) It occurs in an Order which relates to the frame of a suit, and not to the array of parties. It lays down no rule as to who is to be impleaded as a defendant, and does no more than provide that the plaintiff must include, in the relief he asks for in his plaint, the whole claim he is entitled to make in respect of his cause of action against the defendant. It nowhere prescribes that where one person has two distinct causes of action, different in their nature and in their incidents, respecting the same property, one against one person, and one against another, he is bound to join those causes of action in one suit.(2) Not only must the plaintiff be the same, but the bar applies only to a suit against the same defendant.(3) This rule does not affect that which lays down the principle of bar for jointness. The principle of the maxim, *Nemo debet bis vexari*, applies not only to the case of one individual being sued twice for the same cause of action, but also to the case of a person suing twice on the same contract.(4) The rule that a decision against a joint, not joint and several, contractor, or a joint tortfeasor, is a bar to a suit against another contractor or tortfeasor, while proceeding also on the ground of unity of cause of action, is based on a different principle, viz. merger of the right of action in a judgment.(5)

(*e*) **And there must be identity of the cause of action.**—In order that the action should be a bar, the cause of action must be the same in both suits; both claim and remedy have reference to the same cause of action. The rule has no application where the causes are distinct. The rule does not compel a plaintiff, who has several causes of action, to lump them together under the penalty of having a subsequent suit barred. It applies only where there has been a splitting of a single cause of action. As pointed out by the Privy Council, the "section does not say that every suit shall include every cause of action, or every claim which the party has, but every

(1) Nobin Chandra Roy *v.* Magantara, 10 C. 924, at p. 927 (1884).

(2) Balmakund *v.* Sangari, 19 A. 379, at pp. 384, 388, 389 (1897).

(3) Sabeer Khan *v.* Kali Doss, 1 W. R. 199, 201 (1864) ["if the present suit includes persons who were not defendants in the former suit, . . . at least as to such persons wholly unaffected by the sections referred to"]; Dial Singh *v.* Jowala Devi, 1896, P. R. No. 58 [the Court observed that "it followed from the authorities that the identity of the defendants is essential when the bar under s. 43 is pleaded"]. In Ramayya *v.* Venkataratnam, 17 M. 122, 128 (1893), the section was held not to apply as the defendants were born subsequent to the former suit; and cf. Ganpat Rai *v.* Hira Singh, 1891, P. R. No. 29; Balmakund *v.* Sangari, *supra*. And in Madud *v.* Jaleem, 4 N. W. P. H. C. R. 142 (1872), Pearson, J., dissenting (in this respect, it is submitted, rightly), held that the section did not apply, and said, that the direction that "every suit shall include," etc., is to be understood, in respect of the defendants, impleaded in that suit; but see also Murti *v.* Bhola Ram, 16 A. at p. 173 (1893).

(4) Cambefort *v.* Chapman, 19 Q. B. D. 32.

(5) See the subject, which is foreign to the section, treated in Hukm Chand, Res Jud. 734; C. P. C. 551; and the leading decision of Kendall *v.* Hamilton, 4 App. Cas. 504, which has been referred to in numerous cases in this country which will be found in the text-books cited.

suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought." (1) It has also been held, in the under-mentioned case,(2) that a plaintiff was not bound to alter the nature of his suit upon the addition, at their own instance, of certain persons as defendants. In this case a suit had been brought by A for the recovery of certain moveable property. Two persons were in possession of a house, which, as well as the moveable property, had originally belonged to the same person. They were, on their own application, added as defendants. In a subsequent suit by A's son to recover the house, it was held that his father was not bound to set up a claim to the house in the first suit against the added defendants. To have done so would have been to alter the nature of the suit as originally brought, and to have offended against the provisions of sect. 44 of the last Code and O. II. rr. 4, 5 of this.

As in the case of *res judicata*, the claims in the two suits must have been made under the same title. The plaintiff must not only be the same person, but he must be suing in the same right. Thus, a suit for damages, under Lord Campbell's Act (corresponding to Indian Act XIII. of 1855), is no bar to a suit for damages suffered by the personal estate and effects of the deceased, inasmuch as the action under the Act is not connected with the estate of the deceased, and the damages recovered form no part of that estate; whereas the second action is brought by the executor or administrator as representing the estate of the testator or intestate.(3)

In order to determine whether in any case the causes of action in the two suits are the same, it is necessary to determine what was the cause of action

(1) Pittapur Raja *v.* Surya Rau, 8 M. 520, 524 (1885); s. c., 12 I. A. 119; Amanat Bibi *v.* Imdad Husain, 15 I. A. 111, 112 (1888): Mahomed Reasat Ali *v.* Hasin Banu, 20 I. A. 155, 158 (1893); Subbayya *v.* Venkatesappa, 6 M. 49, 52, 53 (1882); Thyila *v.* Kunhamed, 4 M. 308, 310 (1881); Pragji *v.* Endarji, 9 B. H. C. R. 257 (1872) [although the Code allows of claims arising from different causes of action being included in one suit, there is no provision which makes it obligatory]; Tirupati *v.* Narasimha, 11 M. 210, 211 (1887); Ambu *v.* Ketlilamma, 14 M. 23 (1890); Bulwant *v.* Chittan, 3 N. W. P. 27 (1871); Ganesh Chandra *v.* Ram Kumar, 3 B. L. R. 265 (1869); Bungsee Singh *v.* Soodist Lall, 7 C. 739, 747 (1881); Andi *v.* Thatha, 10 M. 347 (1887) [the claim and the remedy mentioned in s. 43 have like reference to the cause of action litigated in the previous suit]; Udmi *v.* Raji, 1894, P. R. No. 23; Chunni Lal *v.* Banaspat Singh, 9 A. 23 (1886); Balmakund *v.* Sangari, 19 A. 379, 383 (1897) [the two essentials are same cause of action and same parties]; Munshee Buzloor Ruheem *v.* Shumsoonnissa Begum, 8 W. R. P. C. 312 (1867); Naro Balvant *v.* Ramchandra, 13 B. 326, 329 (1888); Bikrama Singh *v.* Prab Dial, 1889, P. R. No. 129, cited Hukm Chand, C. P. C. 501 [ejectment; claim for mesne profits]; Purshottam *v.* Atmaram, 23 B. 597, 601 (1899); Narayan *v.* Shamrao, 27 B. 379, 388 (1903); Ramaswami Ayyar *v.* Vythinatha Ayyar, 26 M. 760 (1902) [the real test is whether the cause of action is the same and not whether the transaction is sought to be established in different modes or by different means]; Preonath Mukerji *v.* Bishnath Prasad, 29 A. 256 (1906) [cause of action the same]; Maung Po *v.* Ma Lon Ma Gale, 38 C. 629 (1911); 31 I. A. 140; 14 C. L. J. 15; suit for divorce and partition in Burmah.

(2) Hingu Lal *v.* Baldeo Ram, 24 A. 553 (1902).

(3) Leggott *v.* Great Northern Railway Co., L. R. 1 Q. B. D. 599.

in the former suit, and this cause of action, it has been held, must be sought for between the four corners of the plaint.(1) The Court has not to see how the facts stood upon the finding of the Court in the first suit. The question to be determined turns not upon what was the proper suit for the plaintiff to have brought, or the proper remedies for him to have applied for, having regard to the facts as found upon the trial of the first suit, but upon whether the causes of action alleged in the plaints in the two suits are one and the same, or are distinct.(2) The cause of action as alleged in the plaint cannot be altered by the result of the suit.(3) So where a suit for confirmation of possession is dismissed upon the ground that the plaintiff is not in possession, such suit is no bar to another for recovery of possession.(4) And in the under-mentioned case (5) it was held that there was nothing in the former section which would justify the Court in going behind two bonds to consider the circumstances out of which they sprang, albeit those circumstances might themselves at the time constitute a cause of action.

Meaning of "cause of action."—The meaning of the term "cause of action" has been discussed in the notes to sect. 20 and O. I. r. 1, *ante*. The question of the identity of the cause of action in the two suits will depend considerably on the circumstance whether, in cases other than those in which the cause consists merely of a right, the term is used in its restricted sense of the infringement of a right; or in the wider sense both of the right and its infringement. The wider the meaning which is attached to the term "*cause of action*," the more restricted is the operation of the section; for if the term is composed of only one element, there is more likelihood of the identity of the two suits than where their identity is required in all of several elements. The term has, in connection with this section, been defined in a number of cases in its wider sense, (6) though there are others in which the term appears to have

(1) Jibunti Nath Khan *v.* Shib Nath Chuckerbutty, 8 C. 819, 822 (1882); Nonoo Singh Monda *v.* Anand Singh Monda, 12 C. 291 (1885). As to plaintiff not knowing nature of defence, see Mt. Ackjoo *v.* Lalla, 23 W. R. 400 (1875). In order to see whether there is a bar of *res judicata*, that is, to see what was heard and *decided*, it is necessary to look both at the pleadings and judgment: Jagatjit Singh *v.* Sarubjit Singh, 19 C. 159, 172 (1891); see notes to s. 11, *ante*.

(2) Jibunti Nath *v.* Shib Nath, *supra*, at pp. 823, 824.

(3) Ittappan *v.* Manavikrama, 21 M. 153, 157 (1897).

(4) Jibunti Nath *v.* Shib Nath, *supra*; Nonoo Singh *v.* Anand Singh, *supra*; Komola Kaminy *v.* Lokenath Kur, 8 C. 825 (1882); Mohan Lal *v.* Bilaso, 14 A. 512 (1892); ref., Thakore Bechar ji *v.* Thakore Pujaji, 14 B. 31, 51 (1889); Ambu *v.* Ketlilamma, 14 M. 23, 24 (1890). See, however, Nathu *v.* Budhu, 18 B. 537, 542 (1893); the Court expressed an opinion *obiter* that s. 43 must be applied as if the facts had been as found by the Court and not as alleged in the plaint; Bande Ali *v.* Gokul Misir, 34 A. 172, 183 (1911).

(5) Umed Dholchand *v.* Pir Saheb, 7 B. 134 (1883).

(6) Jibunti Nath *v.* Shib Nath, 8 C. 819, 822 (1882); Nonoo Singh *v.* Anand Singh, 12 C. 291, 294 (1885); Ittappan *v.* Manavikrama, 21 M. 153, 156 (1897); Ram Bhaj *v.* Devia, 1881, P. R. No. 123 [in which case the breach was one, but the antecedent rights were distinct, and in which Brandreth, J., expressly observed that both the antecedent right and the breach were necessary to constitute the cause of action]; Salima Bibi *v.* Sheikh Muhammad, 18 A. 131 (1895); Sheo Prasad *v.* Lalit Kuar, 18 A. 403 (1895); Rajjo Koer *v.* Debi Dial, 18 A. 432 (1895); in Dial Singh *v.* Jowala Devi, 1896 P. R. No. 58, it was pointed out that while the term is also used in the Code in its limited sense, as in the former s. 26 [see Haramoni

been understood, though not expressly stated to have been used, in its restricted sense.(1)

It was said of the last Code that the term "*cause of action*" had not been used in all its sections in precisely the same sense.(2) It is to be construed with reference rather to the substance than to the form of action.(3) The test has been said to be whether the same evidence and arguments apply in the two cases.(4)

The cause of action must be distinguished from the subject-matter (5) of the suit, as well as from the relief (6) claimed. The words have no relation whatever to the defence, but refer to the grounds set forth in the plaint.(7)

Dassi *v.* Hari Churn Chowdhry, 22 C. 833 (1895)], in the present rule the wider meaning was intended: as has also been held to be the case for the purpose of former s. 45 (see Jhaman Lal *v.* Sant Lal, 1897, P. R. No. 43); Murti *v.* Bhola Ram, 16 A. 165 (1893), citing Read *v.* Brown, 22 Q. B. D. 128, but in which the decision of the majority was rather in favour of the opposite construction; Hukm Chand, C. P. C. 511; Balmakund *v.* Sangari, 19 A. 379, 384 (1897); Dampanaboyina *v.* Addala, 25 M. 736, 739 (1902); Narayan *v.* Shamrao, 27 B. 379, 385 (1903).

(1) See Hukm Chand, C. P. C. 511, 512. See cases cited, *post*.

(2) Anderson, Wright & Co. *v.* Kalagurla, 12 C. at p. 347 (1885); Maulvi Muhammad *v.* Muhammad Abdul, 24 I. A. 22, 26 (1896).

(3) Duncan Bros. *v.* Jeetmull Greedharee Mull, 19 C. 372, 379 (1892), as in the case of the rule relating to *res judicata*. The "cause of action, into whatever Protean forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference," *per* West, J., Vishnu *v.* Krishnarao, 11 B. at p. 165 *n.* (1874). The difficulty in the way of interpretation of this term in the Code has now been removed by the amendment of s. 26 (now O. I. r. 1).

(4) Appasami *v.* Ramasami, 9 M. 279, 281 (1886); Narayan *v.* Shamrao, 27 B. 379, 383 (1903); s. c., 5 Bom. L. R. 233; Rangayya *v.* Naryappa, 24 M. 491, 499 (1901), P. C.; Brunsden *v.* Humphreys, 14 Q. B. D. 148; in Naro Balvant *v.* Ramchandra, 13 B. 329 (1888), it was pointed out that the evidence in the two suits was essentially different. The test, however, was not accepted by Edge, C.J., in Murti *v.* Bhola Ram, 16 A. 165, 173 (1893); and in Anderson, Wright & Co. *v.* Kalagurla, 12 C. 339 (1885); Garth, C.J., held that the different actions required different evidence, though Wilson, J., held that the former s. 43 applied on the ground that though there were several breaches they were under one contract. More properly it can be described as a rough test: Purshottam *v.* Atmaram, 1 Bom. L. R. 76, 81 (1899); s. c., 23 B. 597; and see as to different issues, Soorasoonderee Dabea *v.* Gopal Lall Thakoor, 19 W. R. 141 (1873).

(5) See Suddaruddin Ahmed *v.* Banimadhub Roy Chowdhry, 15 C. 145, 150 (1887), in which the Full Bench, holding that the dismissal of a suit for rent at an enhanced rate was no bar to a subsequent suit for rent at the rate originally fixed, observed that it might be the subject-matter was the same but the cause of action was not.

(6) Shankar Baksh *v.* Daya Shankar, 15 C. 422 (1887) [difference in the mode of relief does not affect the identity of the cause of action]; Narayan *v.* Shamrao, 27 B. 379, 383 (1903); Nagathat *v.* Ponnusami, 13 M. 44, 45 (1889), in which case the relief was said to be substantially the same though the cause of action was different [suit to cancel document; suit to declare that it was not intended to take effect]; Rangayya *v.* Nanjappa, 24 M. 491, 499 (1901), in which the relief asked for was different but the cause of action was identical in the two cases: Narayan *v.* Shamrao, 27 B. 379, 383, 385 (1903).

(7) Dampanaboyina *v.* Addala, 25 M. 736, 739 (1902), in which also, at pp. 745–747, the distinction between "cause of action" and "same matter," in s. 26 of the former Code, is pointed out.

If the causes of action in two suits are separate, the fact that the suit which might have preceded in point of time has actually been posterior does not affect the question.(1) Nor does the fact that joinder of claims might be made without being open to the charge of multifariousness take away the plaintiff's right to bring separate suits in respect of separate causes of action. Because a plaintiff has not formerly availed himself of the right to join separate claims when that is permissible, that is no objection under this section to a subsequent suit.(2)

Prior valid causes of action cannot be made into one by a transaction which is inoperative in law and challenged as such in the suit. So a suit to cancel a release, obtained by duress, of all claims against defendants, and to recover the amount of one such claim, was held to be no bar to subsequent suits upon other causes of action so released.(3) The same rule applies if a document is inadmissible in evidence, and, in consequence, a party sues on the original transaction prior to such document. So where a balance was found due between the parties, and a promissory note was executed providing for its payment by instalments, and the note being inadmissible for want of stamp, the plaintiff had to sue on the original transaction, he was held to be bound to sue for the full amount, and a suit for the amount due for some of the instalments provided for in the note was held to bar a subsequent suit for the balance.(4)

The duty to obey a foreign judgment is a new and separate cause of action from that of the original cause of action to which the judgment gave effect.(5)

Each right which gives a right of action, as also, as a general rule, distinct acts, constitute separate causes of action.(6) So as regards separate rights; a cause of action in respect of injury to a proprietary or permanent interest in an estate is not the same as that in respect of injury to a temporary or leasehold interest; (7) and the cause of action accruing to a co-sharer by reason of exclusion from joint possession is not the same as that which he possesses to have the joint estate partitioned; (8) nor is the cause of action the same in a

(1) Doorga Nath Roy *v.* Roy Kalee Narain, 24 W. R. 212, 213 (1875).

(2) See *In re* Huree Mohun Paramanick, 15 W. R. 486 (1871); s. c., 14 B. L. R. 418, 419; Laluchand *v.* Girjappa, 20 B. 469, 474 (1895); Dampanaboyina *v.* Addala, 25 M. at p. 74. (1902); as to alternative relief see Suddurudin Ahmed *v.* Banimadhub Roy, 15 C. at p. 149 (1887) So the fact that a prior mortgagee might have been, but was not, impleaded did not bring the case within the section: Balmakund *v.* Sangari, 19 A. at p. 388 (1897). Where there are separate causes of action against separate defendants, in respect of which they are not jointly concerned: Raja Ram Tewary *v.* Luchmun Pershad, 8 W. R. 15 (1867), the plaint will be rejected.

(3) Subbaya *v.* Venkatesappa, 6 M. 49 (1882).

(4) Benarsi Das *v.* Bhikan Das, 3 A. 717 (1881), Oldfield, J., diss.

(5) Lakshmanan *v.* Karuppan, 6 M. 273 (1882).

(6) Hukm Chand, C. P. C. 513, 514.

(7) Upendra Lal Mookerjee *v.* Secretary of State, 20 C. 716 (1893).

(8) Abdun Nasir *v.* Rasulan, 20 C. 385 (1892); the suit, however, may be barred where the cause of action in each case was partition. So a suit to partition debts bars a subsequent suit to partition lands: Ukha *v.* Daga, 7 B. 182 (1882); disapproved in Monsharam *v.* Gonesh, 17 C. W. N. 521 (1912). In, however, Ittappan *v.* Manavikrama, 21 M. 153, 158, 161 (1897), it was held

suit to recover possession of land upon the strength of alleged title thereto, and a suit based on the fact that there was no title, and that for the consideration money plaintiff got nothing.(1) And when plaintiff had first sued for ejectment in the Revenue Court and afterwards for rent prior to ejectment under sect. 34 of the Agra Tenancy Act of 1901, it was held that the causes of action were distinct and that the latter suit was not barred by rule 2 of this Order.(2) A right of a Mahomedan widow to dower is distinct from a right to a life-interest in the estate of her deceased husband.(3) Similarly, a suit for maintenance is distinct from a subsequent claim for a share in ancestral property.(4) If a suit for partition has been brought, but for some reason the properties have not been actually divided by the decree made therein, it is open to any one of the joint owners to maintain a subsequent suit for partition.(5) A Burmese Buddhist husband's suit for divorce is distinct from his suit for partition based on divorce.(6)

Torts.—As a general rule, every tort is a separate and indivisible cause of action. So a claim in respect of a distinct prior tort need not be included in a suit on a subsequent one, and will not be barred by the suit on that other,(7) even though the suit brought might have embraced the claims on both the torts.(8) Each of several wrongful alienations of property constitutes a separate cause of action.(9) A suit for recovery of land A from X is no bar to a suit for the recovery of land from Y, though the title thereto is the same, and the causes of action may have arisen at the same time, both the persons withholding and the property being different.(10) An act prejudicially affecting more than one person gives to each a separate cause of action, as if the act done to each were separate. So a libel against several persons has often been held to afford a separate cause of action to each.(11)

that the right of a tenant in common to have each field separately divided was different from the right to claim partition of all fields.

(1) Hanuman Kamut *v.* Hanuman Mandur, 15 C. 51 (1887).

(2) Nandan Singh *v.* Ganga Prasad, 35 A. 514 (F. B.) (1913).

(3) Mahomed Reasat Ali *v.* Hasin Banu, 21 C. 157 (1893); s. c., 20 I. A. 155.

(4) Pramada Dasi *v.* Lakhi Narain, 12 C. 60 (1885).

(5) Monsharam *v.* Gonesh, 17 C. W. N. 21 (1912).

(6) Maung Pe *v.* Ma Lon Ma Gale, 15 C. W. N. 766 (1911).

(7) Mahabeer Singh *v.* Rambhajjan Sah, 16 C. 545 (1889).

(8) Hukm Chand, C. P. C. 518.

(9) Looloo Singh *v.* Rajendur Laha, 8 W. R. 364 (1867); Pragji *v.* Endarji, 9 B. H. C. R. 257 (1872); Rao Kuran Singh *v.* Fyz Ali, 14 Moo. I. A. 187, 196 (1871) [suit to impeach alienations by Hindu widow and mother; suit to set aside mortgage granted by them before alienations]; Shafkat-un-nissa *v.* Shib Sahai, 4 A. 171, at p. 173 (1881); Jehan *v.* Sawak, 1 Agra, F. B. 109 (1866) [suit to set aside alienations by Hindu widow to A; the same to B]. See also in connection with the subject of alienation, Ram Lochun Lall *v.* Gour Pershad, 5 N. W. P. 172 (1873) [suit to set aside alienation of half share made by guardian; suit for share recovered by alienee in execution in another suit]; Debi Prosad Chowdhury *v.* Golap Bhagat, 40 C. 721 (F. B.)

(10) Dampanaboyina *v.* Addala, 25 M. 736 (1902); as to suits against several alienees, *vide* pp. 742, 745, ib.

(11) Hukm Chand, C. P. C. 527; and see Ali Serang *v.* Beadon, 11 C. 524 (1885); Salima Bibi *v.* Sheikh Muhammad, 18 A. 131, at p. 138 (1895); Rajjo Kuar *v.* Debi Dial, 18 A. 432 (1896); Ramanuja *v.* Devanayka, 8 M. 361 (1885).

Even in the case of the same person, if his rights in several capacities are infringed, there will be a separate cause of action to him, inasmuch as he will be considered in each case as if he were a distinct person.(1) Where the plaintiff's right is infringed by more persons than one, and by different acts done separately by each of them, the plaintiff has a separate cause of action against each of those persons.(2) A tort, though connected with a contract, constitutes a distinct cause of action from breach of the contract, and so a suit for the hire of a carriage will not bar a suit for the injury done to it during the hirer's use of it.(3) And so as regards distinct acts constituting distinct causes of action; where, for instance, some co-sharers sell their shares on different dates to different persons; each sale gives a distinct and separate cause of action to the remaining co-sharer claiming all the shares sold by right of pre-emption.(4) So also a suit on an unduly stamped instrument, for which the plaintiff had to pay duty and penalty, does not bar a suit for recovery of amount so paid,(5) there being two distinct causes of action, one of which accrued since the institution of the former suit. Unity of title to different properties injured does not make the different acts causing the injuries a single tort. So a man's right to enjoy a piece of land may depend upon one and the same title; but if he is ejected from different parts of it by distinct acts of ouster, each act of ouster would constitute a distinct and separate cause of action.(6) There is, it is submitted, no question but that there is no unity of cause of action in such cases where there is no unity in the act of dispossession, even though the plaintiff's title may be one and the same. So, conversely, if the alleged wrongs be distinct and separable, committed by several persons, and proceeding from no combination or conspiracy of such persons, the wrong-doers must respectively be sued separately in respect of their own misfeasance, and not collectively in respect of wrongs to which they have been neither directly nor indirectly

(1) Hukm Chand, C. P. C. 528, and authorities there cited.

(2) Balmakund *v.* Sangari, 19 A. at p. 384 (1897). It cannot be said that a cause of action against one person is a part of the cause of action against another, though it is not a joint one against both: Dampanaboyina *v.* Addala, 25 M. at p. 740 (1902).

(3) Hukm Chand, C. P. C. 528; citing Shaw *v.* Beers, 25 Ala, 449 (Amer.); and cf. Doorga Nath *v.* Roy Kalee, 24 W. R. 212 (1875) [suit by lessor to recover lands resumed by lessee; suit to recover lands leased].

(4) Kalian Singh *v.* Gur Dayal, 4 A. 163 (1881). See Balmakund *v.* Sangari, 19 A. at p. 384 (1897). See Harbans *v.* Tota Sahu, 32 A. 14 (1909).

(5) Ishar Das *v.* Masud Khan, 6 A. 70 (1883).

(6) Jardine Skinner & Co. *v.* Rance Shama Soondree, 13 W. R. 196 (1870); Riayatullah Khan *v.* Nasir Khan, 6 A. 616 (1884); Narayan *v.* Shamrao, 27 B. 379, 385 (1903). *Quære* whether Jumoona Dassee *v.* Bamasoonderee, 2 W. R. 148 (1865), which held to the contrary, and as to which, see Madda Singh *v.* Bukan Singh, 1881, P. R. No. 9, was correctly decided. See on this case Hukm Chand, C. P. C. 532; O'Kinealy, C. P. C. 140. In Ram Soondur Shaha, 20 W. R. 103 (1873), the Court remanded the case to ascertain whether there were separate and distinct acts of dispossession; and see cases cited *post*, and cf. Pittapur Raja *v.* Suria Rau, 8 M. 520 (1885), where there was unity of title, and Ramhurry Mondul *v.* Mothoor Mohun, 20 W. R. 450 (1873) [suits for possession of shares of different properties all bought with joint funds, but in different names and at different times].

parties.(1) A question may, however, arise as to the unity of the cause of action where there is unity of the act of dispossession, that is, infringement, but different rights infringed. If the term "*cause of action*" be given its wider sense, then in such cases it cannot be said that there is identity of cause of action. It has, however, been held that it is not the title upon which a party relies, but the infringement of it, which constitutes his cause of action.(2) The fact that a defendant's title rests upon different and distinct transactions, supported by distinct and separate evidence, does not necessarily imply that to a party contesting that title there are different causes of action warranting separate suits.(3) The unity of a tortious act is not affected by the different modes in which it causes injury. Thus, in an action for malicious prosecution, the plaintiff may recover damages not only for his unlawful arrest and imprisonment and for the expenses of his defence, but also for the injury caused to his good fame and character by reason of the false accusation; and, in consequence, a subsequent suit for the latter will be barred.(4)

An act sometimes consists of a series, and so may an act constituting a tort. The various acts may thus constitute a single wrong, so as to furnish but a single cause of action. As a general rule, acts of a similar character, performed in pursuance of the same general purpose, constitute one act and one tort, particularly so if the acts are done at the same time, or in actual continuation.(5) So a libel constitutes a single cause of action, even though it consists of several statements in the libellous pamphlet. A litigant cannot select one portion of a libel as the ground for one action, and another as the ground for a second, and so on.(6)

Generally, where goods are wrongfully detained after seizure, the deten-

(1) Koondun Lal *v.* Rae Himmut Singh, 3 N. W. P. 86, 87 (1871); and see Musst Rutta Bibee *v.* Dumree Lal, 2 N. W. P. 153 (1870), in which, though the plaintiff's title was one and the same, the different alienations sought to be set aside were held to constitute distinct causes of action. The question of combination or absence of concert affecting or not the unity of the cause of action, has been considered with reference to misjoinder in the following cases:—Gujadhur Pershad *v.* Saheb Roy, 19 W. R. 203 (1873); Omur Ali *v.* Weylayet Ali, 4 C. L. R. 455 (1879); Loke Nath Surma *v.* Keshav Ram, 13 C. 147 (1886). There was held to be combination and one and the same cause of action against all defendants in Sudhendhu *v.* Durga Dasi, 14 C. 435 (1887); Ram Narain Dutt *v.* Annoda Prosad Joshi, 14 C. 681 (1887); Mangul *v.* Girdhari, 1892, P. R. No. 127; in Hurro Monee *v.* Onokool Chunder Mookerjee, 8 W. R. 461 (1867), it was held there was none. See Hukm Chand, C. P. C. 519-521; and as to former s. 43, Dampanaboyina *v.* Addala, 25 M. 736 (1902). In Ram Chunder *v.* Omora Churn, 16 W. R. 155 (1871), there was held to be not a single cause of action though the defendants were alleged to have leagued to oppose the plaintiff's possession by force, but no grounds are given for the decision.

(2) Jardine Skinner *v.* Shama Soonduree, 13 W. R. 196 (1870); Koondun Lal *v.* Rae Himmut Singh, 3 N. W. P. 86, 87 (1871); it is, however, to be observed that in these cases the Court was dealing with the contention that it was the title alone which constituted the cause of action.

(3) Ram Soondur Shaha *v.* Delanney, 20 W. R. 103 (1872).

(4) Hukm Chand, C. P. C. 519 [citing Sheldon *v.* Carpenter, 4 N. Y. 579 (Amer.); De La Guerra *v.* New Hall, 55 Cal. 21 (Amer.)].

(5) Ib. 520.

(6) Macdougall *v.* Knight, 25 Q. B. D. 1.

tion does not constitute a separate cause of action, but is only the consequence of the seizure. So, after a suit for recovery of property, a suit for damages for wrongful detention of the same property is barred.(1) In such cases there is one cause of action, for which damages must be assessed once for all, and different remedies. The same principle has in some cases been applied to suits for mesne profits of land from which the owner is dispossessed; (2) and a suit for possession of land has been held a bar to a suit for mesne profits of that land.(3) It has, however, in other cases been held to the contrary, both on account of sect. 10 of the Code of 1859,(4) and sect. 44 of the last Code, corresponding with O. II. rr. 4, 5 of this,(5) that claims to recover possession of immoveable property and for mesne profits are distinct claims; (6) and, conversely, a suit for mesne profits of land has been held not to bar a suit for its possession, the fact of the priority of the suit for mesne profits being immaterial so far as the construction of the Code is concerned.(7) These cases proceed on the principle that the right to possess immoveable property and the right to enjoy the profits of such property are distinct causes of action. The causes of action in a suit to recover possession under sect. 9 of the Specific Relief Act, and in a suit to recover mesne profits, are not the same, in that in the first case the party is entitled to recover possession though he had no title, whereas, if he were a trespasser, mesne profits would not be given against the true owner.(8) But where a suit was brought for possession of mortgaged

(1) Shaikh Punju *v.* Shaikh Oodoy, 18 W. R. 337 (1872); Saem Sirdar *v.* Kamaluddy, 22 W. R. 424 (1874); Serrao *v.* Noel, 15 Q. B. D. 549, and see Debi Dial Singh *v.* Ajaib Singh, 3 A. 543 (1881). In Munghroo *v.* Gyaram, 14 W. R. 253 (1870), the cause of action being the detention of a boat, the plaintiff was held bound to sue for the whole of the demurrage due, Mohabut Mundul *v.* Shoorendro Nath Roy, 4 W. R.; s. c., C. R. 20 (1865) [suit for value of cattle taken; suit for damages].

(2) Venkoba *v.* Subbanna, 11 M. 151 (1887); but see Tirupati *v.* Narasimha, 11 M. 210 (1887); which has been followed in Gutta Saramma *v.* Maganti Ramineedu, 31 M. 405 (1908); Mewa Kuar *v.* Banarsi Prasad, 17 A. 533 (1895). See remarks of Privy Council in this case on appeal, 23 A. 227, 232 (1900); s. c., 5 C. W. N. 793; and Fatima Bibi *v.* Abdul Majid, 14 A. 531, 536 (1892), in which the opinion was expressed that the term "cause of action" had not been used in the same sense in s. 43 and in ss. 44–47 of the last Code.

(3) Venkoba *v.* Subbanna, 11 M. 151 (1887).

(4) Chowdry Imdad Ali *v.* Boonyad Ali, 14 W. R. 92 (1870); Baboo Issur Dutt *v.* Alluck Nusser, 7 W. R. 429 (1867); Sitaram *v.* Bhagvant, 6 B. H. C. R. 109, A. C. J. (1869), decided under the Code of 1859, which, however, expressly dealt with the point. The decision in Ram Ruttun Audo *v.* Ram Chunder Pal, 25 W. R. 113 (1876), is not to the contrary as there in the former suit mesne profits were expressly prayed for. In Rookminee Koeer *v.* Ram Tohul Roy, 21 W. R. 223 (1874), it was held that though a claim for mesne profits was a separate cause of action, yet it cannot itself be divided and every suit must include the whole of the mesne profits which had then accrued.

(5) Lalessor Babui *v.* Janki Bibi, 19 C. 615 (1891).

(6) Ib.; Bikrama Singh *v.* Prab Dial, 1889, P. R. No. 129, F. B., which must be taken to supersede Phalla *v.* Kesav Singh, 1882, P. R. No. 138. And see Pratap Chandra *v.* Rani Swarnamayi, 4 B. L. R., F. B. 113 (1869); Mon Mohun Sirkar *v.* Secretary of State, 17 C. 968 (1890); Subraya *v.* Rathnavelu, 32 A. 330 (1908).

(7) Monohur Lall *v.* Gouri Sunkur, 9 C. 283 (1882); Tirupati *v.* Narasimha, 11 M. 210 (1887).

(8) Sheo Kumar *v.* Narain Das, 24 A. 501, 503 (1902).

property and a deposit was made in Court, a second suit to recover mesne profits from the date of deposit to that of recovery of possession was held barred.(1)

As to whether or not there is a new cause of action in the case of continuing torts; the general rule appears to be that in the case of such torts as are not of a necessarily injurious and permanent character, there is a continuing obligation to abate them, and the continuance of the nuisance is held to be a new tort and therefore a separate cause of action; but the rule is otherwise in the case of all torts of a permanent character which continue to operate injuriously without any external agency.(2) While if there are different persons injured there are different torts, the question as to the number of causes of action which the same person may have, turns upon the number of torts and not upon the number of different pieces of property which may have been injured. Thus an act which damages two properties belonging to the same man at the same time and by the same means does not create two causes of action. The elements of damage are multifarious but the cause of it is a unit; but it will be otherwise if the cause itself is not single and indivisible.(3) A suit for certain moneys said to have been misappropriated by the defendant while acting as manager of a joint family, was held to bar a subsequent suit for the plaintiff's share of certain joint paddy held by the defendant at the time of the first suit, Mitter, J., observing: "The causes of action in both the cases originated in the refusal of the defendant to give to the plaintiffs their share of the properties realized by him as manager . . . the manager of a joint Hindu family holds possession of various items of property on behalf of the family. Can it be contended for a moment that each member of the family has a separate cause of action for his share in each item of those properties?" (4)

An act which causes injury both to person and property may constitute different torts. Both causes of action may be founded upon one act, but they are not on that account identical causes of action.(5) All the claims in

(1) Rukhmmbai *v.* Venkatesh, 31 B. 527 (1907).

(2) See Hukm Chand, C. P. C. 525 527, and cases there cited.

(3) See ib., 528, and Buzloor Ruheem *v.* Shumsoonissa, 11 Moo. I. A. 605 (1867), where the Privy Council pointed out that there was nothing to distinguish the deposit of the particular company's paper from the deposit of those which the plaintiff had deposited with it and recovered in the former suit; Pittapur Raja *v.* Suriya Rau, 8 M. 520; 12 I. A. 116 (1885), in which the conversion of several things was held to be one cause of action, but the particular case was distinguished, and the suit held not to be barred [suit as upon dispossession for land; subsequent suit for personalty; same title to both under will].

(4) Ganes Chandra *v.* Ram Kumar, 3 B. L. R., A. C. 265 (1869); s. c., *sub nom.* Radhakishore *v.* Ram Coomar, 12 W. R. 79. Similarly a suit for certain sums misappropriated by a general agent has been held to bar a suit for all other sums misappropriated before the former suit, on the ground that the cause of action is not the misappropriation but the refusal to account on demand: Monohur Dass *v.* Seetal Pershad, 23 W. R. 418 (1875).

(5) Brunsden *v.* Humphrey, 14 Q. B. D. 141; Darley Main Colliery *v.* Mitchell, 11 App. Cas. 144. See former case discussed in Hukm Chand, C. P. C. 530, 531.

respect of the tort which is the cause of action should be made in one suit.(1)

Contract.—Each separate contract made with the same or different persons constitutes a separate cause of action. So the holder of two independent mortgages over the same property may sue and obtain a decree for sale on each of them separately:(2) and two bonds have been held to constitute separate causes of action, even though the circumstances out of which they sprung might themselves at the time have constituted a cause of action.(3) Each of several contracts made with separate persons, though made at one and the same time, is a distinct and separate cause of action.(4) Thus in the second of the last-mentioned cases an engagement for payment of rent with each tenant was held to be a separate cause of action; as also in the second each purchase of goods made by several persons. A bond executed by father and son living together, joint in all their concerns, constitutes a separate cause of action from that executed by the son alone, as the father could not be responsible for the latter.(5) Where there are separate contracts the breach of each constitutes a separate cause of action.(6) Where there is a single contract, and several breaches which have occurred before any suit is brought, all the breaches must be included in one action even though the claim may be in part for a debt and in part for damages.(7) In Bikrama Singh *v.* Prab Dial,(8) Plowden, J., said: "Where there is an obligation created by a single contract, and several breaches have occurred before action brought, a plaintiff who does not claim all that he is entitled to in respect of such breaches does truly split his claim. The illustration seems to regard the obligation and the several breaches before suit as constituting but one cause of action. Another similar instance would be of an instalment bond and several defaults in payment of instalments due

(1) Maksud Ali *v.* Nargis Dye, 20 C. 322 (1892) [suit for possession of land on which alleged to be palm trees; suit for declaration of title to palm trees]; Lalla Luchmun *v.* Ramsarn Pandyain, 20 W. R. 144 (1873) [suit for declaration of title to mokurruree; suit for amount plaintiff entitled to on account of that title].

(2) Sundar Singh *v.* Bholu, 20 A. 322 (1898); but see Sri Gopal *v.* Pirthi Singh, 24 A. 429, 439 (1902): s. c., 29 I. A. 118; and Hari *v.* Kusum 37 C. 589 (1910).

(3) Umed Dhoichand *v.* Pir Saheb, 7 B. 134 (1883). For the purposes of the rule against misjoinder of causes of action a suit to set aside two bonds alleged to have been executed as parts of the same transaction was held not to be bad, the cause of action being under the circumstances single: Muhammad Baksh *v.* Ramdat, 1896, P. R. No. 5; Anantanarayan *v.* Savithri, 22 M. L. J. 231 (1911); 36 M. 151.

(4) Baroo Sircar *v.* Massim Mundul, 21 W. R. 206 (1874); Jumoona Das *v.* Pookhur Singh, 22 W. R. 133 (1875), in which it was held that there was misjoinder of causes of action and defendants. In Purum Sookh *v.* Subban, 2 Agra, 323 (1867), a creditor's suit against some heirs of deceased was held not to bar a subsequent suit against other heirs for balance unrecovered.

(5) Gokal Chand *v.* Khwaja Ali Shah, 1890, P. R. No. 32.

(6) See Hukm Chand, C. P. C. 534; as to several contracts forming part of one transaction and breaches of several covenants, *vide post*, p. 596.

(7) Duncan Bros. *v.* Jeetmull Greedhari Lall, 19 C. 372 (1892), approving of the opinion of Wilson, J., in Anderson, Wright & Co. *v.* Kalagurla Surjinarain, 12 C. 339 (1885); dist. in Banku *v.* Gopal, 14 C. L. J. 589 (1911).

(8) 1889, P. R. No. 129.

before action brought. Similarly a plaintiff excluded by a defendant for a definite period from enjoyment of profits of his property, would probably be bound to claim all the mesne profits which he was entitled to recover up to date of suit in respect of exclusion for such period." The Explanation is now amended so as to expressly include successive claims arising under the same obligation.

Claims under the same contract for several instalments of the same rent, or for several instalments of the same negotiable instrument, have been frequently held to be claims for the same cause of action.(1) Though a party may sue in respect of each instalment of rent,(2) or of a debt (3) as it falls due, the aggregate of two or more of such unpaid instalments cannot be divided into two or more causes of action but is deemed for the purpose of this section one cause of action. Whatever instalments are due must be sued for.(4) There is no distinction between a suit omitting to claim an earlier rent, and a suit omitting to claim a later rent which is due at the date of its institution.(5) The same principle applies to all interest due at the time of suit, though a suit for interest which may accrue due after the former suit will not be barred.(6) Similarly, though, where there are more covenants than one in a contract which are to be performed at different times, the breach of each constitutes a single and independent cause of action on which a separate suit may be brought, when a suit is brought on any contract after there has been a breach of several covenants, the breach of them all is considered a single cause of action.(7) So, also, in the case of continuing contracts for the doing of any act, though there is a separate covenant for the doing of that act at every moment during the period of the contract, and a breach at every moment the contract is or remains unfulfilled, the entire breach at the time of any suit is deemed a single cause of action.(8) Contracts for service

(1) Anderson, Wright & Co. *v.* Kalagurla Surjinarain, 12 C. 339, 342 (1885), *vide post.*

(2) Ib. So while a separate suit can lie for the rent of each year, a suit must embrace all the rent due at the time it is brought: Chockalinga Pillai *v.* Kumara Viruthalam, 4 M. H. C. R. 334 (1869); Alagu *v.* Abdoola, 8 M. 147 (1884); Sutto Churn Ghosal *v.* Obhoy Nund Doss, 2 W. R. Act X., 31 (1865); Ram Soondur Sein *v.* Kristo Chunder, 17 W. R. 380 (1872); Kristo Kirkur *v.* Ram Dhun, 24 W. R. 326 (1875) [the last three cases are not of authority now to justify splitting of action when different instalments are due]; Behari Lal Pal *v.* Sm. Baran Mai, 17 A. 53 (1894) [in which, however, the suit had been withdrawn with permission]; Chandi Charan *v.* Jogendra Chandra, 1 C. W. N. cxx. (1897); Balaji *v.* Bhikaji, 8 B. 164 (1881); Assanulla *v.* Tirthabashini, 22 C. 680, 691 (1895).

(3) Mackintosh *v.* Gill, 12 B. L. R. 37 (1873); Appasami *v.* Ramasami, 9 M. 279 (1886); Bikrama Singh *v.* Prab Dial, 1889, P. R. 129.

(4) Chockalinga Pillai *v.* Kumara Viruthalam, 4 M. H. C. R. 334 (1869); foll., Shanmugam Pillai *v.* Syed Gulam Ghose, 27 M. 116 (1903); Atul Krishna Ghose *v.* Nripendro Narain Ghose, 1 C. L. J. 114 (1903).

(5) Taruck Chunder Mookerjee *v.* Panchu Mohini, 6 C. 791 (1881): Adhirani Narain *v.* Raghu Mohapatro, 12 C. 50 (1885).

(6) Shailapa *v.* Balapa, 7 B. 446 (1883).

(7) Hukm Chand, C. P. C. 536.

(8) See ib., 540. The principle is, however, not applicable when the covenants are so different in their nature as to be considered separate contracts, in which case the breach of each covenant will be a separate cause of action, ib., 542. And if performance of several covenants is secured differently, their breach will not constitute a single cause of action: Yashvant *v.* Vithal, 21 B. 267 (1895).

for a term are entire contracts. The breach of such a contract constitutes a single cause of action, and a claim for damages for the breach may be made only once.(1) If several items which make up a claim are of the same nature, and form part of the same course of dealing so as to pass under the same description, and form part of one transaction, they must be considered as one cause of action and must be joined in one suit, though they may have arisen out of several contracts.(2) Where, however, the contract expressly provides that each monthly demand is to be deemed or treated as a separate contract, the plaintiff is entitled to bring separate suits for damages.(3) Where several articles are sold in succession by A to B, if the vendor sues for the price, he must sue for the price of all the goods sold up to the date of his suit, and cannot sue separately first for one and then for another.(4) The principle of such cases is that the transaction really constitutes one demand. On the same principle, a running account generally constitutes one demand and one cause of action, as also wages for work done under a general hiring.(5) All damages claimed in respect of the cause of action and accrued at date of suit must be sued for in one action; (6) as also all claims and relief arising thereout.(7)

The scope of the identity of the cause of action has been considerably extended by the addition of the Explanation of the rule, which supersedes those cases in which it was held that a suit on a collateral security given for a debt would not bar a suit for the debt itself. This is generally not the case now, and, conversely, a suit for a bill will bar a suit to enforce a security given in respect of it.(8) As regards, however, mortgages of immoveable property,

(1) Simpson *v.* Cleghorn, 6 C. L. R. 91 (1880); and see English and American cases cited in Hukm Chand, C. P. C. 542-544.

(2) Anderson *v.* Kalagurla, 12 C. 339 (1885), *per* Garth, C.J.; and see Chockalinga Pillai *v.* Kumara Viruthalam, 4 M. H. C. R. 334 (1869), distinguished in case next cited.

(3) Mundul and Co. *v.* Fazul Ellahie, S. C. C., Ref. 2 of 1912 (3rd Feb. 1914), (Jenkins, C.J., and Woodroffe, J.); following Volkart *v.* Suleji, 19 M. 304

(4) Shanmugam Pillai *v.* Syed Gulam Ghose, 27 M. 116, 117 (1903).

(5) See Hukm Chand, C. P. C. 546 548. In Nawab Mahdi Ullee *v.* Mahomed Wajid, 1 N. W. P. 70 (1867) a prior suit to recover a receipt given by way of security for loan of Rs. 500 was held not to bar a subsequent suit for balance due on whole account between parties; for in the first case it was not necessary to go into the general account. All that the Court had to do was to satisfy itself that at the time the suit was brought the money advanced on the security of the receipt had been repaid. As to suit on account stated, see Benarsi Das *v.* Bhikhare, 3 A. 717 (1881).

(6) Sheo Shunkar Sahoy *v.* Hurdoy Narain, 9 C. 143 (1882); s. c., in appeal, Madan Mohan Lal *v.* Sheo Sanker Sahoy, 12 C. 482 (1885), *vide post.*

(7) Hikmatulla Khan *v.* Imam Ali, 12 A. 203 (1890) [usufructuary mortgage; cause of action when possession of property refused; suit for unpaid interest; subsequent suit for interest and principal]; Mian Singh *v.* Sham Das, 1889, P. R. No. 70, cited in Hukm Chand, C. P. C. 535 [bond; suit for one year's interest; suit for principal and interest]; Shib Kristo Dabi *v.* Abdool Sobhan, 15 W. R. 408 (1871) [suit for specific performance; suit to recover money: part of consideration]; Lalji Mal *v.* Hulasi, 3 A. 660 (1881) [suit for specific performance of contract of mortgage; suit for recovery of mesne profits of mortgaged property]; Mewa Kuar *v.* Banarsi Prasad, 17 A. 533 (1895) [claim for possession and mesne profits arising out of one cause of action].

(8) See Preonath Mukerji *v.* Bishnath Prasad, 29 A. 256 (1906). Under the Code of 1859, it was held that the taking of a mere

the rule must now be read in subordination to sect. 99 of the Transfer of Property Act. But that Act does not nullify the rule entirely, and does not remove both the restriction on the splitting of claims and the splitting of remedies. Its only purpose is to relieve a mortgagee from the restriction placed on the splitting of his remedies.(1) It has been held (2) that a mortgagee taking out a money decree was not bound to bring one suit for the whole of the property belonging to his judgment-debtor if it had passed to different parties under different title-deeds, but might follow the property upon which he had a lien into the hands first of one purchaser and then of another; which would appear also to be law now in the case of suits under sect. 67 of the Transfer of Property Act. Where a mortgagee holds two mortgages on the same property executed by the same person, he cannot maintain a suit to recover the sum due on the later mortgage only, by sale of the property subject to the prior mortgage.(3) It has been held that where a mortgagee wishes to make out a case that he is entitled to a decree against the mortgagor personally or against his unhypothecated property in the event of the sale proceeds of the mortgaged property being insufficient to pay the mortgage-debt, he is bound to put forward in his plaint the allegations which, if established, would entitle him to that relief.(4)

Miscellaneous.—As regards mortgages, in the following cases the cause of action in the two suits was held not to be the same :—

Suit by mortgagee against mortgagor to declare mortgage lien; suit against attaching creditors of mortgagors to declare lien over surplus moneys, proceeds of sale by Collector of portion of mortgaged properties.(5) Suit by purchaser of equity of redemption of share for recovery thereof on redemption of whole; suit after purchase of remainder of mortgagor's interest for possession thereof.(6) A suit on a second mortgage is no bar to a suit on the first.(7) Suit for overdue interest on mortgage held not to bar subsequent suit to secure principal and interest by sale, there being two separate contracts contained in same instrument and distinct covenants secured in a different manner.(8) Suit by obligee against obligor to enforce lien; suit by former against purchaser in execution of money decree to have it declared that property was liable to be sold under obligee's

money decree would not necessarily extinguish the creditor's lien: Momtazoodeen *v.* Rajcoomar, 14 B. L. R. 408 (1875); Jonmenjoy Mullick *v.* Dossmoney Dossee, 7 C. 714 (1881); but under the Code of 1877, and prior to the passing of the Transfer of Property Act (*vide post*), it was held that a separate suit for enforcing the lien was barred: Gumani *v.* Ram Padarath, 2 A. 838 (1880).

(1) Govind *v.* Parashram, 25 B. 161, 167, 168 (1900); s. c., 2 Bom. L. R. 864, in which the suit was held to be barred, as there was a splitting of claims. In Bhola Nath *v.* Mahammad Sadiq, 26 A. 223 (1903), the suit was held not to be barred, as no question of this character arose.

(2) *In re* Hurry Mohun Paramanick, 14 B. L. R. 418 *n.* (1871); s. c., 15 W. R. 486.

(3) Keshavram *v.* Ranchhod, 30 B. 156 (1905); Gobinda *v.* Lala Harihar, 14 C. W. N. 1053 (1910); Atab Pramanik *v.* Arif Tarafdar, 19 C. L. J. 590 (1914).

(4) Gulam Hussain *v.* Mahamadalli, 34 B. 540 (1910).

(5) Kristodass Kundoo *v.* Ramkant Roy, 6 C. 142 (1880).

(6) Brahannayaki *v.* Krishna, 9 M. 92 (1885).

(7) Moro Raghunath *v.* Balagi, 13 B. 45 (1888).

(8) Yashwant *v.* Vithal, 25 B. 267 (1895); *vide ante*, p. 594.

decree.(1) Suit by mortgagee for sale in which holder of prior mortgage not impleaded; suit by same as purchaser of the property in execution for redemption of prior mortgage.(2) Suit by mortgagee for establishment of his right as such to mortgaged property under sect. 283 of the Code of 1882, against mortgagor, judgment-debtor, and execution-creditor; suit by him against them for possession of the property under the mortgage deed.(3) Suit by person to whom lands were hypothecated and usufructuary mortgage given for rent due under terms of *pattamchits* executed on date of mortgage; suit to recover principal and interest under mortgage.(4) A contract to pay rent and a mortgage to secure payment of rent constitute separate rights of action.(5) Failure in a redemption suit does not bar a subsequent suit in ejectment, and *vice versâ*.(6) Suit to redeem part of *talukdari* estate; previous suits to establish right in same part of estate.(7) Suit on mortgage; subsequent suit against mortgagor's sons not born at date of previous decree.(8) Ejectment suit by a mortgagor's vendee against purchaser under a mortgage decree; subsequent suit to redeem.(9) Suit by mortgagee against his mortgagors does not bar a subsequent suit to enforce the mortgage lien against purchasers or mortgagors and subsequent mortgagees.(10) Cause of action of mortgagee against his mortgagor is not the same as that against a rival mortgagee.(11) Suit for redemption; suit for mesne profits against mortgagee in possession.(12) The holder of two independent mortgages over the same property has two separate causes of action.(13) As to claims arising in connection with defendant's default and waiver, *vide ante*, p. 579. Suit on mortgage to recover money and for order of sale; suit to eject tenant and to assert right of mortgagee to possession under usufructuary mortgage; (14) suit based upon adjusted account; suit based on mortgage; (15) suit to redeem mortgage alleged to be executed in 1856 over fifty cawnies of land; suit to redeem fourteen out of the fifty cawnies on the footing of a mortgage of 1853, which had been pleaded by the defendants in the previous suit.(16) A former suit to redeem *kanam* is no bar to a subsequent suit based on the *kanam* and title, so far as the latter is based on title.(17) A suit brought by A against B

(1) Bahraichi *v.* Surju, 4 A. 257 (1881).

(2) Balmakund *v.* Sangari, 1897, All.W.N.94.

(3) Ganpat Rai *v.* Hira Singh, 1891, P. R. No. 29.

(4) Nanu *v.* Raman, 16 M. 335 (1892).

(5) Chuni Lal *v.* Banaspat Singh, 9 A. 23 (1886); and see as to same, Banda Hasan *v.* Abadi Begam, 4 A. 180 (1880).

(6) Naro Ba[illegible]nt *v.* Ram Chandra, 13 B. 326 (1888); Shridhar Vinayak *v.* Narayan, 11 B. H. C. R. 224, 230 (1874).

(7) Amanat Bibi *v.* Imdad Husain, 15 C. 800 (1888); s. c., 15 I. A. 106.

(8) Ramayya *v.* Venkataratnam, 17 M. 122 (1893).

(9) Kuppu *v.* Venkata Krishna, 20 M. 82 (1896).

(10) Laluchand *v.* Girjappa, 20 B. 469, 474 (1895).

(11) Balmakund *v.* Sangari, 19 A. 379, 388 F. B. (1897).

(12) Baboo Gour Kishen *v.* Sahay Fukeer Chand, 7 W. R. 364 (1867).

(13) Sundar Singh *v.* Bholu, 20 A. 322 F. B. (1898); but see Sri Gopal *v.* Pirthi Singh, 24 A. 429, 439 (1902); see also Hari *v.* Kusum, 35 C. 589 (1910), and the cases there mentioned.

(14) Veerana *v.* Muthukumara, 27 M. 102 (1903).

(15) Hansraj Lakhmidas *v.* Lalji Anandji, 28 B. 447 (1904).

(16) Ramaswami Ayyar *v.* Vythinatha Ayyar, 26 M. 760 (1902).

(17) Parambath *v.* Puthengattil, 28 M. 406 (1905).

on an alleged mortgage which was dismissed, is no bar to subsequent suit on another mortgage of the same property.(1) A suit brought by a wife during the life of her husband for the recovery of the prompt portion of her dower will be no bar to a subsequent suit for the recovery of the deferred portion.(2)

In the following cases the cause of action was held to be the same:— Where an occupancy tenant made a mortgage with possession of his holding, a suit by the proprietor for the cancellation of the mortgage was held to bar a suit for the possession of the holding; as the cause of action in the two suits would be the same, the defendants taking possession under his mortgage not affording a second and distinct cause of action from the execution of the deed itself.(3) A suit to redeem a mortgage on the ground of the mortgagee having received more than the amount due in respect of mortgage bars a subsequent suit for the amount of the surplus received by him.(4) Suit for redemption of *kanam*: subsequent suit based on admissions known to the plaintiff at time of previous suit that defendants were *kanamdars* under plaintiff's predecessor in title.(5) Suit for possession of a portion of a house alleged to have been partitioned in proceedings before a Court of Revenue; subsequent suit for partition of the same house in a Civil Court.(6) As to specific performance, see below.(7)

The general rule is that every partition shall embrace all the joint property, but it is subject to certain exceptions—such as (*a*) where different portions of it are situated in and out of British India; (*b*) where a portion of it is not immediately available for partition, by reason of (i) its being in possession of mortgagees, or (ii) because it was *inam* land, which required Government permission to give jurisdiction to the Court: (*c*) where property is held in partnership by the joint family along with strangers, who have no interest in the family partition among the sharers, and who could not therefore be made parties in the family partition suit.(8) The section was held not to apply where the title on which the former suit was based was exclusive

(1) Thrikaikat Madathil *v.* Thiruthiyil Krishnen, 29 M. 153 (1905); Ram Sahai *v.* Ahmadi, 33 A. 302 (1910).

(2) Umda Begam *v.* Muhammadi, 33 A. 291 (1910).

(3) Sant Ram *v.* Chanda Singh, 1886, P. R. No. 47.

(4) Baloji Tamaji *v.* Tamangonda, 6 B. H. C. R., A. C. 97 (1869).

(5) Rangasami Pillai *v.* Krishna Pillai, 22 M. 259 (1898).

(6) Balbhaddar Nath *v.* Ram Lal, 26 A. 501 (1904).

(7) Nathu *v.* Budhu, 18 B. 537 (1893) [suit for specific performance and execution of sale deed; suit on sale deed executed by Court to recover possession, but see Narayana *v.* Kandasami, 22 M. 24 (1898)]; Chidambara *v.* Srinivasa, 8 M. L. J. Rep. 61, cited Hukm Chand, C. P. C. 515 [suit for specific performance; suit for recovery of deposit money]; Parangodan *v.* Perumtoduka, 27 M. 380 (1903); Venkatarama *v.* Venkata, 24 M. 27 (1899) [suit for specific performance; subsequent suit for money paid on a consideration that failed]; Rangayya Goundan *v.* Nanjappa Rao, 24 M. 491 (1901); s. c., 3 Bom. L. R. 799 [suit for possession and damages; suit for specific performance and transfer; basis of both actions an agreement for sale].

(8) Purshottam *v.* Atmaram, 1 Bom. L. R. 76 (1899); s. c., 23 B. 597 [the claim of A to obtain his share of property owned jointly by him and B cannot be said to have been founded on the same cause of action as his claim to obtain his share of property owned jointly by him and B and C].

ownership, while that on which the subsequent suit was based was joint ownership.(1)

The *karnavan* of a Malabar *tarwad* is not barred from bringing successive suits for land in possession of an *anandravan*, the cause of action being the right to demand restoration of *tarwad* property at any time, and it being in the discretion of the *karnavan* to leave any item of property he pleases in the possession of *anandravans*.(2)

"**Shall not afterwards sue.**"- The bar is not avoided by an expression of intention to sue again.(3) A plaintiff may, however, obtain leave to omit to sue in respect of one of several remedies. A suit, however, which is withdrawn with permission to sue again does not create any bar, as the effect of such permission is to leave matters in the position in which they would have stood if no such suit had been instituted.(4) The same principle was held to apply even when the suit was dismissed for non-appearances of parties under sect. 140 of the N.W.P. Act, 1881, with leave specially reserved to the plaintiff to bring a fresh suit; the reason assigned for the decision being that before the case was struck off the plaintiff could have so amended his plaint as to have included the claim in the first suit; and *à fortiori* there was no reason why he should not include it in the subsequent suit.(5)

The bar affects the plaintiff in the second suit if he was plaintiff in the first, and those who claim under him; (6) and it is not avoided by the plaintiff having been a minor at the time of the former suit.(7) The rule says, "*shall not afterwards sue.*" It does not therefore apply where the suits are simultaneous and not successive.(8) In the case cited below,(9) the Madras High Court held that of the two simultaneous suits, both would of course not be barred, and the decree in either might stand, provided the decree in the other was reversed; and option was given to the plaintiff to choose which would stand, the other being dismissed. Fractions of a day are, however, recognized, and where two suits are presented on the same day it must be presumed, until the contrary is proved, that the suits were presented and admitted in the order in

(1) Narayan *v.* Shamrao, 27 B. 379 (1903); as to title being the same but the cause of action different, see ib at pp. 386, 389.

(2) Kannan *v.* Tenju, 5 M. 1 (1882). As to the position of a *karnavan* as understood in Malabar, see Vasudevan *v.* Sankaran, 20 M. at p. 138 (1896).

(3) See *ante*, 577; Soonder Bibee *v.* Khilloo Mull, 2 N. W. P. 90 (1870); Chajju Singh *v.* Nihal Singh, 1888, P. R. No. 190; Maksud Ali *v.* Nargis Dye, 20 C. 322 (1892).

(4) See *ante*, p. 574, and Behari Lal Pal *v.* Baran Mai, 17 A. 53 (1894), and cases there cited.

(5) Mulchand *v.* Bhikari Das, 7 A. 624 (1885), *sed quære*. As regards this case it has been submitted (Hukm Chand, C. P. C. 559) "that this argument does not appear to be correct, and the circumstance that a suit is dismissed and not decreed cannot affect the bar which has been attached by s. 43 (now r. 2) to the institution of a suit as distinct from its decision to which s. 13 (now s. 11) would apply."

(6) *Vide ante*, p. 582; Bata *v.* Faiz Baksh, 1893, P. R. No. 76.

(7) Gopal *v.* Narasinga, 22 M. 309 (1899).

(8) Vithu *v.* Narayan, 5 B. H. C. R., A. C. 30 (1868); Kaleshar *v.* Jagan, 1 A. 650 (1878); Seva Ram *v.* Kanshi Ram, 1890, P. R. No. 76.

(9) Appasami *v.* Ramasami, 9 M. 279 (1886); in Alagu *v.* Abdoola, 8 M. 147 (1884), it was held that the plaintiff should have been allowed to withdraw both suits and to file one suit in a competent Court.

which their numbers appear in the register.(1) The rule only bars a subsequent suit. It therefore does not preclude a landlord from adopting any other remedy the law gives him to enable him to recover his rent, as, for instance, by distraint under the Rent Recovery Act.(2)

"**In respect of the portion so omitted or relinquished.**"—The Privy Council observed that the right which a litigant possesses without knowing, or ever having known, that he possesses it can hardly be regarded as a "portion of his claim" within the meaning of the section.(3) It has been said that a plaintiff must be taken to have abandoned or relinquished his claim on a real cause of action if he brings it in a false one.(4) But this statement has been adversely criticized,(5) there being nothing in r. 2 to warrant the inference that all causes of action ought to be included in the alternative or otherwise, and if it were correct it would make no difference whether the cause of action is false in the sense that the facts alleged as constituting it are false, or it is false in the sense that the facts alleged do not in law constitute a cause of action.

"**More than one relief.**"—The present rule, unlike that of the Code of 1859, refers, as has been already pointed out, both to the splitting of remedies or reliefs as well as the splitting of claims.(6) Both the claim and the remedy have reference to the cause of action litigated in the previous suit.(7) There is no bar where the remedy sought in the subsequent suit is in respect of a cause of action different from that which formed the basis of the relief in the former suit.(8) Further, the bar in regard to the remedy is applicable only where the plaintiff was at the time of the former suit entitled to more than one remedy; and where the plaintiffs were entitled to only one remedy in the former suit the provisions of the section are not applicable to the second suit; (9) nor where a plaintiff's suit for a remedy has been dismissed on the ground that he is not entitled to it but to another remedy, for which he

(1) Murti *v.* Bhola Ram, 16 A. 165, 172, 173 (1893), overruling Zahur Husain *v.* Muhammad Hasan, 1888, All. W. N. 147.

(2) Rajah Eswara *v.* Venkatarayer, 21 M. 236 (1897).

(3) Amanat Bibi *v.* Imdad Husein, 15 I. A. 106, 112 (1888). See this subject discussed, *ante*, p. 579.

(4) Rangasami Pillai *v.* Krishna Pillai, 22 M. 259.

(5) Ramaswami *v.* Vythinatha, 26 M. 760, at p. 777 (1902).

(6) *Vide ante*, p. 575.

(7) Andi *v.* Thatha, 10 M. 347 (1887) [suit for declaration of right to enjoy separate possession of land; subsequent suit for partition of that land].

(8) See Nathu *v.* Budhu, 18 B. 537 (1893) [suit for specific performance; decree under which sale deed executed by Court; subsequent suit on sale deed to recover possession. Held not barred as claim to possession not based on contract but on new cause of action arising from deed of sale]. In a similar case in the Madras High Court a contrary view was taken on the ground that the right to possession and conveyance arise coincidently, and suit for possession was not a separate cause of action: Narayana *v.* Kandasami, 22 M. 24 (1898). The principle, however, in the text was applied in Amlu *v.* Ketlilamma, 14 M. 23 (1890).

(9) Ram Sewak Singh *v.* Nakched Singh, 4 A. 261 (1882).

subsequently sues.(1) In a case in the Punjab Chief Court,(2) Burney, J., observed that what the plaintiff "asked for in the former suit was not a remedy to which he was entitled, and was, therefore, not one of the other alternative remedies between which the plaintiff could have chosen;" and in a subsequent case (3) in the same Court, Tremlett, J., observed, that "if the defendant's contentions were sound, we should have to hold that the construction of sect. 43 (now r. 2) is that a plaintiff entitled to only one remedy on his cause of action, who by mistake sues for what the Court considers is not the remedy to which he is entitled, will be precluded from subsequently suing for the proper one;" and, "put in this form, it is clear that the language of the section countenances no such proposition."

The rule applies to the case where there being identity of causes of action in the two suits, the plaintiff was entitled in the first suit to more than one remedy,(4) either cumulatively or alternatively. If without the leave of the Court he omit to sue for any of such remedies he cannot do so afterwards. So a personal decree for maintenance and a declaration that it is a charge on family property are two remedies referable to the same cause of action, viz. the right to receive maintenance, and therefore two separate suits cannot be brought in respect of the two remedies against the same defendant.(5)

It is not very easy to define what constitutes "a claim" as distinguished from a "remedy," for the former appears to include the latter to some extent. Doubtless the two terms were intended to overlap. While a claim has been defined as a demand of right, a remedy has been said to be the legal means to recover a right.(6) It has also been broadly defined to denote the decree or decretal order with its proper legal results, which is the successful suitor's warrant for obtaining the relief he has achieved by his suit.(7) Mortgage cases are common instances in which there is more than one remedy. Where a person asks for relief and ancillary thereto for an injunction, there is more than one remedy. In many cases there is an option of suing on the contract, or for breach of the contract, and in these cases there is more than one remedy, but the remedies are alternative.(8) In some cases the two terms "claim" and "remedy" are used indiscriminately. So it has been held that a suit for specific performance bars a subsequent suit for damages for failure to perform, as both claims arise out of the same cause of action, namely, the breach

(1) Peari *v.* Kheali, 3 A. 857 (1881). Similarly the dismissal of a suit for confirmation of possession on the ground that the plaintiff was not in possession is no bar to a suit for recovery of possession, *vide ante*, p. 585, and cases there cited; cf. case in last note.

(2) Prab Devi *v.* Haskishen Das, 1884, P. R. No. 47.

(3) Parmeshri *v.* Vasdeo, 1885, P. R. No. 35.

(4) These words can scarcely mean a remedy against more than one person: Kalidhun *v.* Shiba Nath, 8 C. at p. 496 (1882).

(5) Rangamma *v.* Vohalayya, 11 M. 127 (1887); and see Saminatha *v.* Rangathammal, 12 M. 285 (1889); Bhagirathi *v.* Anantha, 17 M. 268, 270 (1893).

(6) Kalidhun *v.* Shiba Nath, 8 C. 495, 496 (1882).

(7) Ram Sewak *v.* Nakched Singh, 4 A. at p. 270 (1882); there is, however, a distinction between "relief" and the mode or procedure for obtaining such relief: Bhobo Sundari *v.* Rakbal Chunder, 12 C. 583 (1886).

(8) Kalidhun *v.* Shiba Nath, 8 C. 496, and cases there cited.

of contract.(1) And where a plaintiff was entitled both to recover rent and to forfeiture for non-payment he was held barred after suing for the rent from suing to enforce a forfeiture for non-payment of the same rent, as both the claims arose out of the same cause of action, namely, the non-payment of rent.(2) Similarly, a suit for an injunction against a defendant directing him to abstain from excluding the plaintiff and preventing him from using his house has been held to be a bar to a suit for damages for the exclusion from the house.(3) The amendment now substitutes the word "*relief*" for "remedy."

Upon the question formerly discussed, whether in execution of a simple money decree, only the rights of the debtor pass and the mortgagor retains his lien, see below.(4) Sect. 99 of the Transfer of Property Act restrained a mortgagee from selling the mortgaged premises, except under a decree for sale.(5) Under the Code of 1859 a declaratory decree might be sued for and obtained, and a subsequent suit brought for the consequential relief.(6) But see now sect. 42 of the Specific Relief Act, which virtually repeals sect. 15 of the Code of 1859. Under the special provisions of the amended Dekkan Agriculturists Act excluding the operation of this section, a suit by a mortgagor for account does not bar a subsequent suit for redemption,(7) though prior to the amendment of this Act the contrary was held upon the principle enacted by this section.(8) If mesne profits are not asked for in a suit for specific performance of a contract to reconvey a plot of land, a subsequent suit for them will be barred by this rule.(9)

Leave to omit relief.—The words in the last Code were "*obtained before the first hearing.*" It was, however, held that leave might be applied for and obtained when the case was called on for first hearing and before anything had been done towards the hearing of the case.(10) Though these words have been omitted probably the same rule will hold now. Such leave should be obtained from the Court before which the original suit was pending.(11)

Joinder of **causes of action.**

3. *Save as otherwise provided, a* plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the

(1) Shib Kristo *v.* Abdool Sobhan, 15 W. R. 408 (1871); see Specific Relief Act, 1877, ss. 30, 19.

(2) Subbaraya *v.* Krishna, 6 M. 159 (1882).

(3) Chajju Singh *v.* Nihal Singh, 1888, P. R. No. 190.

(4) Rashbehary Ghose's Law of Mortgage, 3rd ed. 712, 733, and cases there cited.

(5) See O. 34, r. 14 and notes.

(6) Kalidhun *v.* Shiba Nath, 8 C. 483, F. B. (1882); foll., Sarsuti *v.* Kunj Behari, 5 A. 345 (1883), F. B.

(7) Laluchand *v.* Girjappa, 20 B. 474.

(8) See cases cited in last-mentioned decision; and as to decree ordering payment, and in default sale, and subsequent suit for redemption, Govinda *v.* Mavji, 1897, Bom. P. J. 364.

(9) Ganesh Ram *v.* Mohesh Ram, 13 C. W. N. 669 (1909).

(10) Pestonji *v.* Abdool, 5 B. 463 (1880).

(11) Muhammad Fayaz *v.* Kallu, 33 A. 244 (1910).

same defendants jointly may unite such causes of action in the same suit.

(2) *Where* causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Origin and scope of rules relating to joinder of causes of action.— The first paragraph of r. 3, which corresponds with sect. 8, Act VIII. of 1859, is taken from the English O. 18, r. 1, which, though it does not contain any reference to the case of more than one defendant, has been construed as if it referred to the "same defendants" also; it having been held (1) that "to bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected as one matter in the transaction), is not contemplated by O. 18, r. 1, which authorizes the joinder, not of several actions against distinct persons, but of several causes of action." It was, however, pointed out that the provisions contained in several of the English rules had been omitted from the Code, and the inference therefore was that it was not intended to introduce into this country the wide scope now afforded to suits in the English Courts; and that r. 3 is different from the much more general language of the English r. 1 and r. 6, which provide that claims by plaintiffs jointly may be joined with claims by them or any of them separately, and were diametrically opposed to the prohibition of sect. 31 of the last Code, that plaintiffs might not join in respect of distinct causes of action.(2) The rule is based on considerations of convenience, the misjoinder contemplated leading to complication and difficulty of dealing with the case of each defendant separately, and being vexatious and harassing to the defendants.(3)

Objections (as to which see O. I. r. 13) on the ground of misjoinder are favourite ones in this country. There may be misjoinder of plaintiffs or misjoinder of defendants. This matter is dealt with in the preceding Order. The rules under discussion relate only to joinder of causes of action. They assume that the action has been rightly constituted under the provisions relating to the joinder of parties.(4) Then there is misjoinder of subjects of suit, which is sometimes called multifariousness, though the term is not used

(1) Burstall *v.* Beyfus, 26 Ch. D. 35, *per* Selborne, L.C. In England it is settled law that two separate causes of action cannot be charged against two defendants in one action: Muthappa *v.* Muthu, 27 M. 80, at p. 83 (1903).

(2) Narsingh Das *v.* Mangal Dubey, 5 A. 163, 170, 179 (1882), F. B., a leading decision which deserves careful study. Mahmood, J., was, however, of opinion (at p. 178) that the Code did not prescribe a narrower rule upon the particular point then under discussion. In Muthappa *v.* Muthu, 27 M. 80, 83 (1903), it was also said that the terms of the English rule were wider and more general than the terms of the Code. But this case has not been followed: Aiyathurai *v.* Santhu Meera, 31 M. 252 (1908). See now O. I. r. 9, *ante*.

(3) See judgment of Peacock, C.J., in Raja Ram Tewary *v.* Luchmun Pershad, 8 W. R. 15, 16 (1867); s. c., B. L. R. (F. B.) 731; Imrit Nath *v.* Baboo Roy, 18 W. R. 288 (1872); Sudhendu *v.* Durga, 14 C. at p. 438 (1887).

(4) Hannay *v.* Smurthwaite, 2 Q. B. 425 (1893), *per* Bowen, L.J.

in the Code. Multifariousness, however, properly so called, exists when one of the defendants is not interested in the whole of the relief sought.(1) This is prohibited by the first clause of r. 3, where the parties have distinct and separate interests.(2) Misjoinder of subjects of suit is where two subjects distinct in their nature are united in one suit, and, for convenience sake, the Court requires them to be separated. Whether the various subjects shall be dealt with together is a matter of discretion to be determined upon considerations of convenience with regard to the circumstances of each particular case.(3) This matter is dealt with in r. 6. In other words, while multifariousness strictly so called is, in cases coming within the terms of the first paragraph of r. 3, absolutely prohibited, an alleged misjoinder of subjects, as it was formerly called, not amounting to multifariousness in the former sense, is left to be dealt with according to the discretion of the Court. R. 3 applies to cases where there are only one plaintiff, one defendant and several causes of action, and to cases where the plaintiffs or defendants, though consisting of two or more individuals, may be considered as an unit with reference to all the different causes of action. Where there is more than one plaintiff or defendant, the test is—is there community of interest in the issues to be determined? in other words, joint interest in the questions raised by the litigation is a condition precedent to the joinder of several causes of action.(4) The question of absence of cause of action and misjoinder must be distinguished. It may be, for instance, that certain defendants can substantiate pleas which, as a matter of substantive law or on the merits, would absolve them from liability. But this circumstance has no effect upon the question of misjoinder, which is purely a matter of adjective law or procedure.(5) While, as already stated, the rule enacted in r. 3 is based on substantial grounds of convenience, it must also be remembered that the policy of the law is not to favour multiplication of suits; (6) and it is exceedingly undesirable that any suit should fail on account of any such technical objection,(7) unless it has been taken, and is thoroughly well founded.

(1) Pointon *v.* Pointon, L. R. 12 Eq. 547, at p. 541 (1871); and see Narsingh Das *v.* Mangal Dubey, 5 A. at p. 172 (1882), and at p. 177, as to the sufficiency of each party having an interest in some matters in the suit and that they are connected with the others.

(2) See Burstall *v.* Beyfus, 26 Ch. D. 35, in which also the present English procedure which supersedes the demurrer is considered.

(3) Pointon *v.* Pointon, *supra*, at pp. 541. 542; Coates *v.* Legard, 19 Eq. 56 (1874). "The plaintiff will not be allowed needlessly to enlarge the area of the dispute," *per* Collins, M.R., Saccharin Corp. *v.* Wild, 1 Ch. D., p. 422 (1903).

(4) See Bhagwati *v.* Bindeshri, 6 A. 106, 108 (1883); Narsingh Das *v.* Mangal Dubey, 5 A. 163, 171 (1882); Sarala Sundari Dasi *v.* Saroda Prasad Sur, 2 C. L. J. 602 (1904); ref. to in Jaggeshwar Dutt *v.* Bhuban Mohan Mitra, 33 C. 425, 441 (1906).

(5) Narsingh Das *v.* Mangal Dubey, 5 A. at pp. 178, 179 (1882), *per* Mahmood, J. In Janokinath *v.* Ramrunjun, 4 C. 949 (1879), it was held that the fact that the claim for possession or rent against certain defendants was unsustainable in fact was no ground for dismissing the whole suit for misjoinder. This distinction does not appear to have been preserved in the judgment of Stuart, C.J., in Bisheshur *v.* Ram Churan, 5 A. H. C. R. 25, 28 (1872).

(6) Shoroop *v.* Mothoor, 4 W. R. 109, at p. 110 (1865); Narsingh Das *v.* Mangal Dubey, 5 A. at p. 179 (1882).

(7) Sudhendu *v.* Durga, 14 C. at p. 438

It was held that the provisions of sect. 45 of the last Code did not apply to suits for arrears of rent under the Agra Tenancy Act, 1901, so as to admit of a joint suit being brought in respect of arrears of rent due in respect of several holdings.(1)

Summary of rules on this matter.—A summary of the rules which deal with the joinder of parties, shows that any number of plaintiffs may join in respect of relief claimed arising out of the "*same act or transaction;*" that they may not join in respect of distinct causes of action in cases not within O. I. r. 1, *ante;* that any number of defendants may be joined where relief is sought against them under O. I. r. 3, or in respect of any one contract under O. I. r. 6; that no suit shall fail for mere misjoinder; and that except where plaintiffs have joined in respect of distinct causes of action as above stated, the Court may in every suit deal with the matter in controversy as far as regards the rights and interests of the parties actually before it.(2) Putting it shortly, the rules provide that a suit shall include the whole claim; that any plaintiff or plaintiffs having several causes of action, in which they are jointly interested against one defendant or several defendants jointly, may unite them in the same suit, but unless such causes of action are of the kind mentioned in clauses (*a*), (*b*) or (*c*) of r. 4 of this Order, they may not be joined, without leave of the Court, with a suit for the recovery of immoveable property; that where a plaintiff or plaintiffs have united in the same suit several causes of action against a defendant or defendants, the Court of its own motion, or on the application of the defendants, or upon agreement of the parties, may order separate trials, or confine the scope of the suit, or exclude causes of action and direct amendment of the plaint, where by the joinder of several causes of action inconvenience and confusion are likely to be caused.(3) As to whether sect. 45 of the last Code was a restrictive proviso to sect. 28 of that Code, see *post*.

"**May unite.**"—It is a pre-requisite of the right to join in one suit more than one cause of action against a defendant that the Court to which the plaint is presented should have jurisdiction over all the causes of action.(4) In the case cited, it was observed that "unless the plaintiff could lawfully unite them, the Subordinate Judge had no jurisdiction over either," and that "he should have returned the plaint, although, without amendment, it could not have been presented in either Court which had jurisdiction over either cause of action." It is, however, proper to unite several causes of action in a suit when the title to all the property to which the defence relates is the same, though the lands

(1887); Haranund *v.* Prosunno, 9 C. at p. 765 (1883).

(1) Jagan Nath Prasad *v.* Tori, 29 A. 18 (1906).

(2) See Narsingh Das *v.* Mangal Dubey, 5 A. 163, at p. 167 (1882), F. B., a decision under the last Code. The text is therefore, in this and other instances, altered to meet the present provisions.

(3) Ib., at p. 169 (1882), F. B.

(4) Khimji Jivraju *v.* Purushotam, 8 M. 171 (1883).

claimed may not be in one district.(1) For recent applications of the provision, see cases cited.(2)

Was sect. 45 of last Code a restrictive proviso to sect. 28 of that Code? The effect in this respect of the amendments.—There was force in the argument which answered this question in the negative, though the contrary was held under the last Code by the majority of the Full Bench (3) in which it was raised. Chapter III. of that Code dealt with the parties to a suit, and Chapter IV. of the same Code with the frame of a suit. The former assumed the existence of an ascertained subject-matter in dispute, and from that point of view laid down rules as to the persons who might be made parties to the suit. Chapter IV. assumed the existence of ascertained parties, and dealt with the subject-matter of the suit. The two modes of dealing did not clash with one another. Where there was identity of subject-matter the rules governing the case were to be found in Chapter III.; where there was identity of parties the scope of the action was to be limited by the rules in Chapter IV. The two Chapters thus regarded an action from two different points of view, and the rules contained in one could not, in this aspect of the case, be regarded as provisos to the rules contained in the other. By sect. 26 of the last Code all plaintiffs might join in respect of the same "*cause of action*." By sect. 28 all defendants might be joined against whom the right to any relief in respect of "*the same matter*," whether jointly, severally, or in the alternative, was alleged to exist. The term "*matter*" in sect. 28 of that Code was not convertible with "*cause of action*," but was more comprehensive—a conclusion which received support not only from the circumstance that the two expressions were used in contiguous sections (26, 27, 28) of the same Chapter, and could therefore scarcely be construed to have the same meaning, but also from the fact that the last part of sect. 31, which prohibited plaintiffs joining in respect of distinct "*causes of action*," was meant to be a limitation of the latitude allowed by Chapter III. as to the joinder of parties in respect of the "*same matter*." So long, then, as the matter in dispute was identical the plaintiff was entitled to bring before the Court all persons whose presence was necessary to afford him full relief in respect of that matter. Sect. 45 was not applicable to cases in which the subject-matter of the suit was the same, but related to cases in which the causes of action were entirely distinct. Sect. 28, on the other hand, related to cases in which the subject-matter was one and the same, and sect. 45 was not a restrictive proviso to sect. 28, for the effect of such a view would be to nullify an important part of the latter section. The essence of the provisions of sect. 45 was that there should be joint rights in the plaintiffs and joint liability of the defendants; whilst sect. 28 contemplated the granting of relief against the defendants not only jointly and in the alternative, but also severally, and it could not be conceived how this could be done in a case in which the liability

(1) Harchandar Singh *v.* Lal Bahadur Singh, 21 A. 359 (1894).

(2) Shib Prosad Chandhuri *v.* Vakai Pali, 33 C. 601 (1906); Sarada Charan Chatterji *v.* Iswar Samli, 11 C. W. N. 1154 (1907) [enhancement and increase of rent]; Parthasarathy *v.* Thandavaraya, 17 M. L. J. 515 (1907).

(3) Narsingh Das *v.* Mangal Dubey, 5 A. 163 (1882), F. B.

of the defendants was joint, as required by sect. 45. The latter section did not limit the operation of sect. 28, nor did sect. 28 extend the scope of sect. 45. Sect. 28 laid down a rule which was distinct from and independent of the rule embodied in sect. 45.(1)

According to this view of the two sections, a suit might have been brought against several defendants against whom the right to any relief in respect of "*the same matter*" existed, *and* also a suit uniting several distinct causes of action against several defendants jointly.

The majority, however, of the Full Bench held that it was difficult to interpret the expression "*same matter*" in sect. 28 as meaning more than the same "*cause of action*"; and that Chapter III. must necessarily be read with and controlled by the subsequent provisions of Chapter IV. If, then, sect. 28 and sect. 45 were read together, the joint, several, or alternative liability of defendants mentioned in sect. 28 meant such a liability in respect of one or several causes of action, which cause or causes of action were united in the same suit against the same defendants jointly; in other words, while the cause or causes of action had to be joint as to all the defendants, the relief asked might be joint, several, or in the alternative.(2) It might, it was said, be that the term "*same matter*" was more comprehensive than "*cause of action*," and that if sect. 28 stood by itself, it would in effect allow a joinder prohibited by sect. 45. But if, as was held, that section did not affect, but was, on the contrary, controlled by sects. 44 and 45, which regulated the joinder of different causes of action, then sect. 28 was restricted in its application to cases in which different causes of action might be joined in one suit. In this view, sect. 28 did not affect the question of joinder of causes of action, which was entirely regulated by the provisions of Chapter IV., and a suit, though not bad for misjoinder of parties under sect. 28, might be bad for misjoinder of causes of action under sect. 45. It was not clear, however, why the two different expressions should have been used, and neither of the views stated was free from difficulty.(3)

The case of several liability is retained in O. I. r. 3, corresponding with sect. 28 of that Code. But the words "*in respect of the same matter*" have been now omitted from O. I. r. 3. For the reasons given by him, the opinion of Mahmood, J., would still seem preferable even had this not been so. The position would now appear to be this: O. I. r. 1 allows plaintiffs to join where the relief claimed (whether the claim be joint or several) is in respect of or arises out of "*the same act or transaction.*" The necessary corollary of this is that if all persons may be joined as defendants against whom relief is claimed in respect of "*the same matter*" this phrase must include what is understood

(1) Narsingh Das v. Mangal Dubey, 5 A., p. 172 *et seq.*, *per* Mahmood, J.

(2) Ib., 5 A., p. 166 *et seq.*

(3) It has also been held in a recent Madras case that the words "same matter" are wider than the term "cause of action:" Dampanaboyina *v.* Addala, 25 M. 736, at pp. 745, 746 (1902). The Calcutta High Court has in some cases justified the joinder of defendants on the ground that there was but one cause of action: Loke Nath *v.* Keshab Ram, 13 C. 147, 152 (1886); Ishan Chandra *v.* Rameshwar, 24 C. 831 (1897); though it has never held that the two terms are synonymous. See also Luckumsey *v.* Fazulla, 5 B. 177, at p. 179 (1880); Janokinath *v.* Ramrunjun, 4 C. at pp. 952, 953 (1879); Muthappa *v.* Muthu, 27 M. 80, at p. 83 (1903).

by "*the same act or transaction*" in O. I. r. 1, that is, cases where, though the cause of action may not be the same, relief is claimed on a common ground. The qualification is now omitted, but the same result would follow even if O. I. r. 3 had not been (as is the case) expressly amended to bring it into conformity with the provisions of r. 1 of that Order. But where the subject-matter of the suit is not the same as regards plaintiffs and defendants, and the causes of action are entirely distinct, there being no common ground, then under r. 3, in order to justify joinder, there must be joint rights in the plaintiffs and joint liability in the defendants.

Cause of action.—As already elsewhere observed, this expression has always had a signification which cannot be said to be precise or definite,(1) being sometimes taken to mean the right, together with the infringement, or the title together with the injury; in order words, all the circumstances which a plaintiff is required to allege in order to show a right to relief; and being sometimes used as indicating merely the injury, which *is the cause of the plaintiff coming into Court.(2) or as indicating the plaintiff's* right merely.(3) These differing definitions account in part for the differing views to be found in the cases under this as other sections.(4) So *the right* has been treated as the whole cause of action.(5) On the other hand, it was held that the term as used in sect. 31 of the last Code, and in the section corresponding with r. 3, had the same sense as in English law, viz. of every fact which it was necessary for the plaintiff to prove to support his right to the judgment of the Court.(6) The title on which a plaintiff sues is only one of several ingredients in the cause of action, and that term includes also the infringement of the plaintiff's right.(7) The question under the section, which r. 3 replaces, has often arisen in cases of alienations of joint property by a coparcener, or of a Hindu widow's estate by the widow, and sometimes in other cases. The cases upon the point are in conflict, and it is not possible to reconcile them. The determination of the question whether there is a misjoinder in respect of cause of action, where one suit is brought against all the alienees, depends upon the view which is adopted of the meaning of the term "*cause of action*," and also on the question discussed in the last paragraph.

(1) In Fatima Bibi *v.* Abdul Majid, 14 A. at p. 536 (1892), it was said that the term "cause of action" had not been used in ss. 43, 44, 45, 46, and 47 of the Code of 1882, in precisely the same sense.

(2) Narsingh Das *v.* Mangal Dubey, 5 A. at p. 173, *per* Mahmood, J.

(3) See cases cited *post*.

(4) See Ameerun *v.* Wascehun, 11 W. R. 11, where there was a difference of opinion; see the cases cited *post*, and Hukm Chand, C. P. C. 567, 568.

(5) Lhan Chunder *v.* Rameswar, 24 C. 831 (1897) [diss. from Ram Prosad *v.* Sachi Dassi, 6 C. W. N. 585 (1902)]; Sami Chetti *v.* Ammani, 7 M. H. C. R. 260 (1873), and cases cited *post*, note 8.

(6) Salima Bibi *v.* Sheikh Muhammad, 18 A. 131 (1895); Ram Prosad *v.* Sachi Dassi, 6 C. W. N. 585 (1902).

(7) Ram Prosad *v.* Sachi Dassi, *supra*, at p. 589. So also in Koondun Lal *v.* Rae Himmut, 3 A. H. C. R. 86, 87 (1871), the Court said, "It is not a plaintiff's title which is to be regarded in a suit of this nature in considering a plea of misjoinder, but rather the wrongs alleged," and pointed out that if those wrongs were distinct and separable the wrong done must, in the absence of combination, be tried separately. See Mohan Lalji *v.* Gordhan Lalji Maharaj, 35 A. 283 (P. C.) (1913), proof of title by Shebait.

In some cases, the decision in favour of the unity of the cause of action proceeds upon the theory that the plaintiff's right is the cause of action.(1) If this be so, and there be unity as to the right, there is no misjoinder of causes of action in a suit in which the several alienees are defendants.(2) Apart from the question as to the correctness or otherwise of this view, practical objections have been urged against joinder in such cases. It has been said that one alienee is not interested in an alienation of another part of the estate made at another time to another person. Evidence against one defendant may not be admissible against another. Different questions may arise as to mesne profits. The procedure may prove vexatious and harassing to the defendants, each of whom has to wait whilst the case is going on against others, and to detain his witnesses meanwhile. The case is complicated in both the Court of first instance and appeal, where each case may have to be argued as a separate and distinct cause.(3) Even where the action was held sustainable, the Court observed that separate actions against the alienees was the better procedure.(4) As against this, it

(1) Sami Chetti *v.* Ammani, 7 M. H. C. R. 260 (1873). In this case, which was a suit brought against the alienees of the plaintiff's father's widows to recover the properties which had been alienated by the widows during his minority, Holloway, Ag. C.J., said: "The Judge says that the cause of action against each of the purchasers is a distinct one. The plaintiff claims his share of family property. His cause of action, the right, is his relation to the family to which the property appertains, and on this right, if established, and if he is not otherwise barred from recovering, he will be entitled to that share wherever found. The fact that various persons during his minority have affected to purchase parcels of the property does not destroy the unity of his ground of action." And in a suit by reversioners of B against defendants, who set up respective titles to different plots of land by purchase from B, it was also held there was no misjoinder, the Court holding that the cause of action was that plaintiffs were reversioners of B: Ishan Chunder *v.* Rameswar 24 C. 831 (1897), diss. from in Ram Prosad *v.* Sachi Dassi, 6 C. W. N. 585 (1902); appd. in Parbuti Kunwar *v.* Mahmud Fatima, 29 A. 267 (1907). In Mahomed *v.* Krishnan, 11 M. 106 (1886), a suit by junior members of a *tarwad* against the *karnavan* and others, including persons to whom he had alienated *tarwad* property, the Court observed (at p. 111) that it made no difference whether the right enforced was that of a coparcener or reversioner, and that in the view that the primary ground of action is the interest vested in possession as regards the whole of the property in suit there is unity of title, and the claim made is one in respect of the same cause of action. See also the cases in the following note, which may have proceeded upon the same principles.

(2) Vasudeva *v.* Kuleadi, 7 M. H. C. R. 290 (1874); Abdal *v.* Ayaga, 12 M. 234 (1889); Vithu *v.* Narayan, 5 B. H. C. R., A. C. J. 30 (1868); Kanth Narain *v.* Prem Lal, 3 W. R. 102 (1865); Shoroop *v.* Mothoor, 4 W. R. 109, at p. 110 (1865); Krishna Gopaul *v.* Hurry Nath, 25 W. R. 60 (1876); Haranund Mozoomdar *v.* Prosunno Chunder, 9 C. 763 (1883) [where the alienation was in execution]; cf. also *In re* Rutnessur Das, 14 W. R. 381 (1870), where the Revenue Commissioner had taken possession of the plaintiff's lands and given them to various defendants. In some of these cases, however, the alienor was a party, as to which, see *post*.

(3) See judgment of Peacock, C.J., in Raja Ram Tewary *v.* Luchmun Pershad, 8 W. R. 15, 16 (1867), and judgment of first Court in Sami *v.* Ammani, 7 M. H. C. R. 260, 261 (1873).

(4) Vithu *v.* Narayan, 5 B. H. C. R., A. C. J. 30 (1868); Subramanya *v.* Sadasiva, 8 M. 75 (1884).

may be said that the policy of the law is not to favour multiplication of suits.(1) And in some cases, as observed by the Madras High Court,(2) "it is manifest that the number and nature of the alienations are no unimportant elements for the determination of their propriety. It is most desirable that the whole of them should be at once before the Court called upon to decide the question, in order to secure the soundness of the particular decisions, and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same." It would probably be best if the Courts were given, as to procedure, a discretion to be exercised in a manner to the convenience of trial and of the parties and to the advantage of substantial justice. It is, however, necessary to determine the question by reference to the definition of the term under discussion and the other provisions of the Code. If therefore, on the other hand, the words "*cause of action*" denote both the right and its infringement,(3) there has been said to be distinct causes of action against each of the alienees, and in consequence misjoinder,(4) except perhaps where the suit is both against the alienor and the alienees. In such case it has been said (5) that (there being a complete cause of action both as to right and infringement) against the defendant alienor, it is necessary to bring the alienees on the record to afford ground for decision of the whole dispute, and that it cannot be said that a separate cause of action exists against the alienor "in conjunction with each group of alienees, the alienations not being the causes of the present action,(6) but merely incidental thereto." (7) In a case, however, where the alienor was a party, the Bombay High Court held that the plaintiffs had distinct causes of action against the several defendants, and that there was a misjoinder.(8) Whether, however,

(1) Shoroop *v.* Mothoor, 4 W. R. 109, at p. 110 (1865), where it was also said: "Reversioners frequently bring one suit to set aside such claims, and such a suit has never been held to be inadmissible."

(2) Vasudeva *v.* Kuleadi, 7 M. H. C. R. 290, 293 (1874).

(3) Ganeshi Lal *v.* Khairati, 16 A. 279 (1894), where the Court pointed out (at pp. 280, 281) that "the relationship of the reversioner to the widow's husbands could not form the cause of action, but only a part of the cause, which comprised among other things the wrongful possession of the separate sets of defendants over the lands held by them respectively;" and see cases in next note.

(4) Ganeshi Lal *v.* Khairati, *supra* [dist. in Parbuti Kunwar *v.* Mahmud Fatima, 29 A. 267 (1907)]; Kacharbhoj *v.* Bai Rathore, 7 B. 289 (1883); Raja Ram Tewary *v.* Luchmun Pershad, 8 W. R. 15 (1867), F. B.; Golam Mustafa *v.* Sheo Soondaree, 10 W. R. 187 (1868); Tewaree Raghoonath *v.* Syud Mahomed, 4 A. H. C. R. 108 (1871).

(5) Chuhar Mall *v.* Bakhtwaddi, 1890, P. R. No. 149. See Hukm Chand, C. P. C. 568, 570.

(6) In the case in question apparently the cause of action was held to be the refusal by the alienor to recognize the plaintiff's rights to share in the family property.

(7) In the following cases, which have been already cited, the alienor was a party to the action: Sami Chetti *v.* Ammani, 7 M. H. C. R. 260; Mahomed *v.* Krishnan, 11 M. 106; Abdal *v.* Ayaga, 12 M. 234; Chuhar Mall *v.* Bakhtwaddi, 1890, P. R. No. 149; Haranund *v.* Prosunno, 9 C. 763; Vithu *v.* Narayan, 5 B. H. C. R., A. C. J. 30; Kanth Narain *v.* Prem Lal, 3 W. R. 102, 103, where the Court said: "The case by the sons against the father is so entire as to be hardly capable of being prosecuted in several suits."

(8) Kachar Bhoj *v.* Bai Rathore, 7 B. 289 (1883); ref., Sadu Bin Raghu *v.* Ram Bin Govind, 16 B. 608, 611 (1892); and in Mata *v.* Bhugmanee, 1 A. H. C. R. 128 (1869), the suit was held bad for misjoinder, as though the alienor (a guardian) was a party, no relief was sought against her.

the suit is open to objection for misjoinder or not, the Court may always in its discretion direct separate trials to be held. Similarly, in a suit for possession of immoveable property against two defendants, the cause of action being that the first defendant had no title to mortgage the property to the second defendant, it was held that there was no misjoinder, and that there were not two causes of action, but one, namely, the infringement of the plaintiff's right by the first defendant, out of which flowed the title asserted by the second defendant, who derived title from the first defendant, and whose case stood or fell with his.(1) *A fortiori*, there is but one cause of action against a defendant and others who are not real but merely ostensible purchasers from him.(2) So, again, a defendant who, under a decree, subsequently reversed, ousts a plaintiff from possession, may be sued with persons to whom, subsequent to the ouster, he has leased the land; they stood in the shoes of their lessor, and were jointly liable with him to be ousted.(3) The joinder of several persons in doing an act does not affect its unity or the unity of the cause of action constituted by that act, as in the case of an obstruction or ouster by a number of persons who are alleged to have acted in combination.(4) It was held that different causes of action could not be joined in one suit against different parties, where each had a distinct and separate interest; (5) that the Courts should reject plaints against several defendants for causes of action which had accrued against each of them separately and in respect of which they are not jointly concerned; (6) that there was no section of the Code which permitted a person to sue various defendants together in respect of various causes of action; (7) and that plaintiffs could not join in one suit in respect of causes of action in which they were not all jointly interested.(8)

(1) Indar Kuar *v.* Gur Prasad, 11 A. 33 (1888). For similar cases of suits against mortgagors alienating property, see Bal Kishen *v.* Bistoo Churn, 22 W. R. 532 (1874), in which both mortgagor and his alienors were parties; also Krishna Gopaul *v.* Hurry Nath, 25 W. R. 60 (1876); Srinath Das *v.* Khetter Mohun, 16 C. 693 (1888).

(2) Wise *v.* Gureeb Hossein, 13 W. R. 271 (1870).

(3) Antu *v.* Vishnu, 22 B. 630 (1897).

(4) Loke Nath Surma *v.* Keshab Ram, 13 C. 147, 152 (1886); Muthuvijaya *v.* Chockalingam, 19 M. 335, 336 (1896); and see as to ousters by different persons on different dates committed as part of the same contest, Harchandar *v.* Lal Bahadur, 16 A. 359, 361 (1894); Varajlal *v.* Ramdat, 26 B. 259 (1901) [joint assault]; *aliter* where it is not shown that the defendants acted in concert or under some common title. For acts done by different persons are not deemed one unless done in concert: Sudhendu *v.* Durga Dasi, 14 C. 435 (1887); Ram Narain *v.* Annoda Prosad, 14 C. 681 (1887); Koondun *v.* Rae Himmut, 3 A. H. C. 86 (1871); Hurro Monee *v.* Onookool, 8 W. R. 461 (1867). In Shooroop *v.* Mothoor, 4 W. R. 109 (1865), in which the Court expressed a doubt as to whether there was misjoinder, it is not clear whether there was combination or not. In Bisheshur *v.* Ram Churun, 5 A. H. C. 25 (1873), Pearson, J., held that as there was collusion there was no misjoinder. Stuart, C.J., held there was no cause of action against first defendant, a different matter from misjoinder, though he held that the suit was bad on that ground. In Ram Prosad *v.* Sachi Dassi, 6 C. W. N. 585 (1902), there was no combination.

(5) Baroo *v.* Massim, 21 W. R. 206 (1874).

(6) Baboo Motie *v.* Rance, 8 W. R. 64 (1867), in which it was held that the defendants had no common interest, and that the causes of action were distinct.

(7) Ram Narain *v.* Annoda Prosad, 14 C. 681, at p. 687 (1887).

(8) Rajjo Kuar *v.* Debi Dial, 18 A. 432 (1896), *vide post*.

The following suits have thus been held to be bad for misjoinder:—A joint action for the price of timber against defendants, who purchased each one pair of timber separately from the other; (1) A sold to X and B sold to X; a suit by Y against A, B, and X to enforce a right of pre-emption; (2) a suit claiming possession against all of defendants, with mesne profits against some and damages against others; (3) a suit by a talookdar against the zamindar and several purchasers to set aside sales to them respectively of five *patni taluks* sold for arrears of rent due separately upon each; (4) a claim to set aside sale against auction purchaser and for damages against *zurpeshgidars;* (5) a suit against several persons, each a party to a distinct contract; (6) a suit as against one defendant for specific performance of a contract to sell land and as against another for a declaration that he was not entitled to any charge upon the same lands, the causes of action being distinct as against the defendants; (7) a suit against one person, an alleged agent of a firm, for breach of contract and against another as partner to have accounts taken and the partnership wound-up.(8)

It is necessary now, however, particularly in the case of suits by reversioners above mentioned, to consider the effect of the enlarged scope of O. I. r. 1 and its effect on the question of joinder of defendants, for now apparently all reversioners might join in any suit any number of defendants in respect of several properties, provided they base their claims (which need not be joint but may be several) on a common ground.

The relief.—The cause of action must, as in other cases, be distinguished from the relief claimed. So where plaintiff, a creditor, brought a suit on his own behalf and on behalf of other creditors, asking on his own behalf to set aside a deed as void, and on behalf of other creditors for a declaration that the deed was voidable, it was held that both the plaintiff and the other creditors had one cause of action, namely, the right to treat the deed as one which could not affect their rights, although as the plaintiff had obtained a decree which he

(1) Baroo *v.* Massim, 21 W. R. 206 (1874).

(2) Bhagwati *v.* Bindeshri, 6 A. 106 (1883); and see Kalian Singh *v.* Gur Dayal, 1 A. 163 (1881).

(3) Narsingh Das *v.* Mangal Dubey, 5 A. 163 (1882), F. B., Mahmood, J., dissent. The majority of the Court held that the suit was not against defendants jointly (p. 168), and that nothing in ss. 28 or 44 of the Code of 1882 authorized a suit by a plaintiff against A for dispossessing him or opposing his obtaining possession with distinct claims against B, C, D, and E for damages for separate years in respect of such primary wrongful act on the part of A (at pp. 170, 171), and that what was contemplated by the Code was a suit for recovery from a trespasser or trespassers in possession at time of suit, and the joinder of claim for mesne profits against such trespasser or trespassers (ib.). Mahmood, J., considered (at p. 179) that the case was similar to Janokinath *v.* Ramrunjun, 4 C. 949.

(4) Imrit Nath *v.* Baboo Joy, 18 W. R. 288 (1872).

(5) Ram Kishen *v.* Chowdhury Trebeni, 1 C. W. N. cii. (1897).

(6) Namasivaya *v.* Kader, 17 M. 168 (1893); and as to separate contracts, see case in last note.

(7) Luckumsey *v.* Fazulla, 5 B. 177 (1880); dist., Mokund Lall *v.* Chotay Lall, 10 C. 1061 (1884); Jamsetji *v.* Kashinath, 26 B. 326, 328 (1901); Krishnasami *v.* Sundarappayyar, 18 M. 415, 417 (1894); ref., Alagappa *v.* Sivaramasundara, 19 M. 211, 216 (1895); Ramchandra *v.* Ramchandra, 22 B. 46 (1896); and see Probhooram *v.* Robinson, 11 W. R. 398 (1869).

(8) Muthappa *v.* Muthu, 27 M. 80 (1903).

wished to execute, he for that purpose required relief by setting aside the deed as void.(1)

A plaintiff may always put forward an alternative case,(2) provided that the facts stated as the basis of alternative relief are the same. Where there is a single cause of action, or several causes of action against the same defendant, no difficulty arises. Where the first defendant dispossessed the plaintiff of land sold to him by the second defendant, and he sued for possession and mesne profits, or in the alternative for the refund of the purchase-money from the second defendant, it was held that there was but one cause of action, namely, the dispossession and no misjoinder.(3) Two separate alternative causes of action against the same defendant may be joined.(4)

A claim for possession by plaintiffs, four anna zemindars, to receive a four anna share in a *patni* alleged to be in possession of all six defendants, or in the alternative, except as against one defendant, for rent, was held not to be bad for misjoinder, it being further held that notwithstanding that the claim for possession or rent might be unsustainable in fact as against some of the defendants, that was no ground for dismissing the suit generally for misjoinder.(5)

"Does sect. 45 (now rule 3) contemplate a case where plaintiff has really only one cause of action upon which he can succeed, but being in doubt as to which of his alleged causes of action will be successful proceeds upon both, with the intention of obtaining relief out of one of them? Are not the several causes of action contemplated by sect. 45 causes of action which, it is alleged, each afford grounds for separate relief, and combined for cumulative and not alternative relief?" (6) In England it has been held that if two persons could not be joined as defendants unless the causes of action against them were exactly the same, the object of the Legislature would be entirely defeated.(7) It would seem from the cases cited that the fact that alternative reliefs were claimed did not authorize a joinder of several causes of action against several persons not jointly interested. So where a suit was brought to set aside the sale of a *mehal* against the persons who had purchased it at an auction sale held for default in payment of Government revenue by *zurpeshgidars*, to whom the mehal had been let, or in the alternative for damages against the *zurpeshgidars* who had defaulted in the payment, it was dismissed for multifariousness as the two claims were based on distinct causes of action.(8) And where a plaintiff contracted for sale to him of a house for Rs.2500, and sued, alleging a subsequent sale by the defendant to a third party, and prayed for

(1) Ebrahim *v.* Lalbhai, 4 Bom. L. R. 180, 184 (1902).

(2) Lakshmibai *v.* Hari, 9 B. H. C. R. 1 (1872); in Kabir Khan *v.* Khawani, 1897, P. R. No. 41, the plaintiff asked that he might be declared to be the proprietor of the whole village, or, failing that, an occupancy tenant, and it was held there was no misjoinder

(3) Serajal Huq *v.* Abdul Rahaman, 29 C. 257 (1902); s. c., 6 C. W. N. 300.

(4) Bagot *v.* Easton, 7 Ch. D. 1; Ann. Pr., 1905, p. 223.

(5) Janokinath *v.* Ramrunjun, 4 C. 949 (1879); approved by Mahmood, J., in Narsingh Das *v.* Mangal Dubey, 5 A. at p. 179 (1882).

(6) Fatima Begum *v.* Muhammad Zakaria, 1895, P. R. No. 96, *per* Rivaz, J.

(7) Child *v.* Stenning, 5 Ch. D. p. 702, and see Ann. Pr., 1905, p. 223.

(8) Ram Kishen *v.* Chowdhury Treboni, 1 C. W. N. ciii. (1897).

a decree either for specific performance of the contract of sale on payment of Rs.2400 (Rs.100 having been paid as earnest-money), or for pre-emption on the sale on payment of Rs.2500, or whatever might be the market value of the house, Chatterjee, J., observed, that two distinct claims in the alternative, based on distinct causes of action, could not be joined under the section corresponding with rule 3. Rivaz, J., also doubted the correctness of their joinder, putting the query already quoted.(1)

Same defendants jointly. -It has been already pointed out that joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants, the test being whether there is community of interest in the causes to be determined.(2) It was held that there was no provision of the Code allowing distinct causes of action against distinct sets of defendants, that is to say, causes of action in which the defendants are not all jointly interested, to be united in the same suit.(3) The mere similarity of the claim is no ground for joining in one suit claims which, though similar, are several and distinct against several persons; (4) nor is the convenience of their trial by one Court.(5) Where a cause of action arising out of a joint account of two defendants was united with another arising out of a transaction in which one of the defendants alone was concerned, it was held that the causes of action were not against the same defendants jointly.(6) Where the defendants are not jointly liable, each distinct cause of action must form the subject of a separate suit. So where A sold to X, and B sold to X, whereupon Y sued A, B, and X to enforce a right of pre-emption, it was held to be a misjoinder, there being distinct causes of action in respect of which the defendants had no common interest.(7) So where plaintiffs in a suit for partition joined as defendants a number of cultivating ryots, whom they sought to eject, it was held that the suit for partition was of little interest to the ryots, and the question of ejectment was a distinct one in the case of each ryot.(8) So, also, there has been held to be a misjoinder where the right to relief against one defendant was in respect of the non-fulfilment of a contract, and the right to a declaration against another was in respect of a threatened disturbance of the plaintiff's possession.(9) The same has been held in a suit against defendants for possession, and against some of them for damages, and against others for mesne profits; (10) and in a suit to recover possession of certain lands by reversal of certain deeds,

(1) Fatima Begam *v.* Muhammad Zakana, 1895, P. R. No. 96; Hukm Chand, C. P. C. 571.

(2) Bhagwati *v.* Bindeshri, 6 A. 106, 108 (1883), *vide ante*.

(3) Mullick Kefait *v.* Sheo Pershad, 23 C. at p. 826 (1896).

(4) Koondun Lal *v.* Rae Himmut, 3 A. H. C. R. 86, 87 (1871); as to trial by one Court, ib., and Harchandar *v.* Lal Bahadur, 16 A. at p. 362 (1894).

(5) Koondun Lal *v.* Rae Himmut, *supra*.

(6) Saina Mal *v.* Shah Bag, 1888, P. R. No. 189.

(7) Bhagwati *v.* Bindeshri, 6 A. 106 (1883).

(8) Saminada *v.* Subba, 1 M. 333 (1877).

(9) Luckumsey *v.* Fazulla, 5 B. 177 (1881); dist. in Mokund Lall *v.* Chotay Lall, 10 C. 1061 (1884), where the co-defendant who was not a party to the contract had no distinct interest and was sued as the benamidar of the real defendant. This decision is not opposed to the first.

(10) Narsingh Das *v.* Mangal Dubey, 5 A. 163, 168 (1882).

some of the deeds being of absolute, and some of conditional, sale.(1) Although there must still be community of interest where the causes of action are entirely distinct, it will be necessary in each case to see whether this is so or whether though the causes of action are several there is a common ground justifying their joinder. On the other hand, there was held to be no misjoinder in a suit against a defendant who had obtained possession under a decree which had been reversed, as also against his lessees, the latter standing in the shoes of their lessor and being jointly liable with him to be ousted.(2) In a suit against joint decree-holders for the plaintiff's customary fourth share of the profits realized by the decree-holder by an execution sale of different houses at different times, the decree-holders were held to be joint, though their liability to give the share in respect of the sale of each house was separate.(3) So, also, a suit instituted to eject all the tenants holding separate lands in a village, and to recover arrears of rent from them, was held not to be bad for misjoinder, as all the defendants claimed by inheritance or by purchase or otherwise under one and the same person, or under one of two persons who had executed the *muchalka* for the lands, and the plaintiff therefore had a common cause of action against the defendants, and was not obliged to sue them separately.(4)

As in other cases,(5) a person who is a party in different capacities is not the same defendant—a principle which though partly recognized in rule 5 is of general application. Thus, where a person is a party in two capacities there is misjoinder, unless each cause of action affects him in both capacities.(6)

Plaintiffs jointly interested.—The words "*jointly interested*" were first introduced by Act XII. of 1879. Under the Code of 1859, it was held to be a misjoinder where the causes of action of the plaintiffs were different and distinct in their nature.(7) A suit brought by three persons for the possession

(1) Raja Ram *v.* Luchman Pershad, B. L. R. (F. B.) 731 (1867). This case was distinguished in Haranund *v.* Prosunno, 9 C. 763 (1883) [suit by purchaser of property subsequently sold in execution against parties to the decree and purchasers in execution of different portions of property]; and in Ram Narain *v.* Annoda, 14 C. 681 [plaintiff talookdar obtained decree for ejectment of tenant. In execution of decree opposed by defendants. One suit against judgment-debtor and all parties opposing but without collusion]. In the first of these suits it was held there was no misjoinder, and in the second that there was. Both cases, however, based the decision upon the question whether the plaintiff had one object and the defendants a common defence. As regards these cases it was pointed out (Hukm Chand, C. P. C. 573), that the test for joinder was the unity of the cause of action and not of the object of the suit, and the unity of the defence was not knowable until after the institution of the suit.

(2) Antu *v.* Vishnu, 22 B. 630 (1897).

(3) Nanku *v.* Board of Revenue, 1 A. 444 (1877).

(4) Thiagaraja *v.* Giyana Sambandha Sannadhi, 11 M. 77 (1888).

(5) *Vide ante*, p. 528.

(6) See Hukm Chand, C. P. C. 571, 572.

(7) Romoona *v.* Manicko, 9 W. R. 525 (1868), in which Phear, J., pointing out the inconveniences of such a suit, said that "saving all questions of abatement and matters in amendment of the record, I have never in my memory heard of a suit decreed in favour of one co-plaintiff, and dismissed as against the other co-plaintiff. And that negative fact of usage is, I think, influential to show how very unpracticable, quite apart from any matter of law, it has been found that combined suits of this character should be united together and treated as if they were one."

immoveable property, in which two of them claimed half the property under a title by inheritance, and the third claimed the other half in virtue of a sale thereof to him by the first plaintiff, was held to be bad for misjoinder of causes of action.(1) The Court said: "Although it appears to us that sect. 8 of Act VIII. of 1859, the first paragraph of sect. 45 of Act X. of 1877, and the first paragraph of the present Code mean the same thing, we assume that the Legislature by the amendment of 1877, by the amendment of 1879, and by the wording of the first paragraph of sect. 45, as it at present stands, intended to make it clear that their intention was that several plaintiffs could only join in suing several defendants in one suit for several causes of action *when the plaintiffs were jointly interested in each and all of such causes of action*, and that the second part of the first paragraph of sect. 45, is merely enacting that several plaintiffs jointly interested in the same causes of action against the same defendant or several defendants jointly may sue in the same manner, as by the first part of that paragraph it is enacted one plaintiff may sue one defendant or more jointly in one suit on several causes of action, to which the defendants, if more than one, were parties, and that it did not intend to confer a right by sect. 45 on several plaintiffs to sue, on causes of action which were not jointly vested in them, one or more defendants, although the acts of all the defendants jointly might have completed a separate cause of action of each several plaintiff and afforded him a cause of action on which he could sue alone." It was assumed, however, by the Judges that the Legislature did not intend "directly or indirectly to prohibit the joining by Hindu or Mahomedan heirs in one suit of their causes of action in respect of what had been the property of their ancestor or of the family;" and that it had been the practice in the North-West Provinces "to allow Hindu or Mahomedan heirs, even where their interests were several, to join in one suit for the recovery of property which had belonged to a common ancestor through whom title was claimed," and that they regarded the decision in Ram Sewak Singh *v.* Nakched.(2) as necessarily confined to the maintenance of that practice. The same principle was followed in a subsequent case,(3) in which it was held that several creditors, to each of whom separate debts were owing by the same debtor, could not jointly sue for the avoidance of a deed of gift executed by the debtor, which deed was alleged to have been made fraudulently with intent to defeat or delay executant's creditors, the cause of action of each separate creditor not being the same as that of the others. Similarly, a suit by two brothers for a declaration that the parts of the house attached in execution of a decree against their father belonged to them and not to him was held to be irregular, though the Court observed that the plaintiffs might well have thought that the case came within the latter part of the first paragraph, as in one sense their title was a common title, which was assailed by one and the

(1) Salima Bibi *v.* Sheikh Muhammad, 18 A. 131 (1895). The plaint was returned so that the plaintiffs might elect which of them should proceed with the suit; foll., Rahim Baksh *v.* Amiran Bibi, 18 A. 219 (1896).

(2) 4 A. 261 (1882).

(3) Rajjo Kuar *v.* Debi Dial, 18 A. 432 (1895).

same action of the execution creditor, and they were jointly interested in opposing the attachment and sale, although a sale would only have affected each man's separate interest.(1) Where the cause of action in the case of the first plaintiff aimed at the establishment of the title of the first plaintiff as issueless widow of M. G. to succeed him jointly with the other widows, whereas the cause of action in the case of second plaintiff aimed at the establishment of the title of second plaintiff by reason of an adoption to take the estate of M. G. to the exclusion of all others, it was held that it could not be said that the two plaintiffs were jointly interested in these inconsistent causes of action. The establishment of first plaintiff's title would exclude second plaintiff from all right to take or share in the estate, and the establishment of second plaintiff's title would equally debar first plaintiff from any share in the estate, but a right to be maintained out of it—a right which was not brought in contest (2) The Court added: "Sect. 45 permits of the joinder in the same suit of several causes of action in which several plaintiffs are jointly interested against the same defendant. These plaintiffs are jointly interested against the same defendant in the sense that it is the object of both plaintiffs to show a title in one or other of them to the whole or a portion of the estate in competition with the defendant; but this is not enough: they must each be jointly interested with the other in *the several causes of action*—not necessarily *equally* interested, but *jointly* interested; *i.e.* as we understand, not jointly interested as a mere matter of affection, but jointly interested as to the subject-matter of the suit which the causes of action have in contemplation." (3) When two persons are interested in a piece of land—one as *melvaramdar*, and the other *kudivaramdar*—and a third party commits a wrongful act which affects the rights of the persons so interested, it may be properly held that the land is common to both to the extent of entitling them to sue jointly in respect of the wrongful act, treating such act as giving rise to but one cause of action affecting the two persons more or less.(4) So long as several causes of action are by the same or jointly interested plaintiffs and against the same defendant or defendants jointly, they may be joined subject only to the Court's discretion of ordering their separation. There are no restrictions as to the nature of the cause of action which may be so joined, as it is stated (5) there are in most of the Code States of the American Union; but the restrictions there may sometimes prove a good guide here as to the advisability, as apart from the legality, of the joinder.(6) Sect. 26 (now O. 1. r. 1) has now been amended so as to permit plaintiffs to join in whom any right to relief exists in respect of, or arising out of, the same act or transaction, that is, where if separate suits were brought any common question of law or fact would arise.

Procedure to be followed where misjoinder.—Under the last Code where a plaint was presented which was bad for misjoinder of causes of action,

(1) Behari Lal *v.* Kodu Ram, 15 A. 380 (1893).

(2) Lingammal *v.* Venkatammal, 6 M. 239, 242 (1882).

(3) Ib., at p. 242.

(4) Muthuvijaya *v.* Chockalingam, 19 M. 335 (1896).

(5) See Hukm Chand, C. P. C. 575.

(6) Ib.

it might at any time before the settlement of issues have been returned for amendment.(1) If the plaint, having been returned for amendment, was not amended, it might have been rejected.(2) If this was not done and subsequently objection was taken by the defendant, which might be either in the written statement or in a motion to take the plaint off the file or on the settlement of issues,(3) or the Court, on further consideration, considered that there were grounds for considering the plaint bad for misjoinder, the Judge should have raised an issue and decided it, and dismissed the suit.(4) If, however, the Judge felt doubtful whether his decision on the point of misjoinder would stand, he might have properly framed the issues of fact for the determination of the case, and then dismissed the suit for misjoinder without recording any finding on the other issues.(5) Further, the circumstances must have been such that the first Court had no alternative open to it but to proceed to trial of the matters of fact upon the preliminary determination of which the point raised as to misjoinder turns. It might then have dismissed the suit.(6) As to the present Code, *vide post*. Where the District Judge disallowed the objection on the ground that it was not taken at the

(1) Section 53 of last Code; Ram Prosad *v.* Sachi Dassi, 6 C. W. N. 585, at p. 588 (1902); Ganeshi *v.* Khairati, 16 A. 279, 281 (1894); Muthappa *v.* Muthu, 27 M. at p. 84 (1903). In Behari Lal *v.* Kodu Ram, 15 A. at p. 381 (1893), the Court said: "that in the great majority of cases in which two or more plaintiffs sue in one suit in respect of causes of action which are not joint, it would be proper to return the plaint for amendment and leave the plaintiffs to elect as to which of them should be struck out, but they doubted whether a Court should, without giving the parties an opportunity of amendment, absolutely dismiss the whole suit." And in Aldridge *v.* Barrow, 34 C. 662 (1907), the plaintiffs were put to election.

(2) Sect 54 of last Code. In some of the earlier cases the plaint appears to have been in the first instance rejected, or it was held that it should have been rejected: Narsingh Das *v.* Mangal Dubey, 5 A. 163, 171 (1882) [rejection stated to be under s. 53 of the Code of 1882, *sed qu.*]; Raja Ram Tewary *v.* Luchmun Pershad, 8 W. R. 15 (1867); Baboo Motu *v.* Rance, 8 W. R. 64 (1867); Sudhendhu *v.* Durga Dasi, 14 C. 435, 439 (1887); Tewaree *v.* Syud, 4 A. H. C. 108 (1871); Mussumat Rutta *v.* Dumree Lall, 2 A. H. C. 153 (1870).

(3) Ram Dyal *v.* Ram Doolal, 11 W. R. 273 (1869). The Code, however, it was held, did not apparently contemplate an application by a party that a plaint be amended: Muthappa *v.* Muthu, 27 M. at p. 84 (1903).

(4) Kachar Bhoj *v.* Bai Rathore, 7 B. 289, 291 (1883); Ram Prosad *v.* Sachi Dassi, 6 C. W. N. at p. 588 (1902); Bhagwati *v.* Bindeshri, 6 A. 106 (1883); Baroo *v.* Mahomed, 21 W. R. 206 (1874). The plaint might also be returned for amendment under s. 53 before settlement of issues. In Sudhendhu *v.* Durga, 14 C. at p. 439, the Court held, that with reference to ss. 31 and 53 of the Code of 1882, the Court should not have dismissed but rejected the plaint. It is not clear whether issues had been settled, but neither sections appear to apply. S. 31 related to misjoinder of parties, and s. 53 dealt with rejection for want of cause of action. In Janokinath *v.* Ramrunjun, 4 C. at pp. 953, 951 (1897), the Court said that when distinct causes of action are improperly joined the Court should not dismiss the suit but try them separately. This observation was *obiter*, and s. 45 contemplated separation, not where the joinder was illegal, but where it was permitted, though a joint trial was inconvenient (*vide post*). In Hurro Monee *v.* Onookool, 8 W. R. 461 (1867), it was said that the Court should have called upon the plaintiff to elect against which defendant he would proceed.

(5) Imrit Nath *v.* Roy Dhunput, 9 B. L. R. 241 (1872): s. c., 18 W. R. 288; Kachar Bhoj *v.* Bai Rathore, *supra*.

(6) Bhagwati *v.* Bindeshri, 6 A. 106, 108 (1883).

earliest possible moment, namely, in the written statement, but the objection was taken at the settlement of issues before trial, it was given effect to on second appeal.(1) The power given to the Court to return a plaint was only discretionary, and if it was shown that the form of a suit was bad, by reason that there has been misjoinder of parties, or of causes of action, it could not be said that a party was precluded from raising the objection and taking it at the hearing of the suit or on appeal. There was nothing to warrant the proposition that when a Court of first instance decided a question of misjoinder in favour of the plaintiffs, there was an end of the matter, and that the defendant was precluded from raising the question in appeal.(2) Where such a question has been raised, the Appellate Court has allowed a suit or claim to be withdrawn.(3) Where the appeal has proceeded, the question has been raised in some cases whether the Appeal Court was precluded from reversing a decision on the ground of misjoinder, by reason of sect. 578 of the former Code. In some cases, misjoinder of causes of action has been considered an irregularity not affecting jurisdiction or the merits of the case.(4) In other cases it has been held that, assuming but not deciding that misjoinder was a mere irregularity, it did affect the merits.(5) In other cases it appears to have been held that misjoinder of causes of action was of the nature not of an irregularity, but an illegality.(6) The law upon the point

(1) Namaswaya *v.* Kadir, 17 M. 168, 175 (1893).

(2) Muthappa *v.* Muthu, 27 M. 80, at p. 85 (1903). In Shunkur *v.* Lala, 2 A. H. C. 443 (1870), it was held that misjoinder was not a ground of special appeal, but this it is submitted is not so.

(3) Tara Prosunno *v.* Koomaree, 23 W. R. 389, 390 (1875); Ganeshi *v.* Khairati, 16 A. 283 (1894), in which case the appeal proceeded against those defendants in respect of whom there was no misjoinder.

(4) Kalian Singh *v.* Gur Dayal, 4 A. 163 (1881) [held misjoinder of causes of action and parties; objection taken by one defendant; *held*, Court should not having regard to s. 578 have reversed decree]; Wise *v.* Gureeb Hossein, 13 W. R. 271, 272 (1870) [held no misjoinder as objected, but, if any, the Court would inquire into merits]; Behari Lal *v.* Kodu Ram, 15 A. 380, 382 (1893) [held to be irregularity though no objection taken to form of suit, and s. 578 applied]; Mokund Lall *v.* Chotay Lall, 10 C. at p. 1068, *per* Mitter, J. (1884).

(5) Ganeshi *v.* Khairati, 16 A. 279, 283 (1894); Mokund Lall *v.* Chotay Lall, 10 C. 1069, *per* Pigot, J. (1884); Namasivaya *v.* Kadir, 17 M. at pp. 175, 176 (1893); Mohima Chandra *v.* Atul Chandra, 24 C. 540, 544 (1897) ["even if it were granted that an objection like the one that the defendants raised involves only a question of irregularity, a point which is by no means free from doubt"]; Muthappa *v.* Muthu, 27 M. 80, 84 (1903).

(6) Musst. Ameerun *v.* Musst. Waseehun, 12 W. R. 11, 12 (1869) [objection in first Court; held in second appeal by Glover, J., "it appears to me something more than an irregularity, something in fact expressly forbidden and consequently an illegality"]; Baroo *v.* Massim, 21 W. R. 206 (1874) [though the term "illegal" was used this particular question was not discussed]; Varajlal *v.* Ramdat, 26 B. 259 (1901) [s. 578 applies to mistakes and irregularities subsequently committed in a suit which has been instituted in such a way as to give the Court jurisdiction to try it. The suit, however, must first be instituted in the manner allowed by law. Cf. upon the question of jurisdiction, Mullick Kefait *v.* Sheo Pershad, 23 C. 821, 826 (1896)]; Romoona *v.* Manicko, 9 W. R. 525, 527 (1868) [Hobhouse, J., said, that joinder of causes of action was forbidden except where authorized, and that a decision in a suit in which causes of action were wrongly joined was contrary to law and being so must be set aside].

was thus unsettled.(1) Probably in some cases it will be found that the merits were affected. Where, however, this was not so, and particularly where no objection had been taken (a circumstance in itself indicating that the party has not suffered disadvantage), the Court would probably have acted rightly in not dismissing the suit upon what, in the supposed circumstances, would be a technical objection. Where effect was given to the objection, the Appellate Court, in the under-mentioned case,(2) did not dismiss the suit, but rejected the plaint, directing the plaintiffs to pay the costs throughout. In other cases, the Court, both in first and second appeal, has dismissed (3) the suit for misjoinder. As to the present Code, *vide post*.

Objections to misjoinder, as all other objections to the frame of a suit, should, of course, be taken as early as possible. An objection taken not in the written statement, but at the settlement of issues before trial, has been given effect to.(4) An objection has been held to be too late after the case has been tried and decided.(5) And it has been said that an objection taken for the first time in special, or possibly in regular appeal, might not be allowed to prevail.(6) Phear, J., said: (7) "As a general rule, if an objection on this ground is pressed and carried to a decision in the first Court, this Court will, even upon special appeal, upon its being shown to be well founded, give the objector the benefit of it. But, on the other hand, if it is not pressed and carried to a decision in the first Court, and if the parties go to trial in the same way as if the objection had not been made, then the objection will not be given effect to at a later stage, unless it appears clearly that there was a defect in the original trial, in consequence of the misjoinder of the causes of action to which the objection is directed. . . . This Court has always held that it is the duty of the first Court, which receives the plaint and entertains the suit, to take care that the parties are not prejudiced by any unfair complication in the matter which the plaintiff charges against the defendants. But if the parties have chosen to go to trial and have not insisted upon the first Court taking a step of this kind, then it may very fairly be taken against them at a

(1) Misjoinder of parties, it has been held, does not affect either merits or jurisdiction: Ram Kanaye *v.* Prosunno, 13 W. R. 175 (1870). In some of the cases previously cited there was misjoinder both of subject-matter and parties.

(2) Sudhendhu *v.* Durga, 14 C. 435, 439, 440 (1887); *sed qu.* as to grounds of decision, *vide ante*. As to amendment on appeal, see Lingammal *v.* Chinna, 6 M. 239 (1882); Karan *v.* Muhammad, 7 A. 860 (1885).

(3) Ram Narain *v.* Annoda, 14 C. 681 (1887); Romoona *v.* Manicko, 9 W. R. 525 (1868); Namasioaya *v.* Kadir, 17 M. 168, 178 (1893); Bhagwati *v.* Bindeshri, 6 A. 106 (1883); Muthappa *v.* Muthu, 27 M. 80, 85 (1903), and cases cited *ante passim*. In Banee Krishnan *v.* Koondun Lal, 2 A. H. C. 221 (1870); Koondun Lal *v.* Rae Himmut, 3 A. H. C. 86 (1871); Tewaree *v.* Syud Mohamed, 4 A. H. C. 108 (1871), the Court dismissed the suit, stating expressly that it did so on the ground of misjoinder only and not on the merits which the plaintiff could raise again in another suit. *Quære* as to the decision, Suroop *v.* Nimchand, 13 W. R. 284 (1870). A dismissal for misjoinder is not a hearing or determination within the rule of *res judicata*: Futteh Singh *v.* Mussamut Luchmee, 21 W. R. 105 (1873).

(4) Namasivaya *v.* Kadir, 17 M. 168, 175 (1893), cited *ante*.

(5) Ram Dyal *v.* Ram Doolal, 11 W. R. 273 (1869).

(6) Mahomed *v.* Potun, 20 W. R. 147, 148 (1873).

(7) Tarinee *v.* Hunsman, 20 W. R. 240 (1873).

later stage of the appeal proceedings that they have not, in fact, suffered any material disadvantage in the trial, unless it be distinctly shown that there was such disadvantage."

To turn to the present Code, it does not, as sect. 53 of the last did, specifically deal with return for amendment, but O. VI. r. 17 allows of amendment, and the Court may, it is presumed, return the plaint for that purpose. Under the last Code (sect. 54 (*d*)) a plaint so returned and not amended was rejected. This provision has not been re-enacted, but O. VI. r. 18 deals with failure to amend after order. As regards an objection on the score of misjoinder, r. 7 of this Order provides for its being taken at the earliest opportunity, and if not so taken the objection is deemed waived. Even if taken, the objection will, under sect. 99, count for nothing in appeal unless it be shown that such misjoinder has affected the merits of the case. Here, therefore, as elsewhere, the Code has diminished the importance of merely technical objections.

Only certain claims to be joined for recovery of *immoveable property.*

4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except-

(*a*) claims *for* mesne profits or arrears of rent in respect of the property claimed *or any part thereof;*

(*b*) *claims for* damages for breach of any contract under which the property or any part thereof is held; and

(*c*) *claims in which the relief sought is based on the same cause of action:*

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

Claims by or against executor, administrator or heir.

5. No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Origin of rules.—These two rules represent, with the amendments italicized, sect. 44 of the last Code, which it was stated was not very happily expressed.(1) R. 4 is taken from English O. 18, r. 2; the words "*or to obtain a declaration of title to immoveable property*" in the former section were

(1) Ganesh *v.* Jewach, 31 C. at p. 272 (1882) Hukm Chand, C. P. C. 563. (1903); Chidambara *v.* Ramasami, 5 M. 161

added to meet the decision in Gledhill *v.* Hunter,(1) but have been now omitted. R. 5 is taken from English O. 18, r. 5; the word "heir" having been added, as in this country it is not an executor or administrator alone who represents the estate of a deceased person.(2) The words after "heir" have also been added.

Objections for misjoinder.—Under sect. 54 (*d*) of the last Code, the plaint might have been rejected in case of failure to amend, on its being returned for the purpose under sect. 53 of the same Code.(3) If the Court, instead of rejecting the plaint or returning it for amendment, proceeded to trial, it should not, it was held, subsequently dismiss the suit for misjoinder, but dispose of it on the merits.(4) The objection being of a dilatory character, and beside the merits, must have been taken in the Court of first instance; if not, it was deemed waived.(5) It was not allowed to be taken for the first time on appeal, and where it was raised for the first time on appeal, the High Court, on second appeal, declined to entertain it.(6) A successful objection for misjoinder is a cause for which time may be deducted under sect. 14 of the Limitation Act.(7) Sect. 54 is now O. VII. r. 11, but clause (*d*) has not been re-enacted. See now O. VI. r. 18.

Leave.—It will be observed that leave can only be applied for in the case of r. 4. R. 5 is absolute Application should be made before the plaint is filed, though possibly, on good reason shown, leave may be given afterwards.(8) A plaintiff may, with the leave of the Court, join causes of action, but he is nowhere compelled to do so.(9) And even in regard to the excepted causes of action which may be joined, the exception implies only a permission of joinder, but does not render it obligatory.(10) Where leave is applied for, the question whether it will be granted must depend upon convenience and the circumstances of the case. Amongst these, the Court will consider the connection between the claims sought to be joined. So leave has been given to join where it was sought to recover immoveable and moveable property comprised in the same instrument, and to join claims in respect of personal and real estate, where both estates rested on a common gift in the same will.(11) No appeal lay from an order rejecting an application for leave, but where the effect of the order was to reject the plaint, it was held that the order was a decree, and, as such, appealable.(12)

Jurisdiction.—Where causes of action are united, jurisdiction depends on the value of the aggregate subject-matters.(13)

Rule 4. "Cause of action."—The rule presupposes a case where there

(1) 14 Ch. D. 492, in which it was held that an action to establish title to land and to recover rent, but not claiming possession, was not an action for land.

(2) Ahmad-ud-din *v.* Sikandar, 18 A. at p. 259 (1896).

(3) Sanna *v.* Ganapa, 5 Bom. L. R. 185 (1903), in which case the Court refused to dismiss the suit in second appeal.

(4) Kishna *v.* Rakmini, 9 A. 221 (1887).

(5) Dhondiba *v.* Ramchandra, 5 B. 554, 561 (1881); Maula *v.* Gulzar, 16 A. 130 (1893).

(6) Maula *v.* Gulzar, *supra.*

(7) Venkiti *v.* Murugappa, 20 M. 48 (1896), F.B.

(8) See Ann. Pr., 1905, 225; O'Kinealy, Civ. Pr. Code; Hukm Chand, C. P. C. 564. In Venkiti *v.* Murugappa, 20 M. 48, 49 (1890), an opportunity was given to amend the plaint and to file separate suits. Cf. rules as to leave under O. I. r. 8, *ante.*

(9) Sheo *v.* Sheosahai, 6 A. 358 (1884); ref., Becharji *v.* Pujaji, 14 B. at p. 53.

(10) Lalessor *v.* Janki, 19 C. 615 (1891).

(11) See Ann. Pr., 1905, pp. 225, 226.

(12) Bandhan *v.* Solhu, 8 A. 191 (1886).

(13) See O. II. r. 3; and as regards the old procedure, see Luchmee *v.* Kallasoo, B. L. R. (F. B.) 620.

are two or more various causes of action, one of which is to recover immoveable property. Several causes of action to recover immoveable property may be joined. The rule does not prohibit this, but a joinder with such causes of action of a different character, except as excepted in the rule.(1) If, however, the Court considers it inadvisable to try the several causes of action in one suit, it can order separate trials.(2) There is nothing, moreover, irregular in seeking to recover in one suit immoveable and moveable property if the cause of action is the same in respect of both.(3) These decisions appear to be embodied in the new clause (c). And even a claim for possession of certain immoveable property, based on the first paragraph of sect. 9 of the Specific Relief Act, may, it has been held, be joined without leave, with a claim for title to that property, and for damages for dispossession from it.(4) Claims which do not amount to a new cause of action, but which are mere machinery, such as a prayer for an injunction or receiver, may be joined without leave.(5) But it has been held that an injunction cannot be asked for where it was not merely ancillary to the claim for possession.(6)

"Suit for the recovery of immoveable property."—The expression "*suit for the recovery of immoveable property*," which is that used in sect. 16, is more limited than the expression "*suit for immoveable property*," or "*for land*" within the meaning of the Charter. A suit may be one "for land" within the meaning of the latter, and not within this rule.(7) So it has been held that a claim for specific performance of an agreement to sell a share in a house might be joined with a claim on a promissory note.(8) So, again, a suit for recovery of a mortgage-debt with an alternative prayer for sale, has been held not a suit for recovery of immoveable property.(9) Wilson, J., said: (10) "It seems to me that a suit for '*the recovery of immoveable property*' is a suit founded upon an existing title in which the plaintiff seeks to get possession of the property itself. The words '*to obtain a declaration*,' etc., seem to me to apply to a case where a title exists, and the plaintiff asks to have that fact declared, not to a case where he seeks to have something done, which, when done, will give him a title." Immoveable property in this rule includes a right of way.(11)

Rule 5.—As to the object of the corresponding English rule, see Padwick *v.* Scott.(12) There is a conflict as to the words, "*or heir as such*," between the Bombay and Allahabad High Courts. Sir Charles Sargent, in the former

(1) Chidambara *v.* Ramasami, 5 M. 161 (1882); Ambika *v.* Ram Udit, 17 A. 274, 277 (1895); Raghubar *v.* Jwala, 25 A. 229 (1903). As to court-fee in case of exception (a), see Reference, 16 A. 401 (1894).

(2) Raghubar *v.* Jwala, *supra*.

(3) Ganesh *v.* Jewach, 31 C. 262, 272 (1903); s. c., 8 C. W. N. 150; 30 I. A. 10, in which the P. C. approve Giyana *v.* Kandasami, 10 M. 375, 506 (1887), which was followed in Nistariney *v.* Nunda Lall Bose, 3 C. W. N. 670 (1899); s. c., in appeal, 7 C. W. N. 353; Mazhar *v.* Sajjad, 24 A. 358 (1902).

(4) Ram Harukh *v.* Sheodihal, 15 A. 384 (1893), not followed in Ramasami *v.* Paraman, 25 M. 448 (1901).

(5) Gledhill *v.* Hunter, 14 Ch. D. 494.

(6) Hambling *v.* Wallani, 1889, W. N. (Eng.) 133.

(7) Cutts *v.* Brown, 6 C. 328, at p. 332 (1880).

(8) Ib.

(9) Govinda *v.* Mana, 14 M. 284, 286 (1890); and see Gorachand *v.* Basanta, 15 C. L. J. 258 (1911).

(10) See Cutts *v.* Brown, 6 C. at p. 332 (1880).

(11) Bejoy Chandra *v.* Banku, 13 C. W. N. 451 (1909).

(12) 2 Ch. D. 736, 743; and see O'Kinealy, C. P. C.; Hukm Chand, C. P. C. 565.

Court, said: "Now, when can it be said that a claim is made by '*an heir as such*'? Plainly, such a claim is made when the plaintiff rests his claim entirely on the allegation that he is the heir of another, and, as such, asserts a right against the defendant." So where a portion of a claim was founded upon the plaintiff's alleged right as heir of A, and another part of the claim had no reference to A's estate, it was held that there was a misjoinder, and that one of the claims must be struck out.(1) The Allahabad High Court has, however, dissented from this decision, holding that the heir referred to in the rule is an heir suing or being sued in his representative capacity, who, like an executor or administrator, represents the estate of a deceased person; and that it is impossible to hold that the rule precludes a person from joining a claim for property acquired by himself, with a claim for property inherited by him from another, when he does not represent persons other than himself.(2) And more recently Jenkins, C.J., explained the meaning of the rule to be as follows:- Those to whom it relates have the common characteristic that they owe their legal condition to the death of another. But there are others of whom this can be predicated, as, for instance, legatees or next-of-kin who are not named in the rule. Executors, administrators, and heirs have this characteristic in common not shared by legatees and next-of-kin, namely, that not only do they acquire title from the deceased, but they may represent him.(3) And in a recent case in the Bombay High Court it was held that a claim for maintenance by the widow of a Mitakshara coparcener was not against the estate of her deceased husband (since his interest was extinguished by his death); but was against the property of which he was a coparcener; and therefore there was no misjoinder when she sued the surviving coparceners for her *stridhan* property and also for maintenance out of the joint-estate.(4)

Power of Court to order separate trials.

6. *Where* it appears to the Court that any causes of action *joined in one suit* cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

Joinder of causes of action.—This rule corresponds, subject to certain alterations, with the second paragraph of sect. 45 of the last Code and with O. 18, r. 1 and portion of O. 16, r. 1 of the English rules. See note to O. II. r. 3, the first paragraph of which embodies the first paragraph of sect. 45 of the Code of 1882. That rule relates only to the joinder of causes of action. It assumes that the action has been rightly constituted under O. I. r. 1, *ante*.(5) Under the English rule it has been held that, save in actions for the recovery of land and in actions by a trustee

(1) Ashabai *v.* Haji Tyeb, 6 B. 390 (1882). In Gokibai *v.* Lakhmidas, 14 B. 490, 492 (1890), the Court ordered the plaintiff to elect, directing that she might proceed with either claim subject to her paying any costs specially caused to the defendant by the misjoinder; but this case has been dissented from in Jankibai *v.* Shrinivas Ganesh, 38 B. 120 (1913).

(2) Ahmad-ud-din *v.* Sikandar, 18 A. 256 (1896).

(3) Hafizaboo *v.* Mahomed Cassum, 31 B. 105 (1906).

(4) Jankibai *v.* Shrinivas Ganesh, 38 B. 120 (1913), dissenting from Gokibai *v.* Lakhmidas, 14 B. 490 (1890).

(5) See *per* Bowen, L.J., in Hannah *v.* Smurthwaite, 2 Q. B. 425 (1893).

in bankruptcy, the plaintiff may without leave, but subject to rules 8, 9, join in one action, not several actions, but several "*causes of action*," (1) which term has been held to comprise every fact which is material to be proved to enable the plaintiff to succeed; (2) the entire set of facts which give rise to an enforceable claim; every fact which, if traversed, the plaintiff must prove in order to obtain judgment,(3) so connected that, as regards evidence, etc., they can conveniently be disposed of together.(4) But this joinder is "always subject to the underlying principle that the burden lies on the plaintiff of proving his case, and that no extra burden should be imposed on the defendant through the plaintiff needlessly enlarging the area of dispute."(5)

Order for separation.—The Court might, under the terms of sect. 45 of the last Code, order separate trials of any "such causes of action"—that is, causes of action which might have been joined in the same suit under the first paragraph of that section. The second paragraph, therefore, had no application in cases of misjoinder of causes of action forbidden by the first paragraph, as to which the only course open to the Court was that of returning the plaint for amendment, or rejecting it if not amended, or dismissing the suit (*vide ante*).(6) Under sect. 45 the Court could, *suo motu*, or on the application of the party, order separate trials. This can be done now under rule which consolidates the provisions of the second paragraph of sect. 45, of sects. 46, 47 of the last Code. The power given did not, it was held, extend to an order for the dismissal of defendants, and that a fresh suit should be brought against them. Such an order would not be one for the "separate disposal" (or separate trial) of the several causes of action; it would be an order preventing the disposal of them in the suit before the Court. If the Court found that the separate causes of action could not be conveniently tried together, it should, it was held, deal with them separately as sub-suits under the title and number of the principal suit from which they spring.(7) So in a suit on title in which the recovery of immoveable property and mesne profits are claimed, the Court may order separate trials in respect of the claim for the recovery of the immoveable property, and in respect of the claim for mesne profits.(8)

A direction to file separate plaints did not, it was held, come within the scope of the section which did not require the plaintiff to file separate plaints, but provided for the separate trial of the several causes of action contained in the one plaint, filed on the institution of a suit.(9) As already stated, the

(1) Burstall *v.* Beyfus, 26 Ch. D. 36, C. A.

(2) Cooke *v.* Gill, L. R. 8 C. P. p. 116; Buckley *v.* Hann, 5 Ex. 43. As to meaning of term, see notes to s. 20, O. 1. r. 1, *ante*.

(3) Read *v.* Brown, 22 Q. B. D. 131.

(4) Ann. Practice, notes to O. 18, r. 1.

(5) *Per* Collins, M.R., Saccharin Corp. *v.* Wild (1903), 1 Ch. p. 422.

(6) See Hukm Chand, C. P. C. 576; the statement in Janokinath *v.* Ramrunjun, 4 C. at pp. 953, 954, that when distinct causes of action are improperly joined the Court instead of dismissing the suit should try them separately was *obiter*, and, it is submitted, erroneous. The order for separation under the last Code applied only where there was no misjoinder. Cf. Sarala Sundari Dasi *v.* Saroda Prosad Sur, 2 C. L. J. 602 (1904).

(7) Khadar *v.* Chotibibi, 8 B. 616 (1884).

(8) Fatima Bibi *v.* Abdul Majid, 14 A. 531 (1892).

(9) Musst. Rutta *v.* Dumree Lal, 2 A. H. C. R. 153 (1870).

order which the Court might make was one for separation, and that only in the case where joinder was not forbidden. In the under-mentioned case,(1) however, the Court appeared to consider that even if two causes of action had been combined in the suit, it had power under sect. 45 of the last Code and would be justified in allowing two causes of action to be united in the case, inasmuch as it was convenient that the matter should be disposed of in one suit rather than two. The power, however, which was given by that section was to order separation, and a definite provision of law cannot be evaded on the ground of convenience.(2) In an earlier case in which the Judge stated that, evidence having been gone into, he preferred trying each cause of action against each defendant separately, instead of rejecting the plaint on the ground of misjoinder, it was pointed out that he had misconceived the extent of his powers in the matter in considering the matter one simply of convenience, and that if he were disposed to try the causes of action against all the defendants in one suit, he was at liberty to do so.(3) Nor again, of course, could the Court, where there had been a misjoinder, even though no inconvenience might have resulted to the defendants, pass a separate decree against each of them.(4) An Appellate Court had power, apparently, to order separate trials.(5) Except where the parties agreed, the order could only be made before the first hearing.(6) There is no such express limitation now, but doubtless the same rule will be ordinarily followed.

Order confining suit.—Sects. 46 and 47 of the last Code dealt with a different order from that in the second paragraph of sect. 45. Under the latter section, the Court dealt with the causes of action separately as sub-suits. The former, however, enabled a defendant, who was embarrassed by the form of the suit, to get the trial confined to a reasonable aggregate of causes of action, and in such a case the other causes must needs be left over for another suit.(7) This provision, as the other, assumed that the causes of action might be legally joined, though such joinder might be inconvenient, in which case a defendant might apply or the Court might act. It did not apply where there was misjoinder. It applied where there were several causes of action against the same defendant, or the same defendant jointly. A case where separate causes of action were alleged against two defendants did not come within the rule.(8) In sect. 46, as in sect. 45 of the last Code, the words "*before the first hearing*" were held to be imperative.(9) Order XVIII. rule 9 of the Judicature Acts,(10) allows such amendment as may be

(1) Serajul Huq *v.* Abdul Rahaman, 29 C. 257, 259 (1902); the observation was, however, *obiter*, as the Court held there was only one cause of action, in which case this section had no application.

(2) Ram Prosad *v.* Sachi Dassi, 6 C. W. N. 585 (1902).

(3) Tara Prosunno *v.* Koomaree, 23 W. R. 389 (1875), in which it was also pointed out that several distinct causes of action may be tried together against the same defendant, but not as against several defendants.

(4) Baroo *v.* Massim, 21 W. R. 206 (1874).

(5) Shoroop *v.* Mothoor, 4 W. R. 109, 110 (1865).

(6) Singa *v.* Madava, 20 M. 360, at p. 362 (1896); Damodar *v.* Gokal, 7 A. 79, at p. 100 (1881).

(7) Khadar Saheb *v.* Chotibibi, 8 B. 619 (1884).

(8) Ib.; Muthappa Chetti *v.* Muthu Palani, 27 M. 80, 84 (1903).

(9) Damodar Das *v.* Gokal Chand, 7 A. 79, at p. 100 (1881).

(10) See Saccharin Corp. *v.* Wild (1903), 1 Ch. 410, C. A., where in an action for infringement of twenty-three patents the Court limited the plaintiff to three instances.

necessitated by the procedure adopted.(1) In the under-mentioned case it was held that it was not necessary to dismiss a suit in which claims upon different causes of action and against different persons have been joined together, and that it ought to be tried, so far as relates to the joint claim, against all the defendants, the Court excluding from its consideration any claim not common against all.(2) But this could be done only by amendment by the plaintiff, as the second paragraph of sect. 45 of the former Code was applicable only to the causes of action which might have been joined in the same suit.(3)

The present rule does not expressly refer to orders confining suits, but the provision in this respect which formerly existed still seems to remain, as appears from the use of the word "*disposed*" and the authority given to the Court "*to make such other order as may be expedient*," which would include such an order confining the suit as was referred to in sects. 46 and 47 of the last Code, which this rule is intended to replace.

Consolidation of suits.—The rule deals with the separate trial of causes of action united in one suit. Neither does it, nor does any other section of the Code, provide for the consolidation of several suits. Consolidation may be ordered by consent of parties.(4) And where the parties do not agree, consolidation is sometimes ordered by the Court as a matter of expediency (5) on general principles of equity and justice. So where the parties to the suit sought to be consolidated were the same, and the subject-matter of the suits also was the same, the Court made an order for consolidation.(6) Where, on the other hand, the parties and the subject-matter were different, consolidation was refused.(7) And three suits were held to have been improperly tried together, where, from the very nature of the case, the evidence in each suit had to be given separately.(8) In the Falls of Ettrick,(9) an application by the impugnant for the consolidation of three salvage actions was refused, as the promovent resisted it on the ground that the several claims were based upon different circumstances, and were in themselves conflicting; Sale, J., observing that there being no general or special rules for the consolidation of actions, the only course left in the case was to follow the analogy of the practice of the Court of Admiralty in England. The order for consolidation may be obtained either by a plaintiff (10) or

(1) See Damodar Das *v.* Gokal Chand, 7 A. at p. 100 (1881).

(2) Ram Coomar Mytee *v.* Koomar Narain Dass, 20 W. R. 482 (1873).

(3) Hukm Chand, 579.

(4) The Falls of Ettrick, 22 C. at p. 517 (1894); Biswanath *v.* Collector of Mymensingh, 7 B. L. R. App. 42 (1871); and see Soorendro Pershad *v.* Nundun, 21 W. R. 196 (1874).

(5) Nehal Singh *v.* Alai Ahmed, 15 W. R. 110 (1871).

(6) Peacock *v.* Byjnath, 10 C. 58 (1883); Kalicharan *v.* Surja Kumar, 17 C. W. N. 526 (1912).

(7) Soorendro Pershad *v.* Nundun, 21 W. R. 196 (1874).

(8) Juggut Chunder *v.* Ear Mahomed, 24 W. R. 217 (1874). The High Court, however, held that the Subordinate Judge was wrong in dismissing the suit because the course so taken though suggested by the plaintiff was sanctioned by the Munsif. It accordingly ordered a remand.

(9) 22 C. 511 (1894). The claims were ordered to be heard successively, subject to one set of costs being allowed, if it were found that the application for consolidation had been wrongly resisted.

(10) Martin *v.* Martin & Co. (1897), 1 Q. B. 429; Peacock *v.* Byjnath, 10 C. 58 (1883); Nehal Singh *v.* Alai Ahmed, 15 W. R. 110 (1871).

defendant.(1) Where the lower Court has consolidated suits, the defendants may prefer one appeal.(2) Where the plaintiff applied for consolidation, which was refused, the Court was held to have acted wrongly in treating without consent all the suits as governed by the judgment given in one of them.(3)

Postponement of suit pending decision of test action.—Where several plaintiffs have commenced several suits against the same defendant, the Court may, under its general jurisdiction, on the application of the plaintiffs, enlarge the time for taking the next step in the rest of the actions until one of them has been tried as a test action, and where the selected action fails to be a real trial of the issue, another of the actions may be substituted as a test action.(4) When several actions had been commenced against different defendants for the same libel, the Court refused to consolidate them, but ordered a stay of proceedings in all the actions except such one as the plaintiff might select, and if he was not satisfied with the result of the trial of that action, he was to select and try one other action, all the several defendants in the other actions undertaking to be bound by the verdict in the test actions, and to have judgment entered against them respectively for the maximum amount of damages awarded in either of the test actions.(5) Where, by an order of the Court, all the defendants in several actions are bound by the result of a selected action, and the defendant in the selected action refuses to appeal against the judgment, the Court has, it has been held, power to substitute another of the defendants for the purpose of prosecuting an appeal.(6)

Objections as to misjoinder.

7. *All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.*

Objections.—See as to this notes to O. I. r. 13, *ante*, which deals with objections where the misjoinder complained of is of parties. It was held that even on second appeal, if a suit was found to be bad for misjoinder of causes of action, the proper procedure to follow would be not to dismiss the suit altogether, but to direct the Court below to perform the duty which that Court ought to have performed, namely, to return the plaint for amendment.(7) See notes to O. II. r. 3.

(1) See unreported case, 10 C. at p. 60; and as to consolidation actions generally, Daniell's Ch. Pr. 1610–1613; Seton, 831–837; Ann. Practice, 1905, 685–686.

(2) Enayetoollah *v.* Radha Churn, 15 W. R. 395 (1871).

(3) Nehal Singh *v.* Alai Ahmed, 15 W. R. 110 (1871).

(4) Amos *v.* Chadwick, 4 Ch. D. 869; 9 Ch. D. 459; Bennett *v.* Lord Bury, 5 C. P. D. 339; Ann. Practice, 1905. p. 686; and see Vithu *v.* Narayan, 5 B. H. C. R. 30, at p. 32 (1868).

(5) College *v.* Pike, 56 L. T. 124.

(6) Briton Life Assurance *v.* Jones, 60 L. T. 637.

(7) Sarala Sundari Dasi *v.* Saroda Prosad Sur, 2 C. L. J. 602 (1904).

ORDER III.

Recognized Agents and Pleaders.

Appearances, etc., may be in person, by recognized agent or by pleader.

1. Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except *where* otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf.

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

"**Appearance.**"—These words ("*appear*" and "*act*") have a well-defined and well-known meaning. To appear for a client in Court is to be present and to represent him in the various stages of the litigation at which it is necessary that the client should be present in Court himself, or by some representative.(1) There may be appearance if the pleader, though instructed, is not prepared to proceed with the case.(2) Under the last Code it was held that where, on the day fixed for hearing, a party was present in person merely for the purpose of applying for an adjournment, which was refused, he must be taken to have "appeared" within the meaning of Chapter VII. of that Code, the provisions of which are replaced by this and following rules. The party has appeared in person. The purpose for which he appeared, or the action which he took on appearance, are immaterial. But where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at an end when the adjournment is refused, in that case the party had not appeared within the meaning of the Chapter.(3) Where the pleader who applies for an adjournment is accompanied by a recognized agent of the party, but the latter neither makes any application, nor does any act, the question is whether he intends to appear, and, in fact, does appear for the party in the exercise of his powers under this rule.

(1) Kali Kumar *v.* Nobin Chunder, 6 C. 585 (1880), *per* White, J.

(2) Ram Chandra *v.* Madhav, 16 B. 23 (1891).

(3) See Kadir Khan *v.* Juggeswar Prasad Singh, 35 C. 1023 (1908) (Woodroffe, J.); Satish Chandra Mukerjee *v.* Ahara Prosad, 34 C. 403 (1907); and *post*, notes to O. 9, r. 1, and O. 41, r. 17.

This rule is merely permissive and enabling. If the recognized agent, although able to do so, does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an "*appearance*" in the suit. An appearance may be made by a pleader or a recognized agent; but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented.(1) The words in the last Code after "party" were "*to a suit or appeal.*" These words are now omitted. The section will still apply to appeals as proceedings in suits.

"**Act.**"—"To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court." (2) The word "*act*" is, however, taken to refer only to ordinary acts, and thus not to include the instituting or defending of a suit, which a recognized agent cannot do in his own name.(3) Nor does a mere power to sue authorize an agent to enter into an agreement with a pleader to pay him more than a reasonable remuneration.(4)

"**Except where otherwise expressly provided.**"—This may be either by the Code itself or by any other law for the time being in force. Thus, this rule is expressly made subject to O. XXXIII. r. 3 in respect of applications to sue *in formâ pauperis*.(5) Again, clause 10 of the Charter provides that no persons but advocates, vakils, or attorneys of the High Court shall be allowed to plead or act (6) for any suitor in the High Court. So it has been held that the former section did not authorize a recognized agent to address a High Court as the suitor himself may do, because that clause forbids that for every person whatever except advocates and vakils,(7) and that an authorized agent could not file a petition of appeal on the appellate side of the High Court.(8) Under the Rules of the High Court an advocate may appear and plead only. He cannot therefore file an appeal in the registrar's office.(9)

"**Party in person.**"—Where a barrister or pleader appears before the Court as a litigant in person, he must not address the Court from the advocate's table or in robes, but from the same place and in the same way as any ordinary member of the public.(10)

"**By a pleader.**"—As to the meaning of this term, which includes advocates, vakils, and attorneys, see sect. 2, *ante*. If a party has more

(1) Soonderlal *v.* Goorprasad, 23 B. 414 (1898).

(2) Kali Kumar *v.* Nobin Chunder, 6 C. 585 (1880), *per* White, J.

(3) Choonee *v.* Hur Prasad, 1 N. W. P. H. C. R. 277 (1869); Carter *v.* Misree Lal, 2 N. W. P. H. C. R. 179 (1870); Ladlee Pershad *v.* Gunga Pershad, 4 N. W. P. H. C. R. 59 (1872; Mokha Harakraj *v.* Biseswar Doss, 5 B. L. R. App. 11 (1870); s. c., 13 W. R. 344.

(4) Keshav Bapuji *v.* Narayan, 10 B. 18 (1885).

(5) See *Ex parte* Devgiri, 4 B. H. C. R., A. C. J. 91 (1867).

(6) See Moran *v.* Dewan Ali Serang, 8 B. L. R. 418, 420 (1872).

(7) Prannath Chowdhry *v.* Ganendra Mohun Tagore, 3 W. R. 108 (1855). As to the Allahabad High Court, see s. 8, Letters Patent.

(8) Buzl-ul-Kareem *v.* Ramgopal Manna, 8 Sev. 241.

(9) Ram Taruck Barick *v.* Sidheswree, 13 W. R. 60 (1870).

(10) West Hopetown Tea Co., 9 A. 180 (1886).

than one pleader, the senior has the entire control of the case, and it is not open to the junior pleader to take any ground of appeal which the senior has not thought fit to argue, except when the senior has obtained the permission of the Court to the taking of that course.(1) A pleader represents both counsel and attorney in that he can both plead and act, whereas the former pleads and the latter acts. As to the respective powers of these various classes of legal practitioners, a subject which is beyond the scope of the work, see the references given below.(2) The Calcutta High Court holds (3) that administrative acts required to be done in the offices of the Courts may be done on a pleader's responsibility by his *bonâ fide* clerks, and a District Judge has no authority to define the acts which may be so done by the pleader himself and by his clerks respectively, as High Courts alone possess such authority. The Punjab Chief Court, however, has dissented from this decision, inasmuch as the Code does not provide for the delegation by a pleader of any portion of his duties to others, and on the ground that if a pleader is allowed to perform some of them by deputy there is no reason why he should not be allowed to do so as regards the whole.(4)

"**Duly appointed.**"—The Court may inquire as to the agent's authority, and if under r. 1 it substitutes the name of the principal, it does not decide that the agent had authority.(5) The words "*duly appointed*" do not simply mean a person duly appointed by the party in the suit, but a pleader duly appointed according to the law regarding pleaders in force in the particular Court.(6) Again, the validity of the appointment must be considered with reference to the general law relating to the employment of legal practitioners. Thus a solicitor or attorney, having discharged his client, cannot change sides and act for the opposite party.(7) As to persons authorized to act for Government or appointed to prosecute or defend Princes and Chiefs, see O. XXVII. rr. 2, 4 and sect. 85. Vakalatnamahs, whether executed by principals or their attorneys or agents, and mookhtarnamas, under the authority of which vakalatnamahs may have been executed, do not require to be verified on oath, the responsibility in regard to their being properly and correctly executed resting entirely with the pleaders.(8)

Recognized agents.

2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(1) Sreenebash Roy *v.* Umbika Churn, 12 W. R. 375 (1869).

(2) Hukm Chand, C. P. C. pp. 471-486, in which the following matters are treated:—pp. 471-473: General considerations; pp. 473-475: Pleader's authority, how far exclusive of his client; pp. 475, 476: Admissions by pleader binding on his client; pp. 477-486: Stipulations and compromises by pleaders and counsel. See also ib. at pp. 9, 10; O'Kinealy's Civ. Pr. Code, Commentary to ss. 2 and 375.

(3) *In re* Kheda Bux Khan, 15 C. 638 (1888); and see R. *v.* Karuppa Udayan, 20 M. 87 (1896), which, however, was a criminal case.

(4) Mula Mal *v.* Atma Ram, 1896, P. R. No. 36, cited in Hukm Chand, C. P. C. 486.

(5) Nam Narain Singh *v.* Raghu Nath, 19 C. 678 (1892).

(6) *In re* Pleaders of High Court, 8 B. 105, 132 (1883).

(7) Ram Lall *v.* Moonia Bibee, 6 C. 79 (1880). See also Anonymous case reported in 4 M. H. C. R. App. xliii.

(8) Maharajah of Burdwan, 7 W. R. 475 (1867).

(*a*) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(*b*) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

Power of attorney.—As to stamp, see Act I. of 1879, clause 50; and vakalatnamahs, notes to last rule. A person holding a power may refuse to act on it.(1) A warrant of attorney to an attorney of a defendant to receive a plaint, confess action, suffer or consent to a judgment or decree, empowers the attorney to accept service and appear for the defendant.(2) The power must authorize the person "to make and do such appearances," etc. A mere authority to look after a case does not make the donee of the power a recognized agent so as to be able to apply to refer a case to arbitration.(3) The authority given must be construed with reference to the special purpose for which the power was granted. General words imply authority to do all that the principal himself could do. They mean that the agent can do all that is necessary for the prosecution of the suit in the ordinary way. He cannot, for instance, enter into an agreement with a pleader to pay him more than a reasonable remuneration, nor could he bring the case to a close in a special manner by joining in a reference to arbitration, or by offering to be bound by the oath of the opposite party given in a particular form.(4) The question of special and general power has become immaterial under this rule.(5)

Clause (*a*). "Persons holding powers of attorney."—The terms of this clause in the former Code were different. It was limited to persons holding *general* powers of attorney within certain local limits, that is, from parties not resident within the local limits of the jurisdiction. The meaning to be attached to the word "reside" has been dealt with in the comments on sect. 20. The expression "*not resident*" appears to have been introduced into the former section in the Code of 1877, to avoid an agent acting as a recognized agent during a casual temporary absence of the principal, as he was held to be able to do under the Code of 1859.(6) The section, however, it was held, was to be construed broadly, so as not to prevent a creditor from enforcing his claims against his debtors; and a person who went for a few months from his usual place of residence to his native province to get his

(1) See notes to next rule.

(2) Khelut Chandra Ghose *v.* Saroda Soondery Dasi, Bourke, 244 (1865).

(3) Bhugwan Dass *v.* Nund Lall, 12 C. 173, 177 (1885).

(4) Sadashiv *v.* Maruti, 14 B. 455 (1890); citing Keshav Bamji *v.* Narayan, 10 B. 18 (1886); Thakur Pershad *v.* Kalka Pershad, 6 N. W. P. Rep. 210 (1874).

(5) Venkatarama *v.* Narasinga Rao, 24 M. L. J. 180 (1913).

(6) Bisandas *v.* Lakhmichand, 6 B. H. C. R., A. C. 159 (1869).

sister married was held during his absence to be "*not resident*" at that place.(1) In the case cited, Melville, J., in delivering the judgment of the Court, observed that "it may be supposed that the Legislature intended to give the benefit of this provision to all persons, and especially to traders, whose interests might be seriously compromised, if, during their absence from home and their place of business, they could leave no one behind who could represent them in Court, as well as conduct their business." If the principal was resident within the jurisdiction, then the agent was not a recognized agent within the meaning of clause (*a*) of the former section. An application for execution was not made "in accordance with law" (2) when made by a general attorney of the decree-holder at a time when the latter himself was resident within the local limits of the jurisdiction of the Court executing the decree.(3) The Legislature has considered it unnecessary to preserve the limitations above noted, and has made the sub-clause general.

Certificated mukhtars.—A mukhtar was at one time not considered a recognized agent.(4) Clause (*b*) of the former section expressly recognized mukhtars. This clause has been now omitted as unnecessary. It is included in sub-clause (*a*), which is general in its terms.

Clause (*b*). "Persons carrying on trade."—As to "carrying on business," see notes to sect. 20, *ante*. The words "where no other agent is expressly authorized" were, under the Code of 1859, held to imply that the persons so carrying on business for or in the names of the parties were purely gomastahs or agents, and not partners.(5) This decision, however, was subsequently dissented from.(6) These latter cases dealt with the point whether service on one partner for his co-partner was a good service, which was the case under the provisions of sect. 74 of the Code of 1882, and is so under O. XXX. r. 3 (6) of the present Code; but the question is still open as regards other acts, appearances and applications. This section and O. V. r. 13 are to be construed together, being intended to carry out the same scheme of relief.(7) It would seem that in order to constitute a recognized agent, the business carried on by him should be continuous, and not occasional or desultory. So a Bombay

(1) Ram Chandra *v.* Keshav, 6 B. 100 (1881); and see Damodar Das *v.* Inayat Husain, 28 A. 135 (1905).

(2) Within the meaning of art. 179 of the Limitation Act.

(3) Murari Lal *v.* Umrao Singh, 23 A. 499 (1901); and it has been so held with reference to an application under s. 258 of the last Code: Kasumri *v.* Beni Prasad, 26 A. 19 (1903).

(4) Kristo Chunder Goopto *v.* Fuzal Ali, 17 W. R. 389 (1872). As to the history of mukhtars, see *In re* Khoda Bux Khan, 15 C. 638, 646 (1888), and see s. 11, Act XX. of 1865; as to certificate, *Re* Muddun Mohun Biswas, 6 W. R. Ref. 29 (1866); *Re* Gujraj Singh, 10 W. R. 355 (1868); Kali Kumar Roy *v.* Nobin Chunder Chuckerbutty, 7 C. L. R. 562 (1881); 6 C. 585. Now see Act XVIII. of 1879 as amended by Acts IX. of 1884 and XI. of 1896. As to the High Courts' power to prescribe rules for mukhtars, see Tussuduq Hosain *v.* Girhar Narain, 14 C. 556 (1887).

(5) Luchmeput Dogare *v.* Sibnarain Mundle, 1 Hyde, 97 (1862–3).

(6) Ram Chandra Bose *v.* Snead, 7 B. L. R. App. 58 (1871); Kustoor Mull *v.* Sookeeram, 11 B. L. R. App. 26 (1873), which appears to approve of the former case, but in which it was held that the service should be made at the place of business.

(7) Goculdas *v.* Ganeshlal, 4 B. 416 (1880); see O. V. r. 13, *post*.

firm simply employed by the owners of a ship visiting Bombay to procure freight for her for a particular voyage, could not, it was held, be regarded under ordinary circumstances as carrying on business in the name of the owners of such ship.(1) A gomastah of a firm ceases to be a recognized agent as soon as the firm ceases to exist.(2) But it is different where a firm does exist, though not actually carrying on business. The survivor of a firm which has ceased to carry on business, who is engaged in collecting the assets of such firm and otherwise winding up its affairs, is a recognized agent of the owner of such firm.(3) A political agent is not, as such, a recognized agent.(4)

Objection to agent acting.—An agent cannot act under this rule so long as his principal is within the jurisdiction; but if he does, and there has thus been an irregularity, the Appellate Court ought not, on that account, to dismiss the suit, unless the irregularity has affected the merits of the case.(5) Similarly, where a recognized agent obtained a decree in appeal without objection, it was held the debtor could not, in execution of it, object to the agent.(6)

Punjab; Oudh; Central Provinces.—The last clause of sect. 37 of the former Code created an exception in the case of these Provinces. This has now been omitted as no longer necessary. The former Chief Commissionership of Oudh has been included in the Lieutenant-Governorship of the United Provinces. See as to former section Notification (7) (Punjab), October 3, 1877, No. 3857, *Punjab Gazette*, October 4, 1877, Part I. p. 391; Notification (Oudh), July 18, 1878, No. 522A, *N.W.P.* and *Oudh Gazette*, July 27, 1878, p. 1058. In some of the Scheduled Districts there are special statutory provisions as to recognized agents, as in Ajmere (see Ajmere, Regulation I. of 1877, sect. 28).

Service of process on recognized agent.

3. (*1*) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

(*2*) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

Service on agent.—The rule is of an enabling character, and does not, of course, bar service of notice on the parties themselves.(8) Further, a person to whom a power of attorney has been given may refuse to act upon

(1) Ratansi *v.* Saunders, 8 B. H. C. R. 159 (1871); see note, 7 B. H. C. R. 111.

(2) Mokha Harakraj *v.* Biseswar, 13 W. R. 344 (1870).

(3) Holkar *v.* Pitambardas, 9 B. H. C. R. 427 (1872).

(4) Venkatrav *v.* Madhavrav, 11 B. 53 (1886).

(5) S. 99, *ante*; Bisandas *v.* Lakhmichand, 6 B. H. C. R. 159 (1869). This rule applies to the whole section: Munoo Dossee *v.* Ishan Chunder, 15 W. R. 245 (1871).

(6) Parvatibai *v.* Vinayek, 12 B. 68 (1887).

(7) The special authority need not be in writing: Mula Mal *v.* Atma Ram, 1896, P. R. No. 36.

(8) Ram Lall Chowdhry *v.* Surdaree Jah, 1864, W. R. Misc. 21.

the power, and may thus refuse to accept service of summons.(1) Service upon an attorney's clerk of an order directed to be served on the attorney has been held to be not good.(2)

Appointment of pleader.

4. (1) The appointment of a pleader to make or do any appearance, application or act *for any person* shall be in writing, *and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in this behalf.*

(2) *Every* such appointment, *when accepted by a pleader,* shall be filed in Court, *and* shall be considered to be in force until *determined* with the leave of the Court, by a writing signed by the client *or the pleader, as the case may be,* and filed in Court, or until the client or the pleader dies or *until* all proceedings in the suit are ended so far as regards the client.

(3) No advocate of any High Court established *under the Indian High Courts Act, 1861,* or of *any* Chief Court, *and no advocate of any other High Court who is a barrister* shall be required to present any document empowering him to act.

Service of process on pleader.

5. *Any* process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

Service of process on pleader.—Act VIII. of 1859, sect. 18. A service on the petitioner's attorney on the record is good, even when decree *nisi* has been obtained in her favour in a divorce suit, and the petitioner has left India for England.(3) Service of notice of appeal upon respondent's pleader is good service on him.(4) So also is service of summons calling on a party to appear and give evidence.(5) Personal appearance to give evidence is within the meaning of the words "personal appearance of the party." (6)

"Left at the office."—These words, it has been held in England, do not mean that a process will be considered served on a pleader, simply if it is pushed under the door of the office, or dealt with in some other similar manner,

(1) Luchmee Chund *v.* Bengal Coal Co., 8 C. 317, 326 (1882).

(2) Emritlall Saligram *v.* Kidd, 2 Hyde, 116 (1864).

(3) King *v.* King, 6 B. 416 (1882).

(4) Ishur Dutt *v.* Shib Pershad, 15 W. R. 290 (1871).

(5) Shivrudrappa *v.* Kashinath Vishnu, 6 B. H. C. Rep., A. C. 141 (1869).

(6) Ib.

or even if it is left at the office without being handed to any one, and the provision virtually means that the process must have been left with an adult person at the office.(1)

Agent to accept service.

6. (1) Besides the recognized agents described in *rule 2* any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

Appointment to be in writing and to be filed in Court.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a *certified* copy thereof shall be filed in Court.

Agent to receive process.—Service on such agent will be sufficient in any case, as provided for in O. V. r. 12 of the Code.(2) This rule corresponds with sects. 50, 51, Act VIII. of 1859, and sect. 41 of the last Code.

ORDER IV.

Institution of Suits.

Suit to be commenced by plaint.

1. (*1*) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(*2*) *Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.*

Register of suits.

2. The Court shall cause the particulars *of every suit* to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints *are* admitted.

Plaints.—See sect. 26, *ante*.

(1) Montgomery *v.* Liebenthal, 1 Q. B. 487 (1898).

(2) See as to the English rule, Ann. Pr., notes to O. 9, r. 8; Hukm Chand, C. P. C. 497.

ORDER V.

Issue and Service of Summons.

Issue of Summons.

Summons.

1. (1) When *a suit* has been *duly instituted* a summons may be issued to *the* defendant to appear and answer the claim on a day to be therein specified: [s. (

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) *A defendant to whom a summons has been issued under sub-rule* (1) *may appear*—

(*a*) in person, or

(*b*) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(*c*) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

Summons.—Instead of the words in the former section (sect. 64), "*When the plaint has been registered and the copies or concise statements required by sect. 58 have been filed,*" the present section runs "*when a suit has been duly instituted.*" The first duty of the Court after the filing of the plaint is [provided that the defendant was alive at that date, for if not, the suit cannot proceed (1)] to summon the defendant, whether he be an adult or not.(2) Natural justice requires that before an order is passed against a man he should be heard, and a decree against one who has never been summoned is not binding upon him.(3) A summons, therefore, is the first of the several writs which are incidental to the proceedings in a suit, as being the official notification to a defendant that he has been sued and should appear in Court and answer the claim.(4) Generally, and in the absence of any special rule,

(1) Mohun Chunder *v.* Azeem Gazee, 12 W. R. 45 (1869).

(2) Suresh Chunder *v.* Juggat Chunder, 14 C. 204 (1886).

(3) Ib., at p. 218.

(4) See Hukm Chand's C. P. C., notes to this section, where the subject is minutely discussed.

the summons should be in the language of the Court, and addressed to the defendant himself and not to his agent. In the first place, the form of the summons should be such as that it can be served; then it should contain such full particulars of the description of the person summoned as will render it unlikely that the person served should mistake his identity. Secondly, the contents should be such as to acquaint the defendant as to the nature of the claim made against him. The title of the suit and the plaintiff's name should be stated, as also the amount and nature of the claim. The Form requires also a statement of the particulars of the claim. What these particulars are has not been judicially determined; but the question is not of much practical importance, as the summons is in every case to be accompanied by a copy of the plaint or of a concise statement of it. Forms of summons are given which are to be used with such variation as the circumstances of each case may require, and are a guide as to what a summons should contain. Thirdly, the day of appearance is to be specified in the summons, and, according to Form 180 of the Code of 1882, it should have at its foot a memorandum stating hours of attendance at the office. Even where there is no express rule to that effect, the hour fixed for appearance or attendance should also be stated; though, considering the language of sect. 96 of the last Code, in which the attendance was required on the day fixed in the summons, the mention of the exact hour did not appear to be material.(1) The words "*to appear*" refer to appearance under O. IX. r. 6, *post*.(2) It is desirable that a summons should contain all that is required; at the same time, formalism is not favoured at present, and it will be sufficient if the summons substantially fulfils its purpose of giving the defendant notice.(3) And a person by appearing and defending may waive all objections arising from want of service or defect in the service of summons.(4) A fresh summons is sometimes required. There are no provisions as to the issue of successive summons, though the practice as to their issue is recognized in O. IX. r. 5, *post*. An application for fresh summons to appear should not, however, be made until the first has been returned into Court,(5) and should generally be supported by grounds showing that it was not by any default of the applicant that the summons was not served.(6)

"Signed" and "sealed."—As to the meaning of the word "*signed*," see sect. 2, *ante*.(7) The Letters Patent for the High Courts and the Acts (8) relating to the other Civil Courts provide for the use of seals. The seal is but one element of the proof of authenticity, and the better view is that its omission is a matter of form rather than of substance, as its omission does not prevent

(1) Hukm Chand, *loc. cit.*

(2) Hira Dai *v.* Hira Lal, 7 A. 538 (1885).

(3) See Hukm Chand, *loc. cit.*

(4) Suresh Chunder *v.* Juggat Chunder, 14 C. at p. 215 (1886).

(5) Issur Chunder *v.* Aushootosh Chatterjee, 1 Ind. Jur., N. S. 283 (1862).

(6) Urquhart *v.* Gilbert, 1 Ind. Jur., N. S. 224; though in Hanlon *v.* East India Railway, 1 Hyde, 197 (1862-63), a new summons was granted on an objection raised to the sufficiency of service, without any petition.

(7) And as to initials, R. *v.* Janki Prasad, 8 A. 293 (1886); Kubra Bibee *v.* Wajid Khan, 16 A. 59 (1894); Hukm Chand, C. P. C. 666, 667.

(8) See s. 16, Act XII. of 1887 (Bengal); s. 11, Act XIV. of 1869 (Bombay); s. 9, Act III. of 1873 (Madras); s. 13, Act XIII. of 1879 (Oudh); s. 8, Act XI. of 1889 (Burmah); s. 14 (*d*), Act XVIII. of 1884 (Punjab); s. 19 (1), Act XVI. of 1885 (Central Provinces).

the writ imparting to the parties, against whom it is issued, information that an action is instituted against them. In the same way, the signature is the official authentication of the seal of which the person signing is the keeper, and the better opinion is that an unsigned writ is not void.(1) The summons is to be signed either by the Judge or such officer as he appoints, such as the Clerk of the Court or Registrar, where there is one.

Proviso.—If the defendant voluntarily appears, an appearance which is usually designated *gratis*, there is no necessity to issue a summons. In case of such appearance, when the defendant admits the claim, the Judge, if satisfied of the defendant's identity, is bound to pass a judgment in favour of the plaintiff, and no question of fraudulent appearance can be gone into at the time; but if by the practice of the Court there are specific rules as to the order in which cases are to be called on, it does not appear that a Judge is bound to dispose of a case either when the plaint is filed or at any subsequent time before it is called on in regular course; and the voluntary appearance of the defendant and his willingness to admit the debt do not make any difference in this respect.(2)

Copy or statement annexed to summons.

2. Every summons shall be accompanied *by a copy of the plaint or, if so permitted, by a* concise statement.

Concise statement.—This should be of the nature of the claim made and of the relief or remedy sought in the suit.

Court may order defendant or plaintiff to appear in person.

3. (1) *Where* the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) *Where* the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

Personal attendance.—Act VIII. of 1859, sects. 42 and 66 of last Code. An order passed for the personal attendance of the plaintiff after his appearance by a pleader on the day fixed for the settlement of issues, and after their settlement, was held not to be an order passed under sect. 42, Act VIII. of 1859, or one to which the provisions of sect. 117, Act VIII., were applicable, although it might have been passed under sects. 127 or 166 of that Act. Further, looking at the severe penalties attached by the law to the non-attendance of parties ordered to attend, great caution and discretion should be used in ordering their personal attendance.(3) As to the result of non-appearance, see O. IX. r. 12, *post*.

(1) Hukm Chand, C. P. C. 664–668.

(2) Bank of Bengal *v.* Currie, 3 B. L. R. 396, 403 (1869).

(3) Juggernath Pershad *v.* Bundeh Ali, S. D., N. W., 1865, p. 371.

4. No party shall be ordered to appear in person unless he resides—

No party to be ordered to appear in person unless resident within *certain limits.*

(*a*) within the local limits of the Court's ordinary original jurisdiction, or

(*b*) without such limits *but* at a place less than fifty or (where there is railway *or steamer* communication *or other established public conveyance* for five-sixths of the distance between the place where he resides and the place where the Court is situate), *less than* two hundred miles *distance* from the court-house.

Appearance in person.—This is sect. 42 of the Code of 1859 and 67 of last Code with modifications italicized. In a rent suit to which the provisions of this section were applicable, and in which the plaintiff improperly summoned failed to attend and his suit was struck off, it was held he should apply for revival.(1)

5. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Summons to be either to settle issues or for final disposal.

Provided that, in every suit heard by *a* Court of Small Causes, the summons shall be for the final disposal of the suit.

Summons.—This is sect. 68 of the last Code unaltered. As to this section,(2) see below.

6. The day for the appearance of the defendant shall be fixed with reference to *the* current business *of the Court*, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Fixing day for appearance of defendant.

Sufficient time must be allowed.—See sect. 45 of Code of 1859. What may be sufficient time in a particular case can only be determined by considering the peculiar circumstances of the case, and this was so stated in the second clause of the former section, now omitted. The time must be sufficient not only to enable a party to appear, but to answer. The nature of the rights

(1) Sheikh Golam *v.* Pulton Singh, 3 W. R., Act X., 162 (1865). See Act VIII. of 1885, s. 148, clause (c).

(2) See Alberooddeen *v.* Mahomed Abusen, Marsh. 307 (1864); Tuljaram Harichand *v.* Sitaram Narayan, 38 B. 377 (1913) (in a mortgage-suit the first summons should be for settlement of issues).

involved in the suit, and the importance of the claim made in it, as well as the actual distance of the defendant from the Court, and the facilities for obtaining legal advice, must also be taken into consideration in determining the sufficiency of the time allowed. In the case cited below,(1) the claim involved a right to landed and other property of the aggregate value of upwards of Rs.6000, and was likely to raise questions of Mahomedan law; and only two days having been allowed from the issue of the summons, it was held that the time allowed was insufficient. In another case,(2) the summons was served on the 17th April by a copy of it being fixed on the outer door of the defendant's place of business at Poona, while the defendant was at Sholapur, and it was held that two days were not a sufficient time to enable him to attend for defence at Poona. It was held that the Subordinate Judge should have postponed the hearing. If the time is unreasonably short the Appellate Court will interfere.(3) In the under-mentioned case (4) the Court said: "We take this opportunity to call the special attention of the Courts below to the urgent necessity there is that they should carefully *themselves see* that due and reasonable time is given in all cases for the service of notices, in order that the Courts themselves may not be made the instruments of fraud and injustice by means of those processes, the vigilant superintendence of the issue and service of which properly and justly is one of their most important duties."

Summons to order defendant to produce documents relied on by him.

7. The summons to appear and answer shall order the defendant to produce *all* documents in his possession or power upon which *he* intends to rely in support of his case.

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

8. *Where* the summons is for the final disposal of the suit, it shall *also* direct the defendant to produce, on the day fixed for his appearance, *all* witnesses upon whose evidence he intends to rely in support of his case.

Service of Summons.

Delivery or transmission of summons for service.

9. (1) *Where* the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, *unless the Court otherwise directs*, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of *a* Court *other*

(1) Khadar Bhi *v.* Rahiman Bhi, 3 M. H. C. R. 167 (1866).

(2) Chanbasappa *v.* Mainaba, 7 B. H. C. R., A. C. 138 (1869).

(3) Khadar Bhi *v.* Rahiman Bhi, 3 M. H. C. R. 167 (1866); Chanbasappa *v.* Mainaba, 7 B. H. C. R. 138, A. C. J. (1869).

(4) Lokhenath *v.* Sobanath, 5 W. R., Act X., 39 (1866).

than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

Issue of summons for service.—The awarding of process is a judicial act, but its service is ministerial. In this country a summons can be served only through the Court, and there is a complete code of rules relating to the service of summons in all cases. It has therefore been contended that parties cannot contract themselves out of the rules prescribed, and the contrary rule has not been recognized by the Courts in any case.(1) The object of the summons is to notify to the defendant that he is sued and the particulars in regard thereto. And in the under-mentioned case it was held that a decree of a Court of competent jurisdiction was not a nullity merely because of an irregularity in service, the parties being shown to be aware of the suit, which is the whole object of service.(2) The Code proceeds upon the assumption that every Court has a jurisdiction within certain limits separate and distinct from every other Court; and its provisions are applicable only to Courts possessing such a jurisdiction.(3) The Court therefore in this case held that it had not the power to execute its own decree or serve its own process out of the local limits of its jurisdiction. A special bailiff cannot be sent to execute civil process in foreign territory.(4) The effect of the words, "*if the defendant resides within the jurisdiction*," coupled with the corresponding words in sects. 85 and 89 of the former Code, was said to be that a summons could be served directly by an officer of the Court on a person residing outside the jurisdiction of the Court even if he were present, though it might be casually or incidentally, within the jurisdiction, but that it must in such cases be sent where he resides, even though it be known that at the time he is not there, but elsewhere. Whether such a construction would be accepted was, however, doubtful, the question not having been raised or decided. The general rule elsewhere is different, and a summons may always be served on a defendant if he is within the jurisdiction, even if he has just come there at the time of service, provided that he has done so voluntarily, and not induced to do so by fraud or false pretences of the plaintiff, or only as a witness.(5) In cases of any but the shortest stay, the point is likely to be solved by a liberal interpretation for the purposes of this section of the word "*resides*." It has been held that the residence under this rule is the place where a person eats, drinks and sleeps or where his family or servants eat, drink and sleep.(6) In the Mofussil the Nazir is the proper officer of the Court to whom under this section the summons is delivered for service. It is for him to return the summons to the Court as unserved, and this he does by countersigning the bailiff's endorsement.(7) No officer can serve a summons beyond the local limits of the exercise of his functions,

(1) Hukm Chand, C. P. C. 674, 675.

(2) Mackintosh *v.* Kally Doss Mullick, 11 B. L. R. 1, 8 (1873).

(3) Sagore Dutt *v.* Ram Chunder Mitter, 1 Hyde, 136 (1863), at p. 139, *per* Wells, J.

(4) Kasim Azim *v.* Kasim Mahomed, 2 B. L. R. 59 (1868); 10 W. R. 349.

(5) Hukm Chand, C. P. C. 671.

(6) Kumud *v.* Jotindra, 38 C. 394 (1911); 13 C. L. J. 221.

(7) Parsotam *v.* Abdul, 13 B. 500 (1889).

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(3) Khadar Bhi *v.* Rahiman Bhi, 3 M. H. C. R. 167 (1866); Chanbasappa *v.* Mainaba, 7 B. H. C. R. 138, A. C. J. (1869).

(4) Lokhenath *v.* Sobanath, 5 W. R., Act X., 39 (1866).

Service to be on defendant in person when practicable, or on his agent.

12. Wherever it *is* practicable, service shall be made on the defendant in person, unless he *has* an agent empowered to accept service, in which case service on such agent shall be sufficient.

Service, personal or on an agent.—This section corresponds with sect. 49 of the Code of 1859. The summons, at a proper and reasonable time and place, should be given directly to the defendant, and not to another person for delivery to him, after the serving officer has satisfied himself of the identity of the person named in the summons with the person on whom he serves it.(1) A person who, being the *ammookhtear* of the male defendant, looked after the affairs of the female defendant, was held not to be an agent empowered to accept service.(2) There may be personal service on a minor.(3) See notes to r. 10, *ante*.

Service on agent by whom defendant carries on business.

13. (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons *is* issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this *rule* the master of a ship *shall be deemed to be* the agent of *the* owner or charterer.

Agent carrying on business.—To satisfy the conditions of this rule as to service of summons on an agent, there must be a person residing without the local jurisdiction, but carrying on business or work within those limits by a manager or agent, and sued on account of such work; that is, business either actually itself carried on by the agent or manager, or forming part of the business in the sense of a connected course of transactions to the management of which he has been duly appointed.(4) This rule and O. III. r. 2, clause (*b*), are to be construed together, and are intended to carry out the same scheme of relief, which rests upon the idea that where an agent has been put forward substantially to take the place of his principal within a particular jurisdiction, he should take the place of such principal (at the option of any person who has dealt with him) in any legal proceedings that may arise out of the business or work in which the agent has been virtually a local principal. The manager or agent contemplated by the Code is one who has an initiative and independent discretion, albeit subject

(1) See Hukm Chand, C. P. C. 677, 678, where the points mentioned (together with the question of service on Government or railway officials through head of office) are more fully discussed.

(2) Ram Soonduree *v.* Rance Surut, 17 W. R. 33 (1871). See notes to O. III. r. 2.

(3) Suresh Chunder *v.* Jugut Chunder, 14 C. at p. 215 (1886); see O. V. r. 10.

(4) Goculdas *v.* Ganeshlal, 4 B. 416 (1880).

possibly to principles and general orders prescribed for his guidance. A mere servant employed to carry out orders or to execute a particular commission, or a factor or common agent who is not identified with the firm for which he acts, is not such an agent.(1) Upon the principle embodied in the rule, it was held, prior to its enactment, that service of summons on an agent to whom a ship was consigned was good service on the owner in respect of matters connected with the ship.(2) Service unduly made under this rule does not become effectual by reason of the fact of such service being subsequently notified to the parties really interested as defendants.(3) *Semble* —Service duly effected under this rule is effectual without reference to the circumstance of its being or not being communicated to the real defendants.(4) An opinion has been expressed that it would be anomalous to hold that, though the Code requires the appointment of a proper person as guardian to act for a minor generally in the conduct of the case, service of summons on a person other than such person may be sufficient service on the minor. The question was not decided, as the Court held that there was no service of summons under the sections corresponding with either rr. 11 or 13 of O. V., even assuming that these sections applied to a case in which some of the defendants who are interested in the partnership or business are minors.(5)

Service on agent in charge in suits for immoveable property.

14. *Where* in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant *has* no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

"**Immoveable property.**"—Act VIII. of 1859, sect. 61. A suit for foreclosure or sale of immoveable property is within the meaning of these words.(6)

Where service may be on male member of defendant's family.

15. *Where* in any suit the defendant cannot be found and *has* no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Explanation.—A servant is not a member of the family within the meaning of this *rule.*

"**Cannot be found.**"—This section corresponds to sect. 53 of the Code of 1859. See notes to r. 17.

"**Agent empowered.**"—This clause involves an essential condition of

(1) Goculdas *v.* Ganeshlal, 4 B. 416 (1880).
(2) Rajaram Govindram *v.* Brown, 7 B. H. C. R. 97, O. C. J. (1870).
(3) Goculdas *v.* Ganeshlal, 4 B. 416 (1880).
(4) Ib.
(5) Jotindra Mohan *v.* Srinath Roy, 26 C. 267, 273 (1898).
(6) Michael *v.* Ameena Bibi, 9 C. 733 (1883).

the service on the adult members of the family, which will not be good unless it is proved that there was no agent empowered to accept the service.(1)

"**On any adult member,**" **etc.**—The person on whom service is made must be both adult and male. The object of this provision is that the copy shall be delivered to some person of the age of discretion who will understand for what purpose such copy is delivered, and will give it to the defendant on his coming. This is all the more necessary as there is no provision in the Code requiring the officer to inform the person with whom the copy is left of its contents, so as to impress upon him the importance of delivering it to the defendant as soon as possible. An adult member will be deemed to reside with the defendant only if the two are *bonâ fide* living in commensality, or at least in the same house.(2)

Person served to sign acknowledgment.

16. *Where* the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

Acknowledgment.—The serving officer under this section, which corresponds to sect. 54 of the Code of 1859, must either deliver or tender a copy of the summons and obtain an acknowledgment on the original. The mere showing of a summons is not sufficient.(3) If the party refuses the acknowledgment, then the serving officer should proceed under the next rule.(4) A mere refusal to sign a receipt or a summons is not an offence under sect. 173 or sect. 180 of the Penal Code.(5)

Procedure when defendant refuses to accept service, or cannot be found.

17. *Where* the defendant or *his agent or such* other person *as aforesaid* refuses to sign the acknowledgment, or *where* the serving officer, *after using all due and reasonable diligence*, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door *or some other conspicuous part* of the house in which the defendant ordinarily resides *or carries on business or personally works for gain*, and *shall* then return the original to the Court from which it *was* issued, with a *report* endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which

(1) Hukm Chand, C. P. C. 680 [see Cal. H. C. Gen. Rules, (9) d.].

(2) Hukm Chand, C. P. C. 680.

(3) Cf. R. *v.* Karsanlal, 5 B. H. C. R. Cr. R. 20 (1868).

(4) Maruti *v.* Vithu, 16 B. 117, 119 (1891).

(5) R. *v.* Krishna Gobinda, 20 C. 358 (1892).

he did so, *and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.*

Refusal to accept service.—This section, which corresponds with sect. 55 of the Code of 1859, and sect. 80 of the last Code, has been amended in several particulars. If the defendant himself or other person (that is, agent or manager, or adult male member of his family) be found, but the defendant or such person refuses to sign, then the serving officer may at once affix the summons on the dwelling-house.

It was not clear from the language of the section as it stood what results should follow when the defendant retained the copy of summons delivered but refused to sign the acknowledgment. Similarly, if the defendant refused to sign the acknowledgment, but did not "ordinarily" reside in any house, as in the case of roving traders and strolling players, no provision appeared to exist. In such a case it was considered that the refusal should operate as service and the following proviso was inserted in the draft:—"*Provided that, where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, and (a) retains the copy of the summons delivered to him, or (b) no house in which the defendant ordinarily resides or carries on business or personally works for gain can be discovered, the Court may direct that the summons shall be deemed to have been duly served.*" The proposal has, however, not been adopted.

"**Cannot find.**"—But if the defendant cannot be found, then the return must show that there is no agent or other person on whom the service could be made before a service on the dwelling-house is good. The words "*cannot find*" constitute a condition of the mode of service provided.(1) Thus where the summons was served on the defendant's paternal uncle, who was a member of the same joint-family and lived in the same house, it was held that the service was insufficient since there was no proof that defendant could not be found.(2) It must be shown that proper efforts to find the defendant were made, as, for instance, that the serving officer went to the place or places and at the times at which it was reasonable to expect the defendant would be found.(3) "It is true that you may go to a man's house and not find him, but that is not attempting to find him; you should go to his house, make inquiries, and, if necessary, follow him. You should make inquiries to find out when he is likely to be at home, and go to the house at a time when he can be found." (4) The summons can be affixed to the dwelling-house only if the defendant could not be found after diligent search and reasonable efforts made to find him.(5) Where

(1) Rama Rai v. Sridhur, 4 C. L. R. 397 (1879).

(2) Makhan Das v. Mannu Lal, 35 A. 556 (1913).

(3) Rajendra Nath v. Hadjee Syed, 2 C. W. N. 574 (1898); s. c., 26 C. 101; Cohen v. Nursing Das, 19 C. 201 (1892); Subramania Pillai v. Subramania Ayyar, 21 M. 419 (1898); Sakharam Bhaskar v. Padmakar Mahâdeo, 30 B. 623 (1906); Kumud v. Jotindra, 38 C. 349 (1911); 15 C. W. N. 399.

(4) *Per* Petheram, C.J., in Cohen v. Nursing Das, *supra*. This case was followed by Jenkins, C.J., and Woodroffe, J., in appeal from Order 75 of 1912 (28th Nov. 1913), where it was held that the serving officer must use all reasonable diligence.

(5) Khudeerun Lall v. Chutterdharee Lall, 21 W. R. 242 (1874); and cf. Baroda Kant v. Raj Churn, 24 W. R. 381 (1875).

there was no attempt to find the defendants, and there being only one summons for a number of defendants, it was affixed to the house of one only, it was held not duly served, even on that defendant.(1) The rule has been amended to embody these rulings to the effect that the serving officer must use diligence. If, though the defendant is absent, the serving officer is told where he is, service on the house is bad; (2) the Court observing, in the last-cited case, that mere temporary absence of the person to be served does not justify the process server affixing the summons to the door. But where the serving officer has information that there is no prospect of his being able to serve the defendant personally within a reasonable time, he is not bound to wait, and will be justified in affixing the summons on the door.(3) A defendant will also be held not to be found when it is known that he is in the house, but the serving officer cannot get access to him.(4) Whether or not the conditions required by the rule are established to the satisfaction of the Court, must, of course, in each case depend on its own particular circumstances.(5) What has to be regarded in all such cases is this, that the object of the service of a summons, in whatever way it may be effected, is that the defendant may be informed of the institution of the suit in due time before the day fixed for the hearing; and when, from the return of the serving officer, it appears that there is no likelihood that the summons will come to the defendant's knowledge in due time, or a probability that it will not so come to his knowledge, it cannot be said that there has been due service.(6)

"**Outer door.**"—The words "*or some other conspicuous part*" have been added, as in this country many houses have nothing which, without a stretch of language, can be described as "outer doors."

"**Ordinarily resides.**"—As to the meaning of the term "resides," see sect. 20, *ante*. The intention of the provision is that the defendant should be residing in the house in such a manner as to make it probable that a knowledge of the service of summons will reach him. Thus, the service will not be good if the defendant have left the house and the village two years before.(7) The rule speaks of the house where the defendant resides. Therefore a place of business would not ordinarily come within the section,(8) though in some cases, where the defendant both resides and carries on business at the same place, it would be so. There must be evidence that the house on which the summons was affixed was that in which the defendant ordinarily resided.(9) It has been held that in this rule and rule 9 of this Order a person must be taken to reside where he or his family or servants eat, drink and sleep.(10)

(1) Shiboo Roy *v.* Kashee Roy, 25 W. R. 394 (1876).

(2) Doolee Chand *v.* Nirban Singh, 20 W. R. 62 (1873); Bhomshetti *v.* Umabai, 21 B. 223 (1895); Sakina *v.* Gauri Sahai, 24 A. 302 (1902); Subramania Pillai *v.* Subramania Ayyar, 21 M. 419 (1897).

(3) Sankaralinga *v.* Ratnasabhapati, 21 M. 324 (1897); Sitaram *v.* Kalandi, 17 C. W. N. 999 (1911).

(4) Hukm Chand, C. P. C. 684, citing Carter *v.* Young, 42 Abb. Pr. 169 (Amer.).

(5) Rajendra Nath *v.* Hadjee Syed, 2 C. W. N. 574 (1898).

(6) Bhomshetti *v.* Umabai, 21 B. 223, *per* Farran, C.J.

(7) Anantha Narayana *v.* Periyana Kone, 5 M. H. C. R. 101 (1869).

(8) Chanbasappa *v.* Mainaba, 7 B. H. C. R., A. C. 138 (1870).

(9) Gopal Doss *v.* Greedharee Doss, 6 W. R. 13 (1866).

(10) Kumud *v.* Jotindra, 38 C. 394 (1911); 15 C. W. N. 399.

"Or carries on business," etc.—These words have been added to bring this rule into closer conformity with sect. 20, the principle of which it was considered was equally applicable to the service of process.(1)

Return.—The return should specify that the copy was affixed to "*the outer door* (or, now, *conspicuous part*) *of the house in which the defendant ordinarily resides;*" and merely to report that it has been affixed to the defendant's house is not sufficient, as the defendant may have more than one house.(2) In a subsequent case (3) the service was held good, as the serving peon deposed that the defendant was living in the house. But where the return does not say that the copy has been affixed, nor does that appear from the inquiry made under r. 19, there is no service.(4) So also the return must state that the summons was affixed to the house in which the defendant ordinarily resided at the time of the service,(5) and where the reference to the time had been omitted, the return was considered insufficient.(6) The Calcutta High Court rules provide that the return must also show that the summons was tendered to the defendant and returned, and that the defendant refused to receive the same, whereupon the serving officer informed him what the document was, and acquainted him with the nature and contents thereof.(7)

Identification.—As the practice of the Courts with regard to identifying persons or houses in connection with the service of process did not appear to be uniform, it was considered expedient to provide in the return endorsed on the summons for, at least, one identifier whom the Court or the parties could call as a witness in case of a dispute with respect to the sufficiency of service. The words "*if any*" were, however, inserted because it was considered that the Code should not render absolutely illegal the service of process without an identifier, where local experience justified the High Court in issuing no directions for such a safeguard.

Endorsement of time and manner of service.

18. The serving officer shall, in all cases in which the summons has been served under *rule* 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, *and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.*

Return not evidence of service.—This section corresponds to sect. 56 of the Code of 1859. The return is not legal evidence of the service.(8)

(1) Baishnab Charan *v.* Bank of Bengal, 19 C. L. J. 581 (1914).

(2) Buddoo *v.* Ram, 1 Hyde, 132 (1862–63).

(3) Ram Coomar *v.* Ram Soondur, 17 W. R. 362 (1872).

(4) Maruti *v.* Vithu, 16 B. 117 (1891).

(5) Rajnarain Ghose *v.* Abdur Rahim, 2 C. W. N. clxxxviii. (1898).

(6) Ram Churn Laha *v.* Ashutosh Dutt, 2 C. W. N. clxxxviii. (1898).

(7) Cal. H. C. Gen. Rules, 8 (*o*).

(8) Okhoy Chunder *v.* Erskine & Co., 3 W. R. Mis. 11 (1865); Shah Koondun *v.* Noor Ali, 10 W. R. 3 (1868); Sreenath *v.* Watson & Co., 4 W. R. Mis. 4 (1865); Mohunt Megh *v.* Shib Pershad, 7 C. 34 (1881); and as to report of Nazir, see Mahomed Abdul *v.* Amtal Karim, 16 C. at p. 171 (1888).

Whenever it is necessary for the Court to satisfy itself that a summons or other process has been duly served, the presiding officer should for that purpose take the evidence of the serving officer. Thus, in Raj Kishore v. Bydonath Shaha,(1) Bayley, J., observed that "there is simply a return by the Nazir to the effect that the peon swears that such a notice had been served on the defendants; but a bare return like this, without the deposition on oath of the serving peon taken before a competent authority, which the Nazir is not, is wholly insufficient in law to prove the service." The general rules of the Calcutta High Court (2) lay down that the requisite proof may be either by the affidavit or verified statement of the person by whom the service was effected, and of any person who may have accompanied the serving officer for the purpose of identifying the party to whom the process was addressed, or otherwise directing or assisting the serving officer, or, if deemed necessary, by the examination in Court as witnesses of such persons as the Court may think fit to examine. As to the added words, see notes to last rule.

Examination of serving officer.

19. *Where* a summons is returned under *rule* 17, the Court shall, if the return under that *rule* has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

"**Shall either declare.**"—These words show that the affixing, taken by itself, is certainly not effectual complete service. The Court has to see that the conditions precedent to such service have been fulfilled. Service is insufficient until confirmed under this rule. If the Court decides against the service, then either a new summons must be issued or substituted service directed.(3)

Substituted service.

20. (1) *Where* the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have

(1) 12 W. R. 365 (1869).

(2) R. 9 (*j*).

(3) Nusur Mahomed v. Kazbai, 10 B. 202 (1886). As to the effect of failure to follow the provisions of this section in a subsequent criminal trial, see R. v. Nanadeshwar, 27 A. 491 (1905).

last resided *or carried on business or personally worked for gain*, or in such other manner as the Court thinks fit.

Effect of substituted service.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Where service substituted, time for appearance to be fixed.

(3) *Where* service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Substituted service.—This form of service can only be had in cases in which (if there were no difficulties in the way) personal service could be had. This is based on the principle that one cannot do indirectly what cannot be done directly. So the defendant must be a person or a corporation or a firm.(1) So, as the Courts have no jurisdiction over a foreign sovereign unless he submits, he cannot be served by substitution.(2) If at the time of the issue of summons there could have been at law personal service of it upon the defendant sought to be served, then substituted service may be allowed.(3) But if personal service could not at law have been made, then, save as hereinafter mentioned, substituted service cannot be ordered.(4) Assuming that personal service *at law* could have been made, the grounds of fact on which service may be ordered are (*a*) that the defendant is keeping out of the way, or (*b*) that for any other reason the summons cannot be served in the ordinary way. In cases of substituted service, the Courts should take care to be satisfied that the conditions on which alone it is good, exist.(5) It has been already stated that, as a general rule, substituted service cannot be ordered where personal service is not legally possible; but under ground (*a*) it can, it has been held, be directed where the defendant was out of the jurisdiction at the time of the issue of the writ if the evidence satisfies the Court that he went out of the jurisdiction to evade service.(6) As regards ground (*b*), the section gives full discretion to the Court. So service has been allowed on proof that the defendant could not be found, that he had not been heard of for over two years, and that his uncle and father did not know where he was.(7)

(1) Sloman *v.* Governor of New Zealand, 1 C. P. D. 567; Hillyard *v.* Smith, 36 W. R. (Eng.) 7; O'Connor *v.* Star Newspaper Co., 30 L. R. (Ir.) 1. See Annual Practice, notes to O. 10.

(2) Mighell *v.* Sultan of Johore (1894), 1 Q. B. 149, and so in the case of a Colonial Government, Sloman *v.* Governor of New Zealand, *supra*.

(3) Trent Cycle Co. *v.* Beattie, 15 Times R. 176, C. A.

(4) Fry *v.* Moore, 23 Q. B. D. 395, C. A.; Worcester City, etc., Co. *v.* Firbank & Co. (1894), 1 Q. B. 784; Wilding *v.* Bean (1891), 1 Q. B. 100.

(5) See Ramchander *v.* Jageshchunder, 12 B. L. R. 229 (1873). These observations were made, however, with reference to Reg. V. of 1812, which did not contain the words "for any other reason," and were cited in Bissonath *v.* Tara Prosonno, 22 W. R. 482 (1874); Rama Rai *v.* Sridhur Pershad, 4 C. L. R. 397 (1879); Nusur Mahomed *v.* Kazbai, 10 B. 202 (1886); though under the Code the service will be valid if any other reason is proved, it is still necessary for its validity that a good reason exists.

(6) *Re* Urquhart, 24 Q. B. D. 73; Jay *v.* Budd (1898), 1 Q. B. 12, C. A.; Graves *v.* Lebaudy, 39 L. J. 234, A. P. p. 61; see observations at p. 186, 3 Q. B. D., Watt *v.* Barnett.

(7) Rajnarain Ghose *v.* Tek Lal, 1 C. W. N. 104 (1896); in Mirza Ally *v.* Syed Hyder, 2 B. 449, 451, the defendant could not be found.

As regards the modes of service, the section expressly mentions two, but also gives the Court a full discretion in the matter, the exercise of which must depend upon the circumstances of each case. The main principle to be always borne in mind is that the summons should, so far as be practicable, be served in such a way that it may come to the knowledge of the defendant. The Court must therefore consider what would be best form of service for this purpose. The usual modes are service on an agent, such as a solicitor or other agent, or any other person with whom the party is in communication ; (1) by advertisement and through the post ; (2) and by leaving a copy at the last known place of residence, and publication in the Court-house. If there are circumstances which go to show, at the time the order is asked for, that the summons will not reach the defendant, service should not be directed on the last known place of residence. So it was held that where service was made at a place, the last known residence of the defendant, but where he had not been for seven years, the order was bad, the Court observing that the object of the provisions of the law was to secure the process coming to the knowledge of the defendant.(3) Such a question is, however, not likely to arise where the Court is satisfied that the defendant is keeping away.

It has been held that, as a rule, the return by a competent Court that the summons has been duly served, or substituted service effected, raises a presumption in favour of service.(4) There is no provision in the Code as to a return of the substituted service showing how and when it was effected. In practice, however, the Court will assure itself of the service having been properly effected, either by affidavit or examination of the serving officer.(5) The procedure laid down in this rule has by analogy been applied to the service of notice of appeal on a respondent.(6)

Effect of substituted service.—The Court, when an application for leave to effect substituted service is made, decides as to the propriety of granting it, and if service is effected according to the order of the Court, it is, while the order remains undischarged, equivalent for all purposes to actual service.(7) The Code contains no provisions whereby the propriety and regularity of the order may be directly attacked by a motion to set it aside.(8)

(1) Annual Practice, p. 60 ; Watt *v.* Barnett, 3 Q. B. D. 367 ; *Ex parte* Warburg, 24 Ch. D. 364 ; *e.g.* an adult relative or a partner where the suit is brought against a firm, or in the case of a purdanashin : Clark *v.* Mullick, 2 M. I. A. at p. 268 (1839).

(2) In Jagannath *v.* Sassoon, 18 B. 606 (1893), it was considered that the service was not sufficient, as it was not shown that the person to whom the letter was delivered was the defendant himself. The report, however, does not show how the service came to be made by post.

(3) See Hukm Chand, C. P. C. 689, 690, citing Protecteur Assurance Co. *v.* Erwin, 4 J. 91 (Amer.).

(4) Nusur Mahomed *v.* Kazbai, 10 B. 202 (1886).

(5) Hukm Chand, C. P. C. 691.

(6) Bidhoo *v.* Bonomalee, 11 W. R. 496 (1869) (a case under the corresponding section 57 of the Code of 1859) ; as was also done in *Ex parte* Warburg, 24 Ch. D. 364, though no express provision to that effect was contained in the Rules of Court.

(7) Watt *v.* Barnett, 3 Q. B. D. at p. 366, *per* Jessel, M.R.

(8) See English O. 12, r. 30 (motion to set aside writ) ; Fry *v.* Moore, 23 Q. B. D. 395 (motion to set aside order for substituted service) ; Ann. Pr., pp. 58, 98, 348 ; and see as to letting in the defendant to defend, Watt *v.* Barnett, *supra*.

But where judgment is obtained, the defendant may show, with a view to set it aside under O. IX. r. 13, either that the summons was not *duly served*—that is, that the order for substituted service (whatever may have been its propriety) has not been carried out—*or* that he was *prevented by sufficient cause from appearing*. A summons served under this rule, if served in compliance with the directions of the Court, is duly *served*, even though it does not in fact come to the knowledge of the defendant. But the time and place of the defendant acquiring knowledge is material in determining whether he could attend on the day fixed in the summons, and may furnish a sufficient ground for non-attendance on that day. "Effectual" thus means merely effectual for proceeding with the suit, and nothing more. It does not, for instance, mean that substituted service on a man's house in Bombay is equivalent to personal service on that date; nor does it imply the consequence that a man who happened to be in Central India had personal knowledge of what was done at his house in Bombay on the day substituted service was effected.(1) The Court in the last case set aside an *ex parte* decree upon its being shown that the defendant was prevented by sufficient cause from appearing. In an earlier case (2) the Court refused to do so. Though the question whether the defendant was prevented from attending was not expressly alluded to, the Court, however, appears to have based its judgment on the facts proved, which went to show that the defendant had in fact notice in sufficient time and therefore could have attended.

Time for appearance.—Where substituted service of the summons is ordered sufficient time ought, under this rule, to be given for notice of the fact to reach the defendant, wherever he may be; and if an *ex parte* decree be obtained by the plaintiff, the Court, on being satisfied that the time fixed was insufficient, will set aside the decree.(3)

21. *A summons may be sent by the Court by which it is issued, whether within or without the province,* either by one of its officers or by post to any Court (not being *the* High Court) having jurisdiction *in* the place where the defendant resides.

Service of summons *where* defendant resides within jurisdiction of another Court.

22. *Where a summons* issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such *limits*, it shall be sent to the Court of Small Causes within whose jurisdiction *it* is to be served.

Service, within Presidency towns and Rangoon, of *summons* issued by Courts outside.

(1) Mirza Ally *v.* Syed Hyder, 2 B. 449, at p. 452 (1878), *per* Pinhey, J.

(2) Kissurchund *v.* Bhoobunessur, Bourke, 25 (1865).

(3) Mirza Ally *v.* Syed Hyder, 2 B. 449 (1878).

Duty of Court to which summons is sent.

23. The Court to which *a* summons is sent *under rule* 21 *or rule* 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court *of issue*, together with the record (if any) *of its proceedings with regard thereto.*

Court to which process must be sent.—See sect. 59 of Code of 1859. R. 21 shortens the earlier portion of sect. 85 of the last Code, the second clause of which is r. 23. R. 22 is sect. 86. The summons, it was ruled, should ordinarily be sent, not to the Judge of the district where it has to be served, but to the Court having jurisdiction at the place where the defendant resides, by which it can be conveniently served—that is, to the Munsif within whose jurisdiction the defendant resides.(1) But the Calcutta High Court summons used to be sent to the District Court for service through the local Court by direction of the District Judge, and the same rule applies in the Panjab Chief Court.(2) For forms of process, see Schedule I., Appendix B. R. 21 says to any Court "not being a High Court." Should, however, the summons be sent in contravention of this rule, the High Court might either return it or order the proper local Court to effect service. This will, however, not be done for a foreign Court. When suits are instituted in England against persons resident in India, the assistance of the Courts here is not invoked. The English Court, through the plaintiff's solicitor, sends the writ to a solicitor in India with instructions to serve and to return writ with an affidavit of service. So the Calcutta High Court refused to serve a summons sent to it by a Court in the Nizam of Hyderabad's territories, advising that it should be sent to a pleader practising in the district where the defendant resided.(3) The summons is to be returned together with the record, which will include the Nazir's return, affidavits, statements, and depositions of the serving officer and of the witnesses relative to the facts of service. As to the necessity of a declaration of sufficiency of service, *vide ante*.

Presumption as to validity of service.—According to the opinion of Scott, J., if the return *primâ facie* shows that service has been duly effected, the presumption in favour of the correctness of the proceedings of the Courts will prevail; and the Court sending the summons is not bound in every case to satisfy itself that the law as to service has been strictly followed. The Court serving the summons alone can judge how in any particular case service should be effected, and whether it has been properly effected; and it does not appear to have been intended by the Legislature that the transmitting Court should act as a revising Court as regards the service. In fact, it would only lead to great inconvenience and delay, without effecting any real good, for that Court to discuss the discretion of the Court serving the summons as to what

(1) Cal. H. C. Gen. Rules, No. 8.

(2) See Hukm Chand, C. P. C. 693, and ib. as to service in Baluchistan, and as to whether process fees and translations should accompany process.

(3) In the matter of the Nizam Dewani District, Parthani, Cal. H. C., 13th Sept., 1905 (Unrep.).

facts are sufficient to justify the waiver of personal service on the defendant, and the substitution of an affixing of the summons on his dwelling-house, or the adoption of other mode of substituted service. For instance, where a Court has returned a summons as duly served, and the return states that the summons has been posted on the defendant's dwelling-house, because the defendant has gone elsewhere, it ought to be presumed that this service was justified by the facts, and that the Court duly acted under the provisions of sects. 80 and 82 read together (now rr. 17, 19). But, at the same time, the presumption in favour of the due execution of acts of a judicial nature only obtains *donec probetur in contrarium*, and there may now and then occur cases where there is something in the return distinctly negativing that presumption, and showing illegality in the mode of service.(1) Probably, however, the true rule is that the transmitting Court may accept but is not bound by the return, the section not requiring any declaration touching the sufficiency of the service.(2) In this view it devolves upon the transmitting Court to determine upon the sufficiency of the service before trying the suit, raising or not raising the presumption according to the circumstances. The practice of the Calcutta High Court has always been to determine for itself whether the service is sufficient, having regard to the numerous irregularities which exist in "Mofussil service." But the Allahabad High Court has held that usually the decision whether such summons has been properly served or not rests with the serving Court, not with the issuing Court.(3)

24. *Where* the defendant *is confined* in *a prison*, the summons shall be delivered *or* sent by post or otherwise to the officer in charge of the *prison for service on the defendant.*

Service on defendant in *prison*.

Defendant in jail.—A suitor ought obviously not to be deprived of his remedy by the fact that the defendant is in jail.(4) The former section (as to which, see sect. 15, Act XV. of 1869) was originally enacted to meet the difficulty felt in the last-mentioned case. Wilson, J., is reported to have held that the endorsement under sect. 87 of the last Code ranked higher than a nazir's return, and was evidence of the service of summons.(5) The amended section contains no provision as regards the return of service, which is dealt with by r. 29, under which the return is evidence of due service.

(1) Nusur Mahomed *v.* Kazbai, 10 B. 202 (1886), *per* Scott, J.

(2) Romanath Bural *v.* Guggodonandan, 22 C. 889 (1895). In Chandhuri Raj *v.* Jugat Kishore, 18 A. at p. 245 (1896), it seems to have been held that it was the duty of the Court making the return to declare whether the summons had been duly served.

(3) Dwarka *v.* Brij Mohan, 33 A. 649 (1911); dissenting from Romanath *v.* Guggodonandan, 22 C. 889 (1895).

(4) Bland *v.* Bland, 3 P. & D. 233 as to the present practice in England, see Dawson *v.* Le Capelain, 21 L. J. Ex. 219; Ann. Pr., 1905, p. 47. In India a life convict is not civilly dead: Sheonarain Singh *v.* Sheobuggun Koor, S. D., N. W., 1853, p. 759.

(5) O'Kinealy's Civ. Pr. Code, s. 87; the reference is not given.

25. *Where* the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and *sent* to him by post, if there *is* postal communication between such place and the place where the Court is situate.

Service *where* defendant resides out of British India and has no agent.

"**Resides out of British India.**"—In such cases the mode of service is necessarily of a private character, as it is a general rule that a Court has no authority to send its process for execution out of the territorial limits of the State. So a bailiff cannot be sent to foreign territory to himself serve the summons on the defendant there.(1) This rule, which corresponds with sect. 60 of the Code of 1859, must be read with the next.

"**Sent**"; "**Forwarded.**"—The section in the last Code required that the summons should be "*forwarded*" to the defendant, which was held to mean that the summons must reach him.(2) This, therefore, did not mean merely put into the post.(3) and there had to be proof of facts from which the Court might reasonably conclude that the summons had reached the defendant.(4) In some cases it would amount to a denial of justice to require direct proof of receipt or refusal. When proof of posting in due course has been given, a presumption may be raised under sects. 16 and 114 of the Evidence Act. This would appear to be the case now. The word "sent" has been substituted. But there ought to be evidence that he is, or has been recently, residing at the place to which the summons has been sent, or that the acknowledgment is in the writing of the defendant.(5) In practice the summons is sent under registered cover, both to ensure service as well as to procure good evidence of it.(6) If a registered cover is refused, the person so refusing cannot take advantage of his refusal and plead ignorance of its contents.(7)

26. *Where*—

Service in foreign territory through *Political Agent* or Court.

(*a*) *in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor General in Council*, a *Political* Agent *has been* appointed, or a Court *has*

(1) Kasim Ajim *v.* Kasim Mohammed, 2 B. L. R., A. C. J. 59 (1868); s. c., 10 W. R. 349; Sagore Dutt *v.* Ramchandra Mitter, 1 Hyde, 136 (1862-63); see Hukm Chand, C. P. C. 695.

(2) Fakhr-ud-din *v.* Ghafur-ud-din, 23 A. 99 (1900), at p. 105.

(3) Ib., at p. 103.

(4) Ib.

(5) Ib., at pp. 102, 103, 105; Sonatun Bukshee *v.* Gopal Chunder, 15 W. R. 31 (1871).

(6) Sonatun Bukshee *v.* Gopal Chunder, 15 W. R. 31 (1871); see Panj. Ch. C. Circ., s. 8, r. 32 (i.); and as to period of service outside India, B. H. C. Orders, Ch. I. r. 62; Phillips *v.* Batho, 17 C. W. N. cclxi.

(7) Lootf Ali *v.* Pearee Mohun, 16 W. R. 223 (1871); Jogendro Chunder *v.* Dwarka Nath, 15 C. 681 (1888); Ismail Khan *v.* Kali Krishna, 6 C. W. N. 134, 137 (1901); Baluram *v.* Bai Pannabai, 35 B. 213 (1910).

been established or continued, *with power to serve a summons issued by a Court under this Code* in *any foreign* territory in which the defendant resides, *or*

(*b*) *the Governor General in Council has, by notification in the Gazette of India, declared that any summons so issued may be served by any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid.*

the summons may be sent to such *Political* Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the *Political* Agent or Court returns the summons with an endorsement *signed by such Political Agent or by the Judge or other officer of the Court* that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be *deemed to be* evidence of service.

Summons outside India.—This section replaces sect. 90 of the last Code, which was itself substituted for the original by the Amendment Act (VII of 1888), sect. 12, and is intended chiefly for Indian Native States. This section does not apply to British or other territories, not under or connected with the Indian Government - such as Ceylon, the Straits Settlements, and even Great Britain, and, *à fortiori*, not to countries like China and Persia, where there is a British Envoy or Ambassador or Consul, as distinguished from a Political Agent; nor to Afghanistan. The general direction contained in r. 25 would apply in all such cases. Summonses issued for service on persons residing in British possessions out of British India, and in other countries to which this rule does not apply, should be addressed to the defendant at the place where he is residing, and sent by post in accordance with that section.(1) The distinction between the cases in which this rule applies and in which it does not apply is to be preserved, as the agency of the post-office under r. 25 should not be used for the service of a summons except when specially prescribed; for when any other mode for serving a notice is prescribed, a service through the post has not been deemed sufficient, even though actual delivery of the notice by the post peon is proved.(2)

Endorsement is evidence.—Unlike the ordinary return, the endorsement under the signature of Political Agent, Judge, or other officer is evidence of the service of the summons; but it is no longer, as under the section prior to its amendment in 1888, conclusive evidence, and the defendant may

(1) See Hukm Chand, C. P. C. 696, citing the Panj. Ch. C. Instrs. and N. W. P. Rules; as to service in Afghanistan, Straits Settlements, Kashmir, Nepal, Hyderabad, ib., and at p. 697.

(2) See Tara Das *v.* Ram Dyal, 2 C. W. N. 125 (1897).

accordingly prove that notwithstanding the endorsement as to the service, the summons was not served.

"**Sent.**"—In the under-mentioned case (1) it was held that the Subordinate Judge should have sent the summons himself, instead of through the Court of the District Judge.

Service on *civil* public officer *or on servant of railway company or local authority.*

27. Where the defendant is a public officer (*not belonging to His Majesty's military or naval forces or His Majesty's Indian Marine Service*), *or is the servant of a railway company or local authority*, the Court may, if it appears to *it* that the summons may be most conveniently so served, send *it for service on the defendant* to the head of the office in which *he* is employed, *together with a copy to be retained by the defendant.*

Service on public officers.—The exigencies of public service demand that both civil and military officers should not be summoned without proper notice to their superiors. This concession, however, coupled with the privileges given in connection with attachment, casts upon the Government a corresponding duty to provide commensurate facilities for service. This section, which replaces sect. 422, extends its provisions, which had hitherto applied to public officers only, to railway servants or servants of local authorities. Military officers are dealt with in the next section. If the summons is not sent to the head of the office it must be served in the usual way. The Government pleader is not the agent of every public officer, as he is of Government, to accept service. As to the duty of the Head of the office, service, and return, see r. 29, *post*.

Service of soldiers.

28. *Where the* defendant is a soldier, the Court shall send the summons *for service* to his commanding officer *together with a copy to be retained by the defendant.*

Soldiers.—The words "*an officer or*" formerly occurring in sect. 468 of the last Code before the words "*a soldier*" were repealed by the Cantonments Act (XIII. of 1889). Military officers, therefore, since that Act ceased to be governed by sect. 468, the provisions of which are embodied in this section so far as they relate to soldiers. Owing to the varied conditions of service of military

(1) Fakhr-ud-din *v.* Ghafur-ud-din, 23 A. 99, at p. 101 (1900).

officers, it has been thought expedient to follow the terms of the Cantonment Act in leaving the matter to be regulated by Rules.

29. (1) *Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to* return it *under his signature,* with the written acknowledgment of *the defendant, and such signature shall be deemed to be evidence of service.*

Duty of person to whom summons is delivered or sent for service.

(2) *Where* from any cause *service is impossible, the summons* shall be returned to the Court with *a full statement* of *such* cause *and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.*

Service.—With a general application so much of sect. 468 of the last Code has been retained as compels the officer addressed by the Court to execute the process.(1) Special provision has been made on the lines of sect. 72 (2) of the Criminal Procedure Code, 1898, for treating a return in such a case as evidence though unsupported by affidavit.(2) It has also been considered desirable to declare such a return to be evidence of non-service also, so as to avoid the necessity for summoning public officers where, as not infrequently occurs, an *ex parte* decree has been passed by inadvertence and is assailed by an application under O. IX. r. 13.

30. (1) The Court may, notwithstanding anything hereinbefore contained, substitute for *a* summons a letter signed by the Judge or such officer as he *may* appoint in this behalf, *where* the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

Substitution of letter for summons.

(2) *A* letter *substituted under sub-rule* (1) shall contain all the particulars required to be stated in *a* summons, and, subject to the provisions of *sub-rule* (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; *and, where* the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

(1) See Mahomed Saib *v.* Aggas, 10 M. 319 (1887).

(2) See Harrison *v.* Hope, 9 B. L. R. App. 43 (1872).

Messenger.—This section corresponds to sects. 64 and 65 of the Code of 1859. It was held in connection with sect. 60 of that Code, corresponding to r. 25 of the present one, that as no officer of a Court could execute process without its jurisdiction, a special bailiff could not be sent to serve process in foreign territory.(1)

(1) Kasim Ajim *v.* Kasim Mohammed, 2 B. L. R., A. C. J., 59 (1868); s. c., 10 W. R. 349.

ORDER VI.

Pleadings generally.

Pleading.

1. *"Pleading" shall mean plaint or written statement.*

Pleading to state material facts and not evidence.

2. *Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.*

Forms of pleading.

3. *The forms in Appendix A when applicable, and where they are not applicable, forms of the like character, as nearly as may be, shall be used for all pleadings.*

Particulars to be given where necessary.

4. *In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.*

Further and better statement, or particulars.

5. *A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.*

Condition precedent.

6. *Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff*

or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

Departure.

7. *No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.*

Denial of contract.

8. *Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.*

Effect of document to be stated.

9. *Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.*

Malice, knowledge, etc.

10. *Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.*

Notice.

11. *Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.*

Implied contract, or relation.

12. *Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.*

13. *Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied, (e.g., consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim).*

Presumptions of law.

Pleadings.—Rules 1–13, 16–18 of this Order are new, and rules 2–13 and 16 are taken from the English O. 19, rr. 4–7, 14, 16, 20–25, 27, respectively. Rules 14 and 15 represent sects. 51 and 52 of the last Code. Rule 17 is taken from O. 28, r. 1 of the English rules, and would appear to hold the place of sect. 53 of the last Code after clause (*a*) of that section, which is now embodied in O. VII. r. 11 of this Code. Rule 18 is taken from O. 28, r. 7 of the English rules, and would appear to replace sect. 54 (*d*) of the last Code. Other rules from the English O. 19 are to be found in O. VIII., *post*. As regards this Order, the Special Committee stated, "In our opinion it is most necessary that litigants in this country should come to trial with all issues clearly defined, and that cases should not be expanded or grounds shifted without reference to the true facts. For this purpose we think that the present system of pleadings in the Mofussil, which is notoriously lax, should be improved, and we have incorporated in the rules an order on pleadings which it is hoped will lead to sounder and fairer methods of arriving at the real points in dispute. The forms have been revised, and we hope that they will be brought into more general use in the Mofussil. The Committee have added a few rules relating to pleadings based upon the system of pleading introduced by the Judicature Acts in England, which is generally admitted to be the best form of pleading in civil suits. In this country, outside the Presidency towns, the pleadings are seldom artistically drawn. They are neither concise nor precise, but contain vague and general statements from which it is difficult to ascertain definitely the real question in controversy between the parties. The sole object of pleadings is thus frequently defeated; the issue is enlarged; the trial is delayed and much unnecessary expense incurred by the parties, who are also liable to be taken by surprise. They have further provided that the forms in the Schedule shall, when applicable, be used for all pleadings, and when they are not applicable, forms of the like character shall be used. The rules prescribed will not prevent the pleader from exercising his discretion; for the amount of detail must necessarily vary with the nature of each suit. It is, however, made clear that these must be particularly sufficient to apprise the Court and the other party of the exact nature of the questions to be tried. The Committee have also given a party who considers that his opponent's pleading does not give him the information to which he is entitled the right to apply for further particulars so as to enable him to know what case he has to meet at the trial. They have, however, endeavoured to modify the rigour of the rules by providing in accordance with sect. 55 of the Indian Evidence Act that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who relies upon it."

The subject of pleading will be found further discussed in the notes to O. VII. rr. 1-6, but some observations summarized from the English "Annual Practice" may be here made.

Rules 2 and 3.—The point of rules 2 and 3 is that pleadings are now mere statements of facts not law, of material facts only, and of facts which are not evidence stated in a summary way after, as nearly as possible, the forms of pleading given in the Schedules. The written statement must be as brief as possible, but should contain a full and true narrative (1) framed with care, so as to dispense with undue statements at the settlement of issues,(2) and should be confined to relevant facts; (3) anything in the nature of argument (4) or evidence or conclusions of law to be drawn from the facts pleaded being inadmissible.(5) The whole object of pleading is that the parties and the Court should know what is the real point to be discussed and decided,(6) and it should be framed with reference to this object.

Rules 4 and 5.—Rules 4 and 5 deal with particularity. In every pleading a certain amount of detail is necessary to ensure clearness and to prevent the other party from being taken by surprise. Pleadings are of no use unless they define clearly the questions at issue between the parties; and for this purpose each party must state his case with precision; otherwise the issue would be "enlarged," as it is called, and neither party would know for certain what was the real point to be discussed and assured at the trial, and therefore would not be able to properly prepare his evidence for it. No precise rule can, however, be laid down as to the decree of particularity which is required. As rule 4 directs the statement of particulars, so rule 5 provides a remedy in case the imperative language of the former rule is overlooked or disobeyed. If the allegations contained in any pleading are too vague, the proper course is to apply by notice and ask for fuller particulars. Each party is entitled to obtain a fair outline of his opponent's case, but cannot compel him to disclose the evidence by which he will attempt to establish that case. Nor will the Court sanction any attempt to deliver interrogatories under the guise of seeking particulars. The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense and avoid allowing parties being taken by surprise. On such an application the notice or summons should ask that if the particulars ordered be not delivered within the time prescribed, the allegations complained of be struck out, or that the party in fault be precluded from giving any evidence in support of it at the trial. The words "*upon such terms*" in the English rule corresponding to rule 5 have been held to authorize an order that if proper particulars be not

(1) Sreenath Mullick *v.* Brojo Lall Pyne, 1 Hyde, 33 (1862-3); if the statement is knowingly false, an offence under s. 191 of the Penal Code is committed. See R. *v.* Meharban Singh, 6 A. 626 (1884).

(2) Anund Chunder *v.* Woomes Chunder, 1 Hyde, 147 (1862-3).

(3) Kasublal Dey *v.* Tremearne, 3 B. L. R. App. 12 (1869). As to particulars in patent cases, see Sheen *v.* Johnson, 2 A. 368 (1879); Ledgard *v.* Bull, 9 A. 191 (1886).

(4) See Bishen Sahaye *v.* Beer Kishore, 8 W. R. 296 (1867).

(5) See Williamson *v.* London & N. W. Ry. Co., 12 Ch. D. 787 (a case of reply); and as to evidence, Spedding *v.* Fitzpatrick, 38 Ch. D. 410.

(6) Thorp *v.* Holdsworth, 3 Ch. D. 639.

delivered within a certain time the action shall stand dismissed or be stayed.(1) Leave may be given to amend or to add to particulars given.

Rule 6.—Cases constantly occur in which, although everything has happened which would at common law *primâ facie* entitle a man to a certain sum of money, or vest in him a certain right of action, there is yet something more which must be done, or something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some Statute, or because the parties have expressly so agreed; this something more is called a condition precedent. It is not of the essence of such a cause of action, but it has been made essential. It is an additional formality superimposed on Common Law. Hence, in England the plaintiff could draft a perfectly good statement of claim without making any reference to the condition precedent. But this, till 1875, he was not allowed to do. In former days the plaintiff was required to set out in his declaration every condition precedent, and to aver the due performance of it with all particularity. Then came the Common Law Procedure Act, 1852; sect. 57 of which provided: "It shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest." And now (O. 19, r. 14 of the English rules) the plaintiff need say nothing about any condition precedent which has been performed. This provision is reproduced in rule 6 of this Order. A general averment of the due performance of all conditions precedent is *implied* in every pleading; *i.e.* it need not be alleged. It is for the defendant, if he contends that there was a condition precedent and that it has not been duly performed, to state specifically what that condition was, and to plead its non-performance: otherwise its due performance will be presumed. And it is not sufficient for him to allege generally that "an express condition" had been agreed to: he must state its terms, and between whom it was made, and whether verbally or in writing. Nevertheless, when a condition precedent is properly pleaded, the burden of proving its due performance or the waiver of its due performance still rests on the plaintiff.

But it is to be noted that an allegation which is of the essence of the cause of action is not a condition precedent within the meaning of this rule, and must still be pleaded in the plaint. Thus the Law Merchant requires that notice of dishonour be given to every person who is sought to be made liable on a negotiable instrument, except the acceptor. Unless such notice was duly given, or was waived or excused, no action lies against the drawer or any indorsee. Hence the plaint must contain either an allegation that notice of dishonour was given to the defendant, or a statement of the facts relied on as excusing the giving of such notice.

Rule 7.—The meaning of rule 7 is that a party's second pleading must not contradict his first. Thus, to illustrate from English practice, if a plaintiff claims rent on his writ, he cannot claim the same sum in his reply as damages for unlawfully "holding over." Or, if the statement of claims alleges merely

(1) Davey *v.* Bentinck (1893), 1 Q. B. 185, C. A.

a negligent breach of trust, the reply must not assert that such breach of trust was fraudulent. Such inconsistent claims should be pleaded, if at all, alternatively in the statement of claim.

Rule 8.—Rule 8 is really a special application of the general principle laid down in rule 2 of O. VIII., *post*. If the defendant wishes to contend that any contract on which the plaintiff relies is invalid he must do something more than merely deny the agreement; he must plead specially by way of confession and avoidance the matters of fact which rendered it invalid. A traverse merely denies that the contract was in fact made: it leaves unquestioned its sufficiency in law.

Rule 9.—It may be noted, with reference to rule 9, that in an action of libel the precise words of the document are material. So in some cases the precise words of a will may be material.

Rules 10–12.—Rule 10 and the two following rules are special applications of the general principle laid down in rule 2 of this Order (which is indeed the fundamental rule of the present English system of pleading), that "every pleading shall contain, and contain only, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved."

14. *Every pleading* shall be signed by the *party* and his pleader (if any): Provided that *where a party pleading* is, by reason of absence or for other good cause, unable to sign the *pleading*, it may be signed by any person duly authorized by him *to sign the same or to sue or defend on his* behalf.

Pleading to be signed.

15. (1) *Save as otherwise provided by any law for the time being in force, every pleading* shall be verified at the foot by the *party or by one of the parties pleading* or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

Verification of *pleadings.*

(2) *The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.*

(3) The verification shall be signed by the person making it *and shall state the date on which and the place at which it was signed.*

Subscription.—These rules deal with all pleadings. Sects. 51 and 52 of the last Code dealt with plaints and sect. 115 with written statements. The object of the signature to the plaint is to prevent, as far as possible, disputes as to whether the suit was instituted with the plaintiff's knowledge and

authority.(1) The rule requires that the plaint (as well as written statement) should be subscribed by the party and his pleader, if any. But this requirement as to subscription is governed by O. III. r. 1. The act of signature cannot be done by the pleader instead of the plaintiff, because the Code requires both signatures; but it permits acts to be done by a recognized agent. Reading, therefore, this section with O. III. r. 1, a personal subscription is not imperative in all cases, and a plaint which may be presented by an authorized agent may in like manner be subscribed by him, and such a subscription is a compliance with the rule.(2) Where the plaintiffs described themselves as lately carrying on business under the name of "C. & Co.," it was held that there was no irregularity in its being signed "C. & Co." (3) It is not possible to set down categorically what is good cause (4) within the meaning of the proviso. A person holding a general power of attorney containing *inter alia* powers to sue and defend suits, but not containing a special power to sign a plaint, was held to be a person duly authorized within the meaning of the proviso of this section in the last Code, in which the words were "duly authorized by him in this behalf," that is, to sign. Now the signature may be that of any one authorized either to sign or to sue or defend.(5) The signature of a plaint by an unauthorized agent, who subsequently becomes empowered to sign, is sufficient.(6) Under the last Code if a plaint was not signed and verified as required, it might have been returned for amendment (7) and rejected if not amended.(8) Presumably there is nothing to prevent this being done now.

The mere fact that the plaint in a suit has not been signed by the plaintiff named therein, or by any person duly authorized by him as required by this rule, will not necessarily make the plaint absolutely void. A defect in the signature of the plaint, or the absence of signature where it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit, and having regard to sect. 99, *ante*, is not a ground for interference in appeal.(9)

Verification.—The object of the verification of the plaint is to fix upon the plaintiff the responsibility for the statements which it contains, and to affirm a guarantee of his good faith.(10) In other words, if he will not swear that he believes his cause to be just, the law does not care to bother itself with it. But when the adversary comes in, such verification is of no moment. It is not even evidence. The justice of the cause must then be proved by competent evidence. Like any other formal matter, its absence is waived by a failure to object. And if its entire absence does not affect the jurisdiction,

(1) Basdeo *v.* John Smidt, 22 A. at p. 61.

(2) Roy Dhunput *v.* Jhoomuk, 3 C. L. R. 579 (1879); Maharanee Surnomoye *v.* Poolin Behary, 3 C. L. R. 15 (1878).

(3) Lachlan *v.* Abdulla, 5 B. L. R. App. 89 (1870).

(4) *In re* Rajah Leelanand, 7 W. R. 168 (1867).

(5) Kastolino *v.* Rustomji, 4 B. 468 (1880).

(6) Maharajah of Rewah *v.* Swami Saran, 25 A. 635 (1903).

(7) S. 53 (b) (i), Act XIV. of 1882.

(8) S. 54, ib.; Basdeo *v.* Smidt, 22 A. 55, 60 (1899).

(9) Basdeo *v.* John Smidt, 22 A. 55 (1899).

(10) Ib., 22 A. 61 (1899).

of course mere defects in it cannot.(1). It would be difficult to imagine any case in which a defective verification could affect the merits of the case or the jurisdiction of the Court.(2) Under the last Code where a plaint was not verified, or improperly verified, it was returned for amendment, and, if not amended, rejected. The suit should not, it was held, be dismissed (3) (*vide ante*). There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint.(4) As the object of verification is to secure good faith, and its effect to make the statements in the plaint the plaintiff's own, the Courts are bound to see that plaints are properly verified.(5) The verification may be by some other person if the latter is acquainted with the facts. The permission to a person to verify on behalf of the plaintiff should be given in each case individually, and not generally.(6) When verification by an agent is once expressly allowed, the Court is not competent afterwards to raise an objection to it.(7) But the plaintiff may himself be required to subscribe and verify,(8) as where a plaintiff charges fraud on facts known to him.(9) It was held that the verification should be by all the plaintiffs, but that the Court might allow one of them to verify; a co-plaintiff coming within the meaning of the words "some other person," etc. (10) The amended section now provides for verification by one of the plaintiffs or defendants. This rule does not apply to the case of corporations, which is provided for by O. XXIX. r. 1, *post*.(11) As to the Administrator-General, see below.(12) In case of a person holding a general power of attorney, or of any other recognized agent, the Court will probably not insist on any extreme stringency of proof as to his acquaintance with the facts of the case.(13) *A fortiori* will this be so in the case of a co-partner or other co-plaintiff. It has been said, that notice of the application for permission to verify should be given to the

(1) Basdeo *v.* John Smidt, 22 A. 55 (1899), citing Vanfleet's "Collateral Attack," etc.

(2) Ib., citing Rajit Ram *v.* Katisar Nath, 18 A. 396 (1896). The mere fact that a plaint contains a defect in the matter of signature or verification does not make it a void and inadmissible plaint: Maharajah of Rewah *v.* Swami Saran, 25 A. 635-637 (1903).

(3) Roy Mohun *v.* Bishnu Chandra, 1 B. L. R. 100 (1868) [co-plaintiff]; Rajit Ram *v.* Katesar Nath, 18 A. 396 (1896). In Overend *v.* Steele, 1 Ind. Jur. N. S. 39, the Court removed the plaint from the file.

(4) Mohini Mohun *v.* Bungsi Buddan, 17 C. 580 (1889); Chandi Mal *v.* Dewa Singh, 1896, P. R. No. 48.

(5) See Keeno Singh *v.* Eshan Chunder, 6 W. R. 213 (1866).

(6) *In re* Muhessur Buksh, 5 W. R. Misc. 33 (1866); Nursing Deb *v.* Ram Mohun, Marsh, 176 (1864); Maharajah Mohessur *v.* Sheonarain, 6 W. R. Misc. 59 (1866).

(7) Rajah Sutto *v.* Suroop Chunder, 12 W. R. 465 (1869).

(8) Raja of Tomukhi *v.* Braidwood, 9 A. 505 (1887); Gokul Chunder *v.* Burreek Begum, Marsh, 344 (1864).

(9) Jardine Skinner *v.* Maharanee Surnomoyee, 24 W. R. 215 (1875), and last note; Protap Chunder *v.* Krishto Kishore, 8 C. 885 (1882).

(10) Chandi Mal *v.* Dewa Singh, 1896, P. R. No. 48. In Ram Chunder *v.* Chooneelal, 12 B. L. R. 35 (1873), it was queried whether the practice was correct according to which in a suit brought by a firm, one partner could, without special leave, verify on behalf of his co-partners.

(11) Delhi and London Bank *v.* Oldham, 21 C. 60; s. c., 20 I. A. 139, 142 (1893).

(12) In the goods of Avdall, 26 C. 404 (1899).

(13) Kastolino *v.* Rustomji, 4 B. 468 (1880).

opposite side; but it is not necessary,(1) and is certainly not required.(2) The substantial portion of the plaint, consisting of the statement of the claim of the plaintiffs and the prayer, was written upon two sheets of plain paper and verified by the plaintiffs. Subsequently to the affixing of the plaintiffs' signatures a front sheet, consisting of a piece of stamped paper with the name of the Court and the names and addresses of the parties, was added, and the plaint thus composed filed in Court. Held, that the verification was defective, but that the suit ought not to have been dismissed. The plaintiffs ought to have been allowed an opportunity of amending the plaint by making a proper verification.(3) The rule does not require the verification of a plaint to be made in the presence of an officer of the Court; but, having regard to the necessity of satisfying the Court that the person, other than the plaintiff, who verifies the plaint is acquainted with the facts of the case, it has, in one case, been said to be desirable that a verification by such a person should be made in the presence of the Court, unless the Court be satisfied that there is sufficient ground for dispensing with his attendance.(4) Persons exempted from attendance are not exempted from signature or verification except the Court allows it for good cause, and then the party verifying should be one proved to the satisfaction of the Court to be acquainted with the facts of the case.(5) When an application is made for verification by an attorney, it has been said to be desirable, though not necessary, that notice should be given to the other side.(6) If a written statement is admitted on the record without verification, the allegations contained in it should be noticed and issues framed accordingly.(7)

Objections to verification.—Objections to verification should be taken before the settlement of issues; after that, the case should be disposed of on the merits and not dismissed for insufficient verification.(8)

Mode of verification.—It was held under the last Code that in all cases, whether the plaint is verified by the plaintiff or by some other person, the person verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the information of others.(9) In the first Allahabad case cited, a verification in the words "to the limit (or extent) of my knowledge the purport of this is true," was held to be bad; and the Court observed that "the verification must be, if all the facts are to the knowledge of the deponent, a distinct verification that they are to his knowledge true;" and that "if he has knowledge as to some, and only information and belief as to others, the verification should show as to which he speaks from his knowledge and as to which he speaks from his

(1) Finlay *v.* Steele, 1 Ind. Jur. N. S. 39 (1862).

(2) Puddomonee Dassee *v.* Shama Churn, 1 Ind. Jur. N. S. 226 (1862).

(3) Fatch Chand *v.* Mansab Rai, 20 A. 442 (1897).

(4) Kastolino *v.* Rustomji, 4 B. 468 (1880).

(5) Kinoo Sing *v.* Eshan Chunder, 2 Wym. 253, cited in O'Kinealy.

(6) Finlay Campbell & Co. *v.* Steele, 1 Ind. Jur. N. S. 39 (1866).

(7) Radha Churn Roy *v.* Moran & Co., 13 W. R. 342 (1870).

(8) Shama Soondaree *v.* Rohimooddeen, 24 W. R. 71 (1875).

(9) Upendro Lall Bose, 6 C. 675 (1881); Girdhari *v.* Kanhaiya Lal, 15 A. 59 (1892); Rajit Ram *v.* Katesar Nath, 18 A. 396 (1896). *Vide* to same effect, Bibee Soloman *v.* Abdool Aziz, 4 C. L. R. 366 (1879).

information and belief." In the last Allahabad case cited, the verification was in the following form: "The contents of the petition of plaint are true to the best of my knowledge and belief," and a Full Bench of the Court held, that although the verification was not in strict compliance with the Code, it substantially complied with it. A failure to distinguish in the pleading between the facts stated on personal knowledge and those stated on information and belief, must of necessity defeat to a great extent the object to be attained by verification, unless the person verifying is held to have made every allegation upon personal knowledge. The rule has now been amended in accordance with these rulings and governs all pleadings. A verification to the effect that the contents of the plaint are substantially true is not sufficient,(1) as it contains a qualification which is a material departure from the requirements of the Code.(2) If an attorney, having obtained leave of the Court for that purpose, means to verify the plaint himself, he should sign the verification on his own account, and not as the plaintiff's attorney; but if he means to sign the verification merely as the plaintiff's attorney, the plaintiff himself ought to see the plaint and verification, and authorize the attorney to sign the verification for him.(3) The General Rules of the North-Western Provinces (4) and Calcutta High Courts,(5) provide that all verifications "shall correctly specify the date and place at which they are signed." This rule has now been embodied in the third clause.

Course to be taken when verification defective.—If the verification of a plaint is discovered to be defective at any time whilst the suit is before the Court of first instance, the plaint may be amended by the Court.(6) If such defect be not discovered until the suit comes on appeal before an Appellate Court, such Court may, if it thinks fit, return the plaint to the Court of first instance to be amended by it. But where the defect is such that it is covered by the provisions of sect. 99, *ante*, there is no necessity for the Appellate Court to take any steps to procure the amendment of the plaint. In any event a defect in the verification of a plaint will not of necessity result in the dismissal of the suit,(7) or in its being decreed.(8)

Striking out pleadings.

16. *The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.*

Striking out pleadings.—This is a general provision, taken from O. XIX. r. 27 of the English Rules, for enforcing the preceding rules. Its

(1) Waggoner *v.* Brown, 8 How. Pr. 212 (Amer.).

(2) Hukm Chand, C. P. C. 624.

(3) Upendro Lall Bose, 6 C. 675 (1881).

(4) Rule 14, cited in Hukm Chand, C. P. C. 625.

(5) Rule 6

(6) Under the former Code it was held, having regard to the provisions of sect. 53 of that Code, that the order for amendment could not be made after the settlement of issues: Baroda Prosad Bose *v.* Griyanath Roy Chowdhury, 2 C. L. J. 11 (1905).

(7) Rajit Ram *v.* Katesar Nath, 18 A. 396 (1896).

(8) Rustun Gazi *v.* Tara Prosanna Chowdhuri, 11 C. W. N. 871 (1907).

language is wide, but its operation has in England been to some extent limited by the decisions given on it. Although the rule expressly states that the order may be made "*at any stage of the proceedings*," still the application should always be made promptly, and as a rule before the close of the pleadings; or the Court may, in its discretion, decline to exercise its jurisdiction.(1) "The rule that the Court is not to dictate to parties how they should frame their cases, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and, if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right." (2) A reasonable latitude must be given.(3) Not every pleading which offends against the rules will be struck out. The applicant must show that he is in some way prejudiced by the irregularity. Still, "the defendant may claim *ex debito justitiæ* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it." (4)

"**Unnecessary.**"—The word "*unnecessary*" was introduced into the English Rule in 1883. But the mere fact that an opponent's pleading contains some unnecessary matter is not sufficient ground for an application under this rule. A statement will not be struck out merely because it is unnecessary, so long as it is otherwise harmless.(5) It is no part of the defendant's duty to reform the plaintiff's pleading, or to dictate to him how he shall plead, or *vice versâ*. But if wholly immaterial matter be set out in such a way that the applicant must plead to it, and so raise irrelevant issues which may involve expense, trouble and delay, then the irrelevant matter will be struck out, as it will prejudice the fair trial of the action.

"**Scandalous.**"—As regards "scandalous" matter, the Court has a general jurisdiction to expunge it in any record or proceeding,(6) and apparently, according to the English practice, any person may make the application.(7) Allegations of dishonesty and outrageous conduct, etc., are not, however, scandalous, if relevant to the issue.(8) "Nothing can be scandalous which is

(1) Cross *v.* Howe, 62 L. J. Ch. 342. See Annual Practice, from which following notes are taken; and see the New Fleming, etc., Co. *v.* Kessowji Naik, 9 B. 373, 381 (1885).

(2) *Per* Bowen, L. J., in Knowles *v.* Roberts, 38 C. D. 270.

(3) Tomkinson *v.* S. E. Ry. Co., 57 L. T. 358.

(4) *Per* James, L.J., in Davy *v.* Garrett, 7 C. D., p. 486; and see Watson *v.* Rodwell, 3 C. D. 380.

(5) *Per* Chitty, J., in Rock *v.* Pursell, 84 L. T. Jo. 45; see the remarks of Kay, J., in Tomkinson *v.* S. E. Ry. Co., 57 L. T., p. 306, and Hocking & Co. *v.* Hocking, 3 R. P. C. 291; and see as to prolixity and irrelevancy, Kasablal Day *v.* Tremearne, 3 B. L. R. App. 12 (1869); Koshadji Naik *v.* Nasarvangi Ardesir, 10 B. H. C. R. 425 (1873); Smallwood *v.* Parry, 1 Coryton, 39 (1864-5); The New Fleming Spinning, etc., Co. *v.* Kessowji Naik, 9 B. 373, at p. 381 (1885); Boolee Singh *v.* Hurobuns Narain Singh, 7 W. R. 212 (1867).

(6) Seton, 31. Even in bills of cost, *re* Miller, 54 L. J. Ch. 205.

(7) Cracknell *v.* Janson, 11 C. D. p. 13.

(8) Everett *v.* Prythergch, 12 Sim. 363; Rubery *v.* Grant, L. R. 13 Eq. 443.

relevant." (1) "The mere fact that these paragraphs state a scandalous fact does not make them scandalous." (2) But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous.(3) The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed.(4)

"**Tend to prejudice, etc.**"—The Court is "disposed to give a liberal interpretation" to the words "*Tend to prejudice, embarrass or delay the fair trial of the suit.*" (5) At the same time parties must not be too ready to find themselves embarrassed. If the defendant does not make it clear how much of the plaint he admits and how much he denies, his pleading is embarrassing.(6) If he does not make it clear whether he is traversing the allegations contained in the plaint, or objecting to them on a point of law, his defence will be struck out as embarrassing.(7) In neither case could the plaintiff safely join issue. So a plea of justification is embarrassing if it leaves the plaintiff in doubt what the defendant has justified and what he has not.(8) But mere prolixity is not embarrassing.(9) Nor will a statement be struck out as embarrassing merely because the other party declares that it is untrue.(10) The mere fact that a Statement of Claim embraces several causes of action is not, according to English practice, embarrassing, if they are distinctly pleaded in the alternative. A claim for alternative relief is not embarrassing.(11) So any number of inconsistent defences may now, in England, be pleaded to the same cause of action; and their inconsistency is not "embarrassing" to the pleader.(12)

But if a claim against executors personally in their private capacity be improperly joined with a claim against the estate of their testator, it will be struck out.(13) So where several plaintiffs or several defendants are improperly joined in one action, though the causes of action be separate, the pleading will be struck out.(14) Where a pleading is defective only in the sense that it does

(1) *Per* Cotton, L.J., in Fisher *v.* Owen, 8 C. D. p. 653.

(2) *Per* Brett, L.J., in Millington *v.* Loring, 6 Q. B. D. p. 196.

(3) Duncan *v.* Vereker (1876), W. N. 64; Blake *v.* Albion Assurance Society, 45 L. J. C. P. 663; Lee *v.* Ashwin, 1 Times Rep. 291; McGuckin *v.* Ralli, 94 L. T. Jo. 12; Coyle *v.* Cuming, 27 W. R. (Eng). 529.

(4) Selbourne, L.C., in Christie *v.* Christie, L. R. 8 Ch. 499; Cashin *v.* Cradock, 3 C. D. 376; Whitney *v.* Moignard, 24 Q. B. D. 630.

(5) Berdan *v.* Greenwood, 3 Ex. D., p. 256.

(6) British Land Association *v.* Foster, 4 Times Rep. 574.

(7) Stokes *v.* Grant, 4 C. P. D. 25.

(8) Fleming *v.* Dollan, 23 Q. B. D. 388; and see Davis *v.* Billing, 8 Times Rep. 58.

(9) Weymouth *v.* Rich, 1 Times Rep. 609; Heap *v.* Marris, 2 Q. B. D. 630.

(10) *Per* Bramwell, L.J., in Turquand *v.* Fearon, 40 L. T. p. 544.

(11) Bagot *v.* Easton, 7 C. D. p. 8.

(12) *Re* Morgan, 35 C. D. 492; Berdan *v.* Greenwood, 3 Ex. D. 251, 255.

(13) Whitworth *v.* Darbishire, 41 W. R (Eng.) 317; 68 L. T. 216, for that is contrary to O. 18, r. 59 of the English rules.

(14) Smith *v.* Richardson, 4 C. P. D. 112; Sandes *v.* Wildsmith (1893), 1 Q. B. 771; Smurthwaite *v.* Hannay (1894), A. C. 494; Sadler *v.* G. W. Ry. Co. & Midland Ry. Co. (1896), A. C. 450; Gower *v.* Couldridge (1898), 1 Q. B. 348; Stroud *v.* Lawson (1898), 2 Q. B. 44; Walters *v.* Green, 2 Ch. 696 (1899); Frankenburg *v.* Gt. Horseless Carriage Co. (1900), 1 Q. B. 504; Kent Coal Co. *v.* Martin, 16 Times Rep. 486; and see notes to Annual Practice, O. 16, rr. 1, 4, where all the cases are cited.

not contain particulars which it ought to contain, and thus deprives the opponent of information to which he is entitled, it is not "embarrassing" in the strict sense of the word (though that epithet is often applied to such a pleading),(1) and application should now be made for "a further and better statement of the nature of the claim or defence" under r. 5, and not for an order to strike out the pleading under this rule.

Amendment of pleadings.

17. *The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.*

Failure to amend after order.

18. *If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.*

Former and present provisions.—The present rules are in very much more general terms than sect. 53 of the last Code which they replace. Clause (*a*) of that section dealt with rejection of the plaint for want of cause of action. This provision has now been referred to O. VII. r. 11. Clause (*b*) dealt with return for amendment under certain circumstances which are expressly stated, (i), (ii), (iii), and (iv), as to which, see *post*. This return was before the settlement of issues. Clause (*c*) dealt with amendment by the Court at any time before judgment. The section also contained the important qualification that no plaint should be amended either by the Court or by the party so as to convert a suit of one character into a suit of another and inconsistent character. Before pointing out the extended scope of the present Code, and for the better understanding of it, a detailed examination of the former provisions is given.

Return for amendment by Court of First Instance under former Code.—A plaintiff (2) might himself apply, at or before settlement of issues, that the plaint which he had filed be returned to him for amendment if he perceived that it was defective formally, or required amendment as regards substance or relief. An application was generally, though not of necessity, made on petition (3) supported by an affidavit (4) showing the grounds on which

(1) See Philips *v.* P., 4 Q. B. D. p. 139; Harris *v.* Jenkins, 22 C. D. 481; Davis *v.* James, 26 C. D. 778.

(2) See Delhi and London Bank *v.* Miller, 7 B. L. R. App. 65 (1871); Shib Kristo *v.* Abdool, 5 C. at p. 604 (1879); Modhe *v.* Dongre, 5 B. 609 (1881).

(3) See Gobind Chandra *v.* Ganga Dye, 7 B. L. R. 333 (1871).

(4) Delhi and London Bank *v.* Miller, *supra*.

it was made. It is submitted also that notice should have been given, though it has been held that if a party has notice of the suit but does not appear, the fact that the plaint was under such circumstances amended without notice to him did not nullify the decree thereafter made.(1) A defendant (2) might similarly apply. If neither party applied, the Court might, under clause (*b*), of its own motion in the specific cases therein mentioned, return the plaint to the party to be amended by him so as to remove the particular objections which might exist to it. The party himself then amended his plaint. But under clause (*b*) the plaintiff need not have amended at all after the plaint was returned to him, but if he did not he incurred the penalty of sect. 54.(3) The Original Court could not, unless acting under the orders of an Appellate Court, return a plaint after settlement of issues, for after that period the power to amend was with the Court alone; (4) but if the plaint required amendment and the fact was only discovered after issues had been settled, the Court could amend the plaint at any time before judgment.(5) It was apparently not intended by the Legislature that any necessary amendment should take any form other than that of an amendment in writing on the face of the plaint; and the Court was not competent to order an amendment so as to require that a plan should be appended to the plaint.(6) Straight, J., incidentally expressed an opinion that a plaint, after being once returned for amendment and amended accordingly, could not be returned again for amendment.(7) In cases in which leave under the Charter had to be obtained prior to the institution of the suit, no such amendment could be allowed as would introduce a new cause of action, for the grant of leave must be taken to relate to the suit as put forward in the plaint on which leave is endorsed by the Judge accepting it.(8) When a plaint was returned a time had to be fixed within which the amendment must be made.(9) The Court, however, had a discretion to extend even after the time originally fixed for amendment had expired.(10) If the plaint was not amended within the time fixed it was rejected under sect. 54 (*d*).

Clause (i) of sect. 53 of former Code.—A defect in the verification of a plaint did not of necessity result in the dismissal of the suit.(11) Before the

(1) Sadho *v.* Golab, 3 C. W. N. 375 (1897).

(2) See Damodar Das *v.* Gopal Chand, 7 A. 79, at p. 83 (1884). In Muthappa *v.* Muthu, 27 M. 80, 84 (1903), Sir A. White, C.J., however, said: "The Code apparently does not contemplate an application by a party that a plaint be amended and proceedings stayed till the amendment is made."

(3) Rajit Ram *v.* Katesar Nath, 18 A. 396 (1896).

(4) Baij Nath *v.* Chowaro, 26 A. 218 (1903) [misjoinder of causes of action]; and see notes, *post*, O. VII. r. 11, "Rejected."

(5) Pajt Ram *v.* Katesar Nath, *supra*. See Sasi Bhusan *v.* Rasik, 17 C. W. N. 989 (1912).

(6) Chenbasaya *v.* Rudrapa, 14 B. 581 (1889).

(7) Badr-un-nisa *v.* Muhammad, 2 A. 671 (1880).

(8) Rampurtab *v.* Premsukh, 15 B. 93 (1890).

(9) See Ismail *v.* Arumuga, 1 M. H. C. R. 427 (1863); and the same rule applies to a memorandum of appeal: Sheo Partab *v.* Sheo Gholam, 2 A. 875 (1880).

(10) Bhagwandas Bagla *v.* Haji Abu, 16 B. 263 (1891).

(11) Rajit Ram *v.* Katesar Nath, 18 A. 396 (1896). In Shama Soondaree *v.* Rohimooddeen, 24 W. R. 71 (1875), where a verification was false, the suit was held to have been

settlement of issues the plaint should have been returned for amendment, and if the verification was discovered to be defective at any time whilst the suit was before the Court of first instance, the plaint might be amended by the Court. If such defect was not discovered until the suit came in appeal before an Appellate Court, such Court might, if it thought fit, return the plaint to the Court of first instance to be amended by it. But where the defect was such that it was covered by the provisions of sect. 578 of that Code, there was no necessity to take any steps to procure the amendment of the plaint.(1) The Allahabad High Court has in some cases remanded the case under sect. 562 of the former Code with an order for the return of the plaint to the plaintiff for duly signing and verifying the same.(2)

Clause (ii) of sect. 53 of former Code.—See as regards clause (ii), O. VII. rr. 1–6, *ante*. The general intention and meaning of a plaint should be regarded, and it should not be returned for want of correctness upon grounds of slight and immaterial mistake.(3) If a plaint was defective in form or wanting in precision it should be returned for amendment and not rejected.(4) Under the rules of the Panjab Chief Court an attempt should be made to remove ambiguity in the statement of any of the particulars before resorting to the return of the plaint for amendment.(5) For an instance of a plaint containing particulars other than those required, see the case cited below,(6) in which the plaint was argumentative and referred to evidence, and contained a prayer for the criminal prosecution of the defendant. Where the plaint disclosed a cause of action, but not with sufficient fulness, it might be returned for amendment or amended; but if this was not done the plaintiff was at liberty to prove any cause of action not inconsistent with the plaint.(7)

Clause (iii) of sect. 53 of former Code.—See as to non-joinder and misjoinder, O. II. rr. 3–7. The Court might return for amendment, but a party was not to be prejudiced because the Court had in its absence inadvertently admitted a plaint which was multifarious. The defendant had a right on a motion to take the plaint off the file to raise the question of misjoinder of causes of action before or at the settlement of issues.(8) If the cause for suing one defendant was different from that for suing another, the plaint should have been returned for amendment. In the event of serious

wrongly dismissed, the defendant having admitted a considerable portion of the plaintiff's claim and taken no objection to the verificati[on]. See also Roy Mohun *v.* Buhoo Soondura, 10 W. R. 145 (1868).

(1) Rajit Ram *v.* Kateear Nath, 18 A. 396 (1896); foll., Chandi Mal *v.* Dewa S'ngh, 1896, P. R. No. 48.

(2) Fateh Chand *v.* Mansab Rai, 20 A. 442 (1897), and cases therein cited.

(3) See Mussoorie Bank *v.* Barlow, 9 A. 188 (1886); and in examining the correctness of a plaint the allegations, if in the present tense, must be deemed to relate to the date of verification: Prindle *v.* Caruthers, 15 N. Y. 425 (Amer.); cited in Hukm Chand, C. P. C. 631.

(4) Pitambur Mookerjee *v.* Huree Narain, 1864, W. R. 50.

(5) S. 2, r. 1 (1); cited in Hukm Chand, C. P. C. 631.

(6) Bishen Sahaye *v.* Beer Kishore, 8 W. R. 296 (1867); and as to prolixity, ib.; and notes to O. VII. rr. 1–6.

(7) Luckhee Prea *v.* Brindabun Dey, 12 W. R. 313 (1869).

(8) Ram Dyal *v.* Ram Doolal, 11 W. R. 273, 275 (1869).

multifariousness being discovered at the first hearing, the Court might, on the defendant's application before any evidence was recorded, require the plaintiff to elect which cause of action he would proceed to trial upon, and should direct the remainder of the claim to be withdrawn and the plaint amended accordingly.(1) Whilst the Court could not return the plaint after settlement of issues it might amend it at any time. If there were misjoinder of causes of action the plaint might be amended by striking out the part which was not properly joined.(2) Where there was misjoinder but the first Court proceeded to trial, not having returned the plaint for amendment or amended it, it should dispose of the case on the merits.(3) There was nothing in the Code to warrant the proposition that when a Court of first instance decided a question of misjoinder in favour of the plaintiff there was an end of the matter, and the defendant was precluded from raising the question in appeal.(4) Where, however, a suit was not objected to on the score of misjoinder of causes of action at or before the settlement of issues in the Court of first instance, the Court seeing, in second appeal, that the suit had proceeded through three Courts, did not feel justified in dismissing the suit.(5) The Appeal Court might dispose of the suit in the mode in which the lower Court ought to have disposed of it if it had held, as it ought to have done, that there was a misjoinder and might direct that the plaint be returned for amendment.(6)

Clause (iv) of sect. 53 of former Code.—See notes to O. II. r. 1, *ante*.

Amendment by Court under clause (c) of former Code.—This clause did not form part of the Code as enacted in 1887, and together with the words "*at or*" in clause (*b*), was introduced by sect. 9 of Act VII. of 1888.(7) The words "*at any time before judgment*" meant substantially the same as the words "*at any stage of the proceedings*" in the corresponding English rule, O. 28, r. 1, under which leave to amend was refused after judgment; but an amendment might be made at any time so long as anything remained to be done in an action, though it be only the assessment of damages, and even on an application for a new trial.(8) Under clause (*c*) the Court itself might amend at any time before judgment but not after.(9) The plaint still remained on, and was part of the file, although the Court might depute any person selected by it to take the plaint, for example, to a pardanashin woman who was plaintiff, or to a person who through illness was unable to attend Court for the purpose of its order being complied with. Any amendment under such circumstances would be an amendment by the Court itself. Under

(1) Instructions to Judicial Officers (Panjab Chief Court), s. 2, r. 1 (iii); s. 2, r. 31; Hukm Chand, C. P. C. 632.

(2) Cutts *v.* Brown, 6 C. 328, at p. 332 (1880).

(3) Kishna Ram *v.* Rakmini Sewak, 9 A. 221 (1887).

(4) Muthappa *v.* Muthu, 27 M. 80, 85 (1903). See now, *post*.

(5) Sanna *v.* Ganapa, 5 Bom. L. R. 185 (1903).

(6) Lingammal *v.* Venkatammal, 6 M. 239 (1882); Ramanuja *v.* Devanayka, 8 M. 361 (1885); Salima Bibee *v.* Sheikh Muhammad, 18 A. 131 (1895); Rajjo Kuar *v.* Debi Dial, 18 A. 432 (1896).

(7) See for the earlier law, Damodar *v.* Gopal Chand, 7 A. 79 (1885); Modhe *v.* Dongre, 5 B. 609 (1881).

(8) Annual Practice, 1905, p. 356.

(9) Percival *v.* Collector of Chittagong, 30 C. 516 (1900).

this clause the amendment was made by order of the Court, and the party had to comply with it. Further, if the amendment was one going to the maintenance of the suit and the defect in the plaint was not discovered until the suit got into a superior Court on appeal, the Appellate Court could either order the amendment to be made in that Court, or, for example, in a case in which there had been not only misjoinder of parties but misjoinder of causes of action, the Appellate Court might order the Court of first instance to do what it ought to have done at the proper stage of the suit when the suit was before it, and return the plaint to the parties so that they might make their election as to which of them was to continue the suit, and might make the necessary amendments.(1)

Amendment by Appeal Court under former Code. It was held under the Code of 1882 that an Appellate Court had power under sect. 582 of that Code, read with sect. 53, to allow an amendment of the plaint.(2) The Appellate Court might itself have made the amendment or directed the lower Court to do so. There are many cases in which amendments have been allowed on appeal, and suits have been remanded (3) for re-trial on amended plaints.(4) The High Court, in special appeal, has also directed the lower Appellate Court to amend the plaint by the insertion of a prayer for declaration

(1) Rajit Ram *v.* Katesar Nath, 18 A. 396 (1896), in which an amendment under clause (c) is distinguished from that under clause (*b*).

(2) Rajah Peary Mohan *v.* Narendro Krishna, 5 C. W. N. 273 (1900) [on appeal to Privy Council, 37 I. A. 27 (1909); 37 C. 229]; whether leave to amend was asked for in the Court below or not; though according to English practice leave is not readily granted in appeal if not asked for in Court of first instance: Annual Practice, 1905, p. 356; though this is a matter which in each case must be determined on its own circumstances: see Ecklin *v.* Little, 6 Times R. 366, *post*. The Appellate Court may similarly amend the memorandum of appeal: Percival *v.* Collector of Chittagong, 30 C. 516 (1900).

(3) The view expressed by Rampini, J., in Dhani Ram *v.* Bhagirath, 22 C. at p. 714 (1895), that an amendment cannot be made which involves a remand, and that a remand is not justified except in the circumstances mentioned in ss. 562 or 566 of the former Code, has not been accepted. There are some observations, however, in Bai Shri Majiraba *v.* Maganlal, 19 B. 303 (1894); but these and some others as to the powers of an Appellate Court were not necessary for the decision, the basis of which was that the character of the suit had been changed. And see Lingammal *v.* Venkatammal, 6 M. 239, 244 (1882), in which it was said that the Appellate Court should dispose of the suit in the mode in which the lower Court ought to have disposed of it.

(4) Rajah Peary Mohun *v.* Narendro Krishna, 5 C. W. N., at p. 279, and cases there cited; and Ram Doyal *v.* Rajah Ojoodhia, 25 W. R. 425 (1876); Sardarsingji *v.* Ganpatsingji, 14 B. 395 (1885); Karimbhai *v.* Conservator of Forests, 4 B. 222 (1879); Nilkanthappa *v.* Magistrate, etc., 6 B. 760 (1880); Balaram *v.* Magistrate, etc., 6 B. 672 (1882); Joseph *v.* Solano, 18 W. R. 424 (1872); s. c., 9 B. L. R. 441; Lingammal *v.* Venkatammal, 6 M. 239 (1882). This has been done in special appeal: Daboo *v.* Luwa, 11 W. R. 223 (1869); Dhani Ram *v.* Bhagirath, 22 C. 692 (1895); Annapa *v.* Ganpati, 5 B. 181 (1880); Radhabai *v.* Shamrav, 8 B. 168 (1881); Thakur Raghunathji *v.* Shah Lal, 19 A. 330 (1897); Hari Gopal *v.* Gokaldas, 12 B. 158 (1887); Narasimha *v.* Suryanarayana, 12 M. 481 (1889); Shyam Chand *v.* Land Mortgage Bank, 9 C. 695 (1883); Seshamma *v.* Chennappa, 20 M. 467 (1897); Krishnaji *v.* Sitaram, 5 B. 496 (1880); and even in the most advanced stage of the suit before the Privy Council: Mohummed Zahoor *v.* Rutta Koer, 11 M. I. A. 468, 487 (1867).

of the plaintiffs' right and to re-hear the appeal.(1) It has, however, been said to be undesirable to allow amendment in second appeal when the plaintiff has in two Courts never contemplated it, and has even gone so far as to persistently maintain his case as originally brought.(2) Amendment has been refused with reference to a state of facts occurring since the decision by the original Court.(3) Amendment has also generally been refused where the plaintiff persisted throughout that the suit as framed was maintainable, and permission to amend was not asked for in the lower Court.(4) In a case where no amendment was asked for and refused in the Court of first instance, but, on the other hand, objection was taken in the lower Court, and the plaintiffs elected to take an issue and to allow the suit to proceed subject to the risk of an adverse decision, the Court said: "It is true that, as a general rule, the plaintiff may be permitted even, on appeal, to amend the plaint when he had framed it *bonâ fide* under a mistake or erroneous advice, and the other party could be adequately compensated by an award of costs, but it must be observed that when such amendment might possibly create a necessity for fresh written statements and for fresh issues, and practically amount to a trial *de novo* from the commencement, it is much more convenient to leave the plaintiffs to the liberty of maintaining a suit for ejectment, so that the opposite party might in no way be prejudiced in his defence or harassed with a second trial of the same suit." (5) The stage of the proceedings, whether in the original Court or Court of Appeal, at which an application for amendment is made might effect the question whether it should be granted, as to which, see *post*.

Proviso to sect. 53 of last Code.—The object of this proviso was only to prohibit amendments which involved the trial of issues substantially different from those raised by the original pleadings.(6) See notes on "Change of character of suit," *post*.

Present provisions as to amendment.—R. 16 is taken from English O. 16, r. 27, and rr. 17 and 18 from O. 28, rr. 1 and 7. The latter rule provides that on failure to amend the order for amendment becomes void. R. 18 more specifically states what the effect of a failure to amend is. From a review of the preceding case-law and the provisions of sect. 53 of the last Code, it will be seen that the present powers of amendment are given in much wider terms. Amendment may be either by the party or by the Court. No mention is made of return for amendment, but this may take place where the party applies or is directed to make an amendment. No

(1) Narasimha *v.* Suryanarayana, 12 M. 481 (1889); Seshamma *v.* Chennappa, 20 M. 467 (1897).

(2) Surendra Narain *v.* Bhai Lal, 22 C. 752, 756 (1894); however, in Ecklin *v.* Little, 6 Times R. 366, it was held that the C. A. had power to amend even where the Court below offered leave and the offer was declined.

(3) Govinda *v.* Perumdevi, 12 M. 136 (1889).

(4) See Jogendra Nath *v.* Price, 24 C. 584, 588 (1897); Obhoy Gobind *v.* Hurychurn, 8 C. 277, 278 (1882). In Durga Prosad *v.* Nawazish, 1 A. 591 (1878), the Court refused to allow an amendment as the plaintiff should have offered, but did not, to pay the sum which he subsequently offered to do when he brought his suit.

(5) Narayana *v.* Shankunni, 15 M. 255, 257 (1891).

(6) Lakshmappa *v.* Nagi Reddi, 28 M. 500 (1904).

time is fixed as to when the amendment may be made. It may be "at any stage of the proceedings." As to the meaning of this term, *vide ante*, "Amendment by Court." Amendment may be by the Court of first instance or appeal, though the principles upon which the Appellate Court will proceed in such cases are in general those stated. As regards misjoinder, see now O. I. r. 13, O. II. r. 7, and sect. 99. As to amendment of applications for execution, see O. XXI. r. 17. An extremely important amendment is the omission of the proviso in sect. 53, a matter which is dealt with *post*, as are also the general principles on which amendment will be allowed. It may be broadly stated that in all cases where amendment has hitherto been allowed it will be permitted now, and that in many instances in which it has been refused it would be allowed under the present provisions, the object of which is to extend to India the liberal principles which govern English Courts under which all such amendments are made as are necessary for determining the real questions in controversy between the parties subject to certain qualifications which are hereinafter stated.

Case desired to be made must be raised.—In the first place a question not raised by the plaint ought not to be decided by the Court.(1) The Judicial Committee has held,(2) that though it is disposed to give a liberal construction to pleadings in Indian Courts, so as to allow every question to be raised and discussed in the suit, yet a plaintiff cannot be entitled to relief upon facts and documents neither stated nor referred to in the pleadings. The determination in a cause must be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.(3) Even where it was argued that the plaintiff had been misled by various representations made by the defendant into framing his suit as it was then framed, the Privy Council said that even if that were so it would not empower them to depart from the rule, which has always prevailed, that a man must recover according to his allegations and his proofs, and that it would not enable them to allow an entirely new case to be brought forward which was not set up or hinted at in the plaint.(4) Further, it is to be noted that stricter rules as regards pleading are enacted by the present Code.

Matters in dispute should be ascertained not only from the plaint and answer, but also at the first hearing of the suit, when issues are settled; and any indistinctness in the form of the plaint does not require that a decision come to upon issues fixed in the lower Court between the parties should be

(1) Lalji *v.* Gungaram, 2 B. H. C. R., A. C. J. 176 (1864).

(2) Mohummud Zahoor *v.* Musst. Thakoorrance, 11 M. I. A. 468 (1867).

(3) Mylapore Iyasawmy *v.* Yeo Kay, 14 C. 801 (1887); s. c., 14 I. A. 168; Eshen Chunder *v.* Shama Churn, 11 M. I. A. 7 (1867); Ameeroonissa *v.* Abedoonissa, 21 I. A. 100, at p. 107 (1875). A plaintiff is only entitled to succeed upon the cause of action alleged by him in his plaint: Sheo Prasad *v.* Lalit Kuar, 18 A. 403 (1896); diss. from Chimnaji *v.* Sakharam, 17 B. 365 (1892).

(4) Gopee Lall *v.* Musst. Sree Chundraolee, 19 W. R. 12 (1872).

set aside.(1) In the case cited,(2) the Privy Council said: "Some importance was attached by learned counsel for the respondents to the manner in which the plaintiff's case was stated in the plaint, but their Lordships are of opinion that in dealing with the case they must look not to the mere wording of the plaint, but to the issue which was settled for trial and to the manner in which the case was treated by the lower Courts." (3) In the case last cited it was pointed out that the object of the plaint was merely to bring the matter in dispute before the Court, but it was for the latter, upon the statements before it, to determine the real issue between the parties.(4) The substance, and not merely the form, of the plaint must be looked at. Where a plaintiff in form seeks for confirmation of possession, yet sets out and states circumstances which are in themselves a dispossession, the suit should be treated really as one for recovery of possession.(5) Where a suit remains substantially the same as one for rent, the fact that the plaintiff claims *bhowlee* rent will not disentitle him to a decree for *nugdee* rent, the defendant admitting that rent of this kind was payable.(6)

Where there is a slight variance between a plaintiff's pleading and his evidence, but the defendant has not been misled thereby, or induced to refrain from calling evidence, the plaintiff's suit should not be dismissed.(7) Though a plaintiff does not prove the precise claim which he makes, if he is substantially right he ought to have a decree, and not to be left to bring another suit.(8) A plaintiff who brings forward a *bonâ fide* case which he proves in substance, though not in form, will be assisted by the Court, but in the absence of such special circumstances no such assistance will be afforded.(9) It is not a rule of universal application that a plaintiff who claims too much or fails to admit reasonable deductions from his claim is therefore to be deprived of that to which he is legally entitled.(10) It might promote honesty

(1) Moulvie Abdoollah *v.* Mujeesooddeen, 15 W. R. 286 (1871).

(2) Raja Rup *v.* Rani Baisni, 7 A. 1, 11 (1884); 11 I. A. 149, 155 [claim based on custom and law; decreed on law].

(3) See also Arbuthnot *v.* Betts, 6 B. L. R. 273; s. c., 14 W. R. 181 (1870), where the case was erroneously stated in the plaint, but it was held that the suit should not have been dismissed on that ground as the issues raised admitted of the true question being tried. The substance and not the mere literal wording of the issues is to be regarded: Hunooman Persaud *v.* Musst. Babooee, 6 M. I. A. at p. 411 (1856).

(4) Dist. in Shib Kristo *v.* Abdool, 5 C. 602, 603 (1879), where it was pointed out that the form of the plaint made no difference as regards the substantial defence in the case.

(5) Moulvie Abdoollah *v.* Shaha Mujeesooddeen, 16 W. R. 27 (1871); Kashee Nath *v.* Mohesh Chunder, 25 W. R. 168 (1876); Rash Dharee *v.* Nathooee, 24 W. R. 301 (1875); Amir Hossein *v.* Imambandi, 11 C. L. R. 443 (1882); Champu Dai *v.* Uma Dai, 11 C. L. R. 451 (1882); but see Sansar Roy *v.* Indrasun Roy, 25 W. R. 6 (1875); Terietput *v.* Gossain, 4 C. 46 (1878).

(6) Musst. Bibee *v.* Bhagul, 21 W. R. 438 (1874).

(7) Ranchordass *v.* Manoklal, 17 B. 648 (1890).

(8) Roy Kishore *v.* Huree Mohun, 19 W. R. 195 (1873).

(9) Terietput *v.* Gossain, 4 C. 46 (1878).

(10) Muhammad Niamat *v.* Ghaffar Muhammad, 21 A. 272, 273 (1899). In Wahid Alam *v.* Safat Alam, 12 A. 556 (1889), it was held that the parties on both sides had overstated their interest in the courtyard in suit, but had not made allegations inconsistent with the use of it, which the Court awarded them.

among litigants if every plaintiff who demanded more than his due, and who supported his demand by perjury or forgery, were made to forfeit the whole of his claim; but it is almost needless to say that that is not the law. Such a plaintiff may properly be mulcted in costs, or he may be punished in a criminal Court; but if he have a good cause of action a civil Court must give him a decree for so much of his claim as he succeeds in establishing. (1) While a plaintiff must be limited to the case which he puts forward in the plaint, he may put forward an alternative case from the commencement, in which case the defendant will then know that he has more than one case to meet, and will not be taken by surprise.(2) There is nothing in the law to prevent a plaintiff from setting up two proprietary rights in the alternative, such as are based upon the ground that the land is included in his ancestral *jama*, and the other on the ground of his having held adverse possession for more than twelve years.(3) In a suit on settlement of account and an agreement to pay, the plaintiff may fall back as an alternative upon the foundation of his case, namely, that in the account current between himself and the defendant the latter was indebted to him.(4) And a suit brought on the allegation that partnership accounts had been adjusted, and in the alternative for such other relief as might be proper, was allowed to be amended by omitting the allegation of adjustment and inserting an alternative prayer for an account.(5) In a suit to recover land as part of joint estate, but which was subsequently divided into separate shares; *held*, that upon failure of proof of allegation of partition plaintiff might obtain relief upon the first allegation.(6) If a plaintiff claims possession generally under some alleged title, such as purchase or gift, and also upon the ground of twelve years' possession, he is entitled to succeed on the latter ground, even though he fail upon the former.(7) Where, in a suit for possession, a specific title is alleged but not proved, the plaintiff, in order to succeed on twelve years' adverse possession, must raise it so clearly in the first Court that his adversary knew he intended to rely on it.(8) There is, however, a distinction between suits for confirmation of possession under a certain title and declaration of title, and suits in ejectment to recover possession. A person ought not to be allowed to obtain a declaratory decree except in respect of the very title which he asserts and

(1) Lakshenan Bhisaji *v.* Hari Dinakar, 4 B. 584, 588 (1880).

(2) Lakshibai *v.* Hari, 9 B. H. C. R. 1 (1872); as to amendment in order to raise an alternative case, *vide post*.

(3) Uma Ch... *v.* Bishun Nath, 3 C. W. N. cxliii. (1899). Apart from the question of inconsistency a plaintiff may be precluded from recovering. See Lalu Gogal *v.* Bai Motan, 17 B. 631 (1896), where the plaint and conduct of the plaintiff was held to amount to a denial of the defendant landlord's title.

(4) Lalla Sheopershad *v.* Juggurath, 13 C. L. R. 266, 268 (1883); s. c., 10 I. A. 74.

(5) Dhani Ram *v.* Bhagnath, 22 C. 692 (1895).

(6) Fukeer Dass *v.* Gopal Mookerjee, 12 W. R. 107 (1869).

(7) Gossain Dass *v.* Issur Chunder, 3 C. 224 (1877); Goluck Chunder *v.* Nundo Coomar, 4 C. 699 (1878).

(8) Krishna Churn *v.* Protab Chunder, 7 C. 560 (1881); Shiro Kuman *v.* Govind Shaw, 2 C. 418, 423 (1877). In Sundari Dassee *v.* Mudhoo Chunder, 14 C. 592 (1887), a plaintiff was held entitled to succeed on the ground of possession, though not alleged in the plaint, or issue framed on it, as the defendant had notice that the plaintiff relied on adverse possession. As to remand, see Kylash *v.* Judoo, 22 W. R. 320 (1874).

upon which he goes to trial.(1) A plaintiff must be limited to the case which he puts forward in his plaint, but he may put forward an alternative case in his plaint from the commencement, as the defendant then will know that he has more than one case to meet and will not be taken by surprise.(2) The rule, however, that a party must prove the particular title he sets up, must not be confounded with the question of the means of proving it. Thus, if a person claims to hold under a grant, such grant being evidenced by a *sunnud*, and fails to prove the latter, he may prove the grant by other means.(3)

Amendment.—In so far, as already stated, relief can only be given on a case made in a plaint formally framed in accordance with the provisions of the Code, provisions for amendment are necessary when the plaint is either in substance, or form, defective. This section is but one of several dealing with the question of the amendment of pleadings or proceedings.(4) Amendments may be of three kinds: (5) (*a*) those which a party desires to make in his own pleadings or proceedings; (*b*) in his opponent's pleadings and proceedings against the latter's will; (6) (*c*) amendments which the Court thinks right to make of its own motion in order to determine the real questions in controversy between the parties.(7) The present rules deals with the amendment of the plaintiff's pleadings upon the application of the plaintiff himself, of or the defendant, or at the instance of the Court of its own motion. The amendment sought may be in respect of substance, parties, or relief. The date of amendment is immaterial for purposes of limitation. The date of institution of a suit is the date of the first presentation of the plaint, and if the plaint is returned for amendment and is then presented again within the time allowed, the date of first presentation is the date of institution.(8)

General principles on which amendment is granted.—Amendment is not the right of the suitor in all circumstances.(9) It was held under the last Code that it was not enough to show that the proposed amendment did not alter the character of the suit.(10) The section gave the Court a discretion which, however, was to be guided by judicial principles.(11) If by inadvertence, or other cause, the recorded issues (the substance and not the mere literal wording of which is to be regarded) do not enable the Court to

(1) Sundari Dassee *v.* Mudhoo Chunder, 14 C. 592, 597, 598 (1887); Man Gobind *v.* Umbika Monee, 16 W. R. 218, 219 (1871); Sheikh Torab *v.* Sheikh Mahomed, 19 W. R. 1 (1872); Goluck Chunder *v.* Nundo Coomar, 4 C. 699, 703 (1878); Terietput Singh *v.* Gossain Sudersan, 4 C. 46 (1878).

(2) Lakshmibai *v.* Hari Ravji, 9 B. H. C. R. 1 (1872) [ejectment suit by landlord; failure to prove lease; general title].

(3) Rash Beharee *v.* Nobaye Poddar, 11 W. R. 465 (1869).

(4) As to amendment of issues, see O. XIV. r. 5; judgment, O. XX. r. 3; decree, s. 152; application for execution, O. XXI. r. 17.

(5) Annual Practice, 1905, p. 349.

(6) See O. I. r. 10, O. VI. r. 17.

(7) See O. I. r. 10, O. VI. r. 17, O. XX. r. 3; s. 152.

(8) See Mitra's Limitation Act, 4th ed. p. 674.

(9) Satyes Chandra *v.* Monmohini, 19 C. L. J. 518 (1914).

(10) Tapiram *v.* Sadu, 21 B. 570 (1896).

(11) Damodar Das *v.* Gokal Chand, 7 A. 75 at p. 83 (1884).

try the whole case on the merits, an opportunity should (the Privy Council have said) be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute.(1) Where a party who has an honest case has, either through ignorance,(2) *bonâ fide* mistake, or some misapprehension, not placed the real facts before the Court,(3) or has misconceived his cause of action and form of suit,(4) he should be allowed to amend, where this may be done without injustice to the defendant, and, in appeal, particularly where the objection that the suit was not maintainable was not taken in the first Court.(5) Where, however, there is reason to think that an omission to claim was deliberate, it would, it has been said, generally not be proper to allow amendment.(6) In short, the object of a trial being to get at the rights of the parties, any amendment which may be required for that purpose should, subject to the general principles to which reference is about to be made, be allowed. Apart from the question of limitation, it is unjust to a plaintiff to put him to the great expense of a new suit when a reasonable amendment, not inconsistent with his case as it originally stood, might equally well answer his purpose as the new suit.(7)

As to the principles governing the grant of leave to amend, the Courts should be guided by the *dicta* of the English Judges here cited. It was no doubt said,(8) with reference to the provisions of the last Code, that the Judicature Act allowed more latitude and scope to judicial discretion than was permitted by that Code. It is, however, submitted that the English rule, O. 28, r. 1, as practically worked, was, to some extent, the same as that which existed under that Code. For though that rule contains no such proviso as that of this section in the Code of 1882, the English Courts do, in practice, refuse an amendment which will change the action into one of a substantially different character which would more conveniently be the subject of a fresh action.(9) In presenting the report of the Select Committee on the amended Bill, Mr. Scoble said: "The object of sect. 9 is to give the Courts greater power of amendments of plaints than they at present possess. The tendency of the Courts in England is to allow the greatest latitude in this direction. In this country, where there is every likelihood of a poor suitor acting in ignorance or under the advice of ignorant advisers, and launching an honest case in a

(1) Hunoomanpersaud *v.* Musst. Babooee, 6 M. I. A. 393, 410, 411 (1856).

(2) Thus amendment has been refused where the plaintiff spoke exclusively from, or the facts were within, his own knowledge: Mokhoda Soondury *v.* Ram Churn, 8 C. 871, 875 (1882); Krishnaji *v.* Wamnaji, 18 B. 144 (1894), though even in such a case allowance may have to be made for inadvertence and mistake.

(3) Bhyro Dutt *v.* Musst. Lekhrance, 16 W. R. 123 (1871); Lakshmibai *v.* Ravji, 9 B. H. C. R. 1 (1872).

(4) Ragho *v.* Vishnu, 5 Bom. L. R. 329 (1903); Shyam Chand *v.* Land Mortgage Bank, 9 C. 695, 698 (1883) [where the plaintiff who had the equity of the case on his side had misconceived his cause of action]; Krishnaji *v.* Sitaram, 5 B. 496 (1880) [where plaintiff had been erroneously advised as to the form of the suit].

(5) Ragho *v.* Vishnu, *supra*.

(6) Lukhee Kant *v.* Sumeerooddi, 21 W. R. 208 (1874).

(7) Modhe *v.* Dongre, 5 B. at pp. 613, 614 (1881).

(8) *Per* Scott, J., in Damodar *v.* Purmanandas, 7 B. 155, at p. 160 (1883).

(9) See Annual Practice, 1905, p. 351; Raleigh *v.* Goschen (1898), 1 Ch. 81; and Blenkhorn *v.* Penrose, 29 W. R. (Eng.) 237, cited in the case in last note.

clumsy and irrational manner, it appeared to the Select Committee *there was abundant reason for adopting the English rule.* The only necessary limitation is to prevent a suit of one character from being turned by amendment into a suit of a different character; and it is therefore provided that amendments which would have this effect are not to be allowed." (1) This limitation was based on the inconvenience which might be caused to a defendant who, summoned to answer one suit, might otherwise be called upon, probably to his surprise, to defend an entirely different claim. Rule 16 has been taken from O. 19, r. 27 of the English rules, and r. 17 has been worded in close conformity with the English O. 28, r. 1, a portion of it being taken *totidem verbis* from the English Order. The proviso against converting a suit into one of a different character has been removed. As to the effect of this, *vide post*, "Change of character of suit."

Bramwell, L.J., said: (2) "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise." "However negligent or careless" (said Brett, M.R.) "may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs." (3) An amendment should be allowed "whenever it can be done without injustice to the other side, and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way, an amendment ought to be allowed for the purpose of raising the real question between the parties." (4) "There is one panacea which heals every sore in litigation, and that is costs." (5) "I know of no kind of error or mistake, which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such an amendment as a matter of favour or grace." (6) "The test as to whether the amendment should be allowed is whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise." (7) An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties," and multiplicity of legal proceedings avoided.(8)

It is also to be noted that the stage in the suit at which the application is made may affect the question. Before the hearing there is, as a rule, little difficulty in a party obtaining leave to amend his own pleadings,(9) on pay-

(1) Speech on 10th March, 1888, in presenting the Report of the Select Committee on the Bill to amend the Civ. Pr. Code, 1882.

(2) Tildesley *v.* Harper, 10 C. D. pp. 396, 397.

(3) Clarapede *v.* Commercial Union Association, 32 W. R. (Eng.) p. 263; Weldon *v.* Neal, 19 Q. B. D. p. 396.

(4) Australian Steam Navigation Co. *v.* Smith, 14 App. Cas. p. 320.

(5) *Per* Bowen, L.J., Cropper *v.* Smith, 26 C. D. p. 711.

(6) Ib., 710; cited with approval in Dhani Ram *v.* Bhagirath, 22 C. 712 (1895).

(7) *Per* Pollock, B., Steward *v.* Metropolitan Tramways Co., 16 Q. B. D. p. 180; and C. A. 558.

(8) J. A., 1873, s. 24; Kurtz *v.* Spence, 36 C. D. 774.

(9) Annual Practice, 1905, at p. 354.

ment of the costs occasioned thereby, provided that his opponent will not be placed thereby in a worse position than he would have been if the amended pleading had been delivered in the first instance,(1) or some injury caused to him for which he cannot be compensated by payment of costs.(2) An admission made inadvertently may be withdrawn and the pleading amended accordingly.(3) There will be difficulty, however, where there is ground for believing that the application is not made in good faith. Thus, if either party seeks to amend his pleading by introducing for the first time allegations of fraud, etc., the Court will ask why this new case was not presented originally; and may require to be satisfied as to the truth and substantiality of the proposed amendment.(4) It has been held that at any stage of the proceedings all amendments ought to be allowed which satisfy the two conditions of not working injustice to the opponent and of being necessary for the purpose of determining the real questions in controversy between the parties.(5) Costs are always in the discretion of the Court; in some cases they will be reserved to abide the event, or for the Judge at the trial to award.(6)

Leave may be given to amend at the hearing. But the Court will not readily allow at the trial an amendment, the necessity for which was abundantly apparent months ago, and then not asked for.(7) There is another difficulty which often arises when a party only applies for an amendment at the trial. His opponent will be taken by surprise. It is unfair that the opponent should suddenly be called upon to meet a case of which he has had no notice, and for which he is not prepared. If an amendment of such a kind be allowed at the trial, the other party may fairly demand an adjournment of the case to enable him to prepare his answer to it.(8) Often, however, the change of front has been anticipated, and a postponement is not insisted on.(9) In such cases it often happens that nothing is said about amendment, and the case continues as though the issues which are being fought had been duly raised in the pleadings.(10) But the opponent must always be allowed an opportunity of meeting the new matter, if he reasonably asks for it.(11) Where the amendment asked for is a substantial one, such that the plaintiff could not succeed without it, he will in a proper case be only allowed to amend at the trial on payment of all costs incurred up to date.(12) And in some

(1) Steward *v.* North Metropolitan Tramways, 16 Q. B. D. 556.

(2) Clarapede *v.* Commercial Union, 32 W. R. (Eng.) 262.

(3) Hollis *v.* Burton (1892), 3 Ch. 226, 236. "I shall always hold that leave to amend should be given where there is a slip," *per* Pearson, J., in Clarke *v.* Yorke, 31 W. R. (Eng.) p. 63; and see Dhani Ram *v.* Bhagirath, 22 C. at p. 710 (1895), where plaintiffs were allowed to amend an incorrect statement which was not made fraudulently or with intent to overreach; and Barkat-unnissa *v.* Muhammad, 17 A. 288 (1895), where there was a mistake in claiming less than the plaintiff was entitled to.

(4) Lawrance *v.* Norreys, 39 Ch. D. 213, 221, 235, *vide ante*.

(5) Kisandas *v.* Rachappa, 33 B. 644 (1909).

(6) See Roe *v.* Davies, 2 C. D. 735.

(7) Hipgrave *v.* Case, 28 C. D. p. 361.

(8) Annual Practice, p. 355 (1905).

(9) Riding *v.* Hawkins, 14 P. D. p. 56; and Bourke *v.* Davis, 44 C. D. p. 112.

(10) Smith *v.* Roberts, 8 Times Rep. p. 507; and see Shickle *v.* Lawrence, 2 Times Rep. p. 777.

(11) Winchelsea *v.* Beckly, 2 Times Rep. p. 300.

(12) Jacobs *v.* Schmalz, 62 L. T. p. 122; King *v.* Corke, 1 C. D. 57; Winchelsea *v.* Beckly, 2 Times Rep. p. 300; Long *v.* Crossley, 13 C. D. p. 392; Bourke *v.* Davis, 44 C. D. p. 125.

cases the Judge will require evidence that the party applying to amend could not with reasonable diligence have discovered the new facts sooner.(1) Where the amendment has become necessary by reason of a variance between the statement of claim and the evidence given at the trial, it should be asked for at the conclusion of the plaintiff's case.(2) After all the evidence on both sides has been taken, leave to amend will, as a rule, be refused.(3) If the defendant is not present at the hearing, it has been held in England that notice must be given him of the application to amend.(4) Unless the pleading is amended, the plaintiff cannot have judgment for more than the amount named in it.(5)

After the hearing, and after judgment, the Court has no power to amend. After an interlocutory judgment, or a decree in an Admiralty action which determines liability but leaves the damages to be assessed, the Court still has power to amend the pleadings,(6) and even to add or substitute parties.(7) As to amendment in appeal, *vide ante*.

General principles on which leave to amend is refused.—The following are some of the principal grounds on which the Courts in their discretion may refuse leave to amend: (8) Where the amendment desired could not be made without prejudicing the defendant in such a way that he cannot be recouped by costs; (9) and where a right accrued might be prejudiced.(10) Thus, though it was under the last Code broadly held that a Court was not precluded from allowing an amendment by the circumstance that at the time of the amendment a suit for what was added by the amendment would be barred by limitation,(11) the general rule was that a plaintiff would not be allowed to amend by setting up fresh claims in respect of causes of action which have, since the institution of the suit, become barred; (12) though peculiar circumstances might take the case out of the ordinary rule,(13) and the Privy Council have actually allowed an amendment on the ground that, if the plaintiff were left to bring a fresh suit, it might be met by a plea of limitation, a defence which, under the circumstances of the case, was considered

(1) Moss *v.* Malings, 33 C. D. 604.

(2) Rainy *v.* Bravo, L. R. 4 P. C. 287.

(3) Ederain *v.* Cohen, 43 C. D. p. 190 (C. A.); James *v.* Smith (1891), 1 Ch. 384, 389; Shib Kristo *v.* Abdool, 5 C. 602 (1879), where Wilson, J., said: "When parties have come to trial to determine which of two stories is true, it would be a dangerous precedent to allow the plaintiff to amend by abandoning his own story and adopting that of the defendant, and asking relief on that footing." But see Chimnaji *v.* Sakharam, 17 B. 365 (1892); dissented from in Sheo Prasad *v.* Lalit Kuar, 17 A. 403 (1896).

(4) Beckett *v.* Beckett (1901), P. 85.

(5) Chattell *v.* Daily Mail (C. A.), 18 Times Rep. 165.

(6) "The Alert," 72 L. T. 124.

(7) "The Duke of Buccleuch" (1892), P. 201; and see Browne *v.* Peto, 16 Times Rep. 133.

(8) Annual Practice, 1905, p. 350.

(9) Ib.; Steward *v.* North Metropolitan Tramways, 16 Q. B. D. 180, 556.

(10) Ann. Pr., *loc. cit.*; and see Rajah Rughoonundun *v.* Gopal Chand, 20 W. R. 17 (1873). In Delhi and London Bank *v.* Miller, 7 B. L. R. App. 65, amendment was allowed as it did not appear that prejudice would be caused to the defendants.

(11) Barkat-un-nissa *v.* Muhammad Asad Ali, 17 A. 288 (1895). That Court has also held that an application having once been admitted the date of a subsequent amendment would not by reason of such amendment become the date of the application: Jewat Dube *v.* Kali Charan, 20 A. 478, 480 (1896).

(12) Weldon *v.* Neal, 19 Q. B. D. 394; Mallikarjuna *v.* Pullayya, 16 M. 319 (1892); Alagappa *v.* Vellian, 18 M. 33 (1894).

(13) Sattappa *v.* Jogi, 17 M. 67 (1893); Dhani Ram *v.* Bhagirath, 22 C. at p. 712 (1895).

inequitable.(1) In a recent case in the Madras High Court it was held that a petition for an amendment of a plaint based on no new facts and asking for a further relief (in this instance, recovery of money) may be allowed if it is put in before evidence has been taken, and if there is no injustice to the defendants, even when it is barred by limitation between its date and the date of the plaint.(2) Trivial and mere technical amendments are discouraged.(3) The Court will always consider the materiality of the proposed amendment, and unless material amendment will not be allowed.(4) A slight delay is not a sufficient ground for refusing leave; but if an application which could easily have been made at a much earlier stage of the proceedings be delayed until after evidence given, and a point of law argued, leave may be refused.(5) This principle has been applied to the suit itself. Where the plaintiff was guilty of delay, and filed the suit on the last day but one on which the law of limitation would permit him to file it, amendment was refused.(6) The application may also be refused if the Court is not satisfied as to the truth and substantiality of the proposed amendment, and has reason to think that the application is not an honest one.(7)

It has also been said by Lord Esher, M.R., to be "the universal practice, except in the most exceptional cases, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance." (8) The circumstances referred to are doubtless those where the plaintiff thoroughly satisfies the Court upon the point why the charge was not made before. It is also a well-known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it.(9) It was held that a plaint which contained general allegations, but no specific instances of fraud, could not be amended in second appeal;(10) and where fraud was charged, but the suit was brought in the wrong form, the Court refused to allow the plaint to be amended, as to do so in that case would change the character of the suit.(11) Peacock, C.J., said: "We think that it would not be the exercise of a sound discretion to allow a party who relies upon a document to set up a fresh case, where an issue as to the execution of such document is found against him and there are good grounds for believing the document to be a forgery." (12)

(1) Mohummud Zahoor *v.* Thakoorance Rutta, 11 M. I. A. 468 (1867), referred to in Dhan Ram *v.* Bhagirath, 22 C. 712 (1895); Damodar *v.* Purmanandas, 7 B. at p. 161 (1883); Modhe *v.* Dongo, 5 B. at pp. 613, 614 (1881).

(2) Sevugan Chetty *v.* Krishna Ayyangar, 36 M. 378 (1911). See Kisandras Rupchand *v.* Rachappa Vithoba, 23 B. 644 (1909); Suthi Kutti *v.* Achutan Nair, 21 M. L. J. 475 (1911).

(3) Annual Practice. Cf. Nagendrabala *v.* Secretary of State, 14 C. L. J. 83 (1911).

(4) Ib.

(5) Ib.; James *v.* Smith (1891), 1 Ch. 384.

(6) Girdharlal *v.* Jagannath, 10 B. H. C. R. 182 (1873).

(7) Annual Practice; Lawrence *v.* Norreys, 39 C. D. 213, 221, 235.

(8) Bentley *v.* Black, 9 T. R. 580; in Riding *v.* Hawkins, 14 P. D. 56, however, Butt, J., at the trial, allowed the plaintiff to amend by adding a charge of fraud with particulars after the defendant, upon whom the burden of proof lay, had been cross-examined and his case closed, *vide post*.

(9) Abdul Hossein *v.* Turner, 11 B. 620 (1887); s. c., 14 I. A. 111.

(10) Krishnaji *v.* Wamnaji, 18 B. 144 (1893).

(11) Kunhamed *v.* Kutti, 14 M. 167 (1891).

(12) Girdhar Manordas *v.* Dayabhai Kalabhai, 8 B. 174, 175 (1882), citing Narainee Dossee *v.* Narrohurry Mohonto, Marsh, 70 (1864).

Amendment of substance of plaint.—An amendment may be sought, either in respect of the substance or form of the plaint, or the parties to the suit or the relief sought. So far as amendment of the substance or form of the plaint is concerned, the matter has already been dealt with. If, for instance, as regards formal matters, the verification is defective, it will be amended.(1) It is the duty of the Court to take care that the plaint, when filed, is an accurate and sufficient statement of the essential ingredients of the plaintiff's claim.(2) The subject of parties and relief is dealt with in the following paragraphs.

Amendment as to parties.—A plaint which may be amended in substance may require, by reason of such amendment, an amendment in respect of parties. So a suit for collision, originally filed as an action *in personam* against the owners of the ship, has been amended also into an action *in rem*, and the ship added as a party defendant.(3) But amendment may have reference to parties only, as well as to the substance of the claim. Where a suit was brought by several persons on the basis of a right vested in them jointly and severally, the plaint was amended by the omission of the names of all the plaintiffs except one.(4) The plaint will be amended where there is a change of parties, or the parties are wrongly described.(5) But where the defendants were dead when the suit was instituted, the Court, on appeal, refused to amend by instituting the legal representatives, as the defendant was likely to be precluded from pleading limitation; (6) and where the wrong parties were sued, the Court in the under-mentioned cases refused amendment.(7) Where A and B sued, and it appeared that A alone was entitled, the name of B was ordered to be struck out and the suit proceeded with.(8) But where plaintiffs suing jointly succeeded only in making out the title of one of them to an undivided moiety, the suit was dismissed.(9)

(1) Fatch Chand *v.* Mansab Rai, 20 A. 442 (1897).

(2) Gobind Chandra *v.* Ganga Dhye, 7 B. L. R. at p. 334 (1871).

(3) Bombay Persia Navigation Co. *v.* Shepherd, 12 B. 237 (1887).

(4) Venkatachala *v.* Kuppusami, 11 M. 42 (1887).

(5) See Delhi and London Bank *v.* Miller, 7 B. L. R. App. 65 (1871); Muhammad Yusuf *v.* Himalaya Bank, 18 A. 198 (1896); Kedarnauth Doss *v.* Protab Chunder, 6 C. 626 (1881); Maharajah of Vizianagram *v.* Lakshmi Challaya, 12 B. L. R. 443 (1872); Gobind Chandra *v.* Ganga Dhye, 7 B. L. R. 333 (1871); Nilkanthapa *v.* Magistrate, etc., 6 B. 670 (1880); Balaram *v.* Magistrate, etc., 6 B. 672 (1882) [in these cases the suits were amended in appeal by the substitution as defendant of the Secretary of State for the Magistrate]; Thakur Raghunathji *v.* Shah Lal, 19 A. 330 (1897) [substitution in appeal of manager of temple for idol in whose name suit brought]; Seshamma *v.* Chenappa, 20 M. 467 (1897) [substitution in second appeal of adopted son as plaintiff]; Hari Gopal *v.* Gokaldas, 12 B. 158 (1887) [parties added in second appeal].

(6) Mallikarjuna *v.* Pullayya, 16 M. 319 (1892); see also Alagappa *v.* Vellian, 18 M. 37 (1894).

(7) Seth Dunraj *v.* Hankin, 1 A. H. C. R. 204 (1869) [a different cause of action was said to be substituted; suit originally against Secretary of State; another party introduced]; Nubeen Chunder *v.* Stephenson, 15 W. R. 534 (1871) [suit against corporate body, not in its corporate capacity but through an agent]; Biddia Soondaree .Doorganund, 22 W. R. 97 (1874) [the amendment was said to involve a material variation of the plaint].

(8) Sreeram Hazra *v.* Gyasam Hatee, 11 W. R. 507 (1869).

(9) Sheo Nundun *v.* Mukdoom, 20 W. R. 364 (1873).

Amendment as to relief.—In suits under the Code, the Court is certainly bound to take into consideration all the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible; but it should confine itself to granting such relief as is prayed by the plaint.(1) It cannot grant relief of a different kind from that prayed for, such as could not have been properly granted except on an amendment of the plaint; (2) or change the suit so that the question involved in it is irrelevant to the relief claimed. (3) If, however, the specific right and infraction of it are not altered, the Court may give relief less than that claimed, or a portion of the relief claimed.(4) The Court, however, whether of first instance or of appeal, has no power to make a decree in favour of the plaintiff beyond the amount stated in the plaint. The plaint may, however, be amended before judgment, so as to enable a Court to pass such a decree.(5)

As regards amendment, it has been broadly affirmed (6) that "an alteration in the relief does not alter the character of a suit." It is perhaps more correct to say that an amendment of relief simply does not generally (7) involve such a change in the suit as to make its character inconsistent in the terms of the proviso of the last Code. It has also been held that where the object of an amendment of the plaint was merely to seek relief ancillary to the principal prayer, such amendment did not alter the character of the suit.(8) So the relief for declaration is in most cases for recovery of possession claimed as ancillary to the latter, and there can be no inconsistency between the two.(9)

The amendment may be in respect of matters occurring before or after suit brought. So as regards the first alternative, where the plaintiff in a suit

(1) Virasvami *v.* Ayyasvami, 1 M. H. C. R. 471, 477 (1863).

(2) Ramchandra *v.* Vasudev, 10 B. 451 (1886); in which case the lower Court was held to have erred in making a decree for partition in a suit to recover possession from the defendants as tenants under a lease.

(3) Ram Singh *v.* Deputy Commissioner Barabanki, 17 C. 144 (1889); s. c., 17 I. A. 54 [Oudh Talukdars; claim as proprietors; if not, then alternatively that there was subproprietory right]. In Mukhoda *v.* Ram Churn, 8 C. 871 (1882), the plaintiff sued to recover possession of property on the allegation of purcha-, and the Court gave him a decree for what he had never asked, viz. a one-fourth share as member of a joint family; Balmakund *v.* Bhagvandas, 15 Bom. L. R. 209 (1912).

(4) Pulamada *v.* Ravuthu, 11 M. 94, 97 (1887) [claim for ejectment and injunction; decree declaring plaintiff's right, directing removal of embankments and regulating cultivation]; and see Ramchandra *v.* Vasudev, 10 B. 451 (1886), where it was pointed out that the Court could not be held to have merely awarded a portion of the relief prayed for. In a suit for confirmation of possession and to set aside deeds, although the confirmation was refused, the deeds were set aside: Thakoor Deen *v.* Ali Hossein, 13 B. L. R. 427 (1874); s. c., 1 I. A. 192.

(5) Perceval *v.* Collector of Chittagong, 30 C. 516, 519 (1900) [amendment of memorandum of appeal]; Nathooram *v.* Jardine Skinner, 1 Coryton, 118 (1864-5), except in the case of mesne profits.

(6) Kasinath Das *v.* Sadasiv Patnaik, 20 C. 805, 808 (1893).

(7) In Kunhamed *v.* Kulli, 14 M. 167 (1890), the Court refused amendment, as to do so would be to change the character of the suit, but the question as to the change being only in the relief asked was not discussed.

(8) Rajah Peary Mohan *v.* Narendra Krishna, 5 C. W. N. 273 (1900).

(9) Raghu *v.* Vishnu, 5 B. L. R. 329 (1903), in which case a suit for a mere declaration was amended into one for possession.

for pre-emption after filing his plaint discovered that the property in suit had been described by mistake as being of a slightly less area than it was in reality, and omitted to claim for a small fraction of the share sold, the plaint was allowed to be amended.(1) A change in the relief asked is generally allowed on appeal, especially by the addition of a prayer for consequential relief in a suit for declaration.(2) A plaint in a suit for the cancellation of a deed of gift of certain land has been amended so as to make it a suit for possession of that land after the cancellation of the deed.(3) As regards events occurring after suit, the general rule is that the rights of parties must be ascertained as at the date of the action brought, and not with reference to events occurring after the institution of the action.(4) But this section does not prevent a plaintiff, who has been ousted after suit brought for declaration of title, from amending his plaint by adding a prayer for possession, the suit as amended not being inconsistent with the suit as originally framed, both being based upon the same title.(5) Where the reliefs claimed and the facts on which they are claimed are stated in the original plaint, this can be amended by addition of a further relief if it does not involve adding anything to the allegations in the plaint.(6) And where a plaintiff filed a suit to obtain a declaration that certain property belonged to his judgment-debtor, and that the defendants had no right to it, and, pending proceedings, purchased the property, it was held that he was still entitled to a declaratory decree, for the change of circumstances brought about by the plaintiff himself purchasing the property did not take away the right to sue which had already accrued to him.(7) But where an amendment rests on an event which did not occur until after the suit had been instituted and had been dealt with by the Court of first instance, and also substantially alters the original cause of action, it will be disallowed.(8) A mortgagee may relinquish his claim for sale and ask simply for a money decree. Such an amendment does not amount to a conversion of the suit into a suit of another and inconsistent character.(9)

Change of character of suit.—So far the matter has been dealt with

(1) Barkat-un-nissa *v.* Muhammed, 17 A. 288 (1895).

(2) *Vide ante*, p. 677. In Sardarsingji *v.* Ganpatsingji, 14 B. 395 (1885), the appeal Court allowed the plaintiff to amend by adding a prayer for an injunction. In Karimbhai *v.* Conservator of Forests, 4 B. 222 (1879), a partner sued to establish his exclusive title to partnership property, and the High Court on appeal allowed an amendment converting the suit into one for dissolution and account, and remanded the case, with directions to the lower Court to make the other partners parties. In Annapa *v.* Ganpati, 5 B. 181 (1880), the suit was for interest only. The plaint was amended so as to make the suit for account and payment of principal and interest. In Radhabai *v.* Shamrav, 8 B. 168 (1881), an ejectment suit was amended by the insertion of a prayer for redemption. In Krishnaji *v.* Sitaram, 5 B. 196 (1880), a suit for possession was changed into a suit for partition.

(3) Ghulam Husain *v.* Shahbaz Khan, 1888, P. R. No. 161.

(4) Ramanadan *v.* Pulikutti, 21 M. 288, at p. 290 (1898).

(5) Bishop Mellus *v.* Vicar Apostolic Malabar, 2 M. 295 (1879).

(6) Sevugan *v.* Krishna, 22 M.L.J. 139 (1911).

(7) Wamanrao *v.* Rustomji, 21 B. 701 (1896).

(8) Govinda *v.* Perumdevi, 12 M. 136 (1888) [suit for declaration that alienations made by Hindu widow were not binding on plaintiff as reversionary heir; death of widow pending appeal; held, plaintiff could not amend and claim possession].

(9) Sukhdeo *v.* Lachman, 24 A. 456 (1902).

as a matter of discretion. Sect. 53 of the last Code was, however, mandatory in this, namely, that no amendment could be allowed which converted a suit of one character into a suit of another and inconsistent character. While the power of the Court extended to the elucidation of what was ambiguous, to the amendment of what was erroneous, and the supplying of what was defective, it did not extend to the conversion of a suit of one character into another inconsistent with and opposed to it, *e.g.* a suit for possession with mesne profits into one for resumption,(1) or a claim on contract to one in tort.(2)

A number of cases will be found reported (not very profitably) on this point, for it must be remembered that each case is only an authority so far as the same set of facts may (which is unlikely) exist in a subsequent case.(3) In some decisions a formal application was made to amend. In others, a new case was sought to be argued, which, however, could only have been done after an application to amend had been made and granted, and the matter was dealt with as, in effect, an application to amend, since a decree could only be made on allegations formally raised at the trial. Further, it is to be noted that the application for amendment was made at differing stages of the suit and under different circumstances, and it may be that, as already stated, an application which, if made before the hearing, would be granted, might, if made after hearing, be refused. Whether an amendment is inconsistent with the suit as originally framed may be tested by an inquiry into the nature of the evidence to be offered in either case.(4) Amendment was not allowed, on the ground that the suit had been changed, in the following cases :—

Claim for rent on contract; claim for use and occupation; (5) claim for hire of cargo boats; claim for agency account in respect of same; (6) claim for dower on written agreement; claim for same on custom; (7) claim based on *den-mohur* right of widow; claim for decree to extent of rights of widow and her son as heirs; (8) claim as adopted son; claim as heir; (9) claim to recover from defendant money paid by him to X on the ground that such payment was unauthorized; claim for damages for negligence in selecting X as agent for plaintiff; (10) claim that a sale had been made to pay immoral debts; claim that the father could only alienate his own share; (11) claim based on gift by will; claim based on inheritance; (12) claim to set aside alienation on ground of illegitimacy of party making it; claim for same on ground that it was without consent of other heirs; (13) claim for a *pottah* on

(1) Gobind Mohapattur *v.* Madhub Persad, 6 W. R. 211 (1866); and see Hamilton *v.* Land Mortgage Bank, 5 A. 456, 459 (1883).

(2) Kasinath Sadasiv, 20 B. 805, at p. 808 (1893).

(3) Gopal Dass Agarwallah *v.* Buddree Dass Sureka, 33 C. 650–660 (1906).

(4) Ibid. at p. 661.

(5) Surendra Naram *v.* Bhai Lal, 22 C. 752, 755, 756 (1895); Luckhee Kant *v.* Sumerrooddi, 21 W. R. 208 (1874); Luchmeeput Doss *v.* Shaikh Enact, 22 W. R. 346 (1874).

(6) Shib Kristo Sircar *v.* Abdool Hakeem, 5 C. 602 (1879); S. C., 5 C. L. R. 455.

(7) Khaja Mahomed *v.* Manija Begum, 14 C. 420 (1887).

(8) Umbika Churn *v.* Nadir Hossein, 11 W. R. 133 (1869).

(9) Gopee Lall *v.* Sree Chundraolee, 19 W. R. 12 (1872); s. c., A. I. Sup. Vol. 131.

(10) Hamilton *v.* Land Mortgage Bank, 5 A. 456 (1883).

(11) Sheo Narain *v.* Bhugwan Dutt, 11 W. R. 10 (1869).

(12) Jankee *v.* Jhanjoo, 2 A. H. R. C. 107 (1870).

(13) Sree Pershad *v.* Raj Gooroo, 14 W. R. 386 (1870).

a special contract against twelve anna sharers of an estate on the ground that they had taken a *kabulyat;* claim based on the ground that plaintiffs, being occupancy ryots, had a right to a *pottah* at a fair rent; (1) claim based on invalidity of a will; claim assuming its validity, but alleging that it did not dispose of whole of testator's property; (2) claim for declaration that joint property was not liable to be sold in execution on the ground that the decree was for debts incurred for immoral purposes; claim that plaintiffs had separated from their father before the decree was passed against him; (3) claim for share of produce of property left undivided at partition; claim for partition of that property; (4) claim for specific performance; claim to cancel contract and retain deposit; (5) personal claim; claim against an estate; (6) claim to eject tenant, but failure to prove lease; claim to fall back on general title as though no lease had been set up; (7) claim to land as mirasdar; claim to hold as occupancy ryot; (8) claim as heir of N.; claim as heir of J. C. G.; (9) claim to remove building erected by defendant on plaintiff's exclusive property; claim for demolition on joint property because erected without co-owners' consent; (10) claim for possession with mesne profits; claim for resumption; (11) claim for possession; claim to symbolical possession as landlord; (12) claim to *khas* possession of whole property and mesne profits; claim to proprietary right of one-fourth of which he is not entitled to *khas* possession; (13) claim to establish right of ownership over land; claim to easement over same; (14) claim to redeem one mortgage; claim to redeem another; (15) claim for ejectment; claim for declaration of reversionary right; (16) claim for declaration of title by purchase; same by long possession; (17) claim as pre-emptor based on vicinage and separate ownership; claim for pre-emption as joint owner; (18) claim to set aside *zurpeshgi;* claim for

(1) Uthur Hossein *v.* Ramphal Roy, 20 W. R. 75 (1873).

(2) Damodar Madhowji *v.* Purmanandas, 7 B. 155 (1883).

(3) Narayanrav *v.* Javhervahu, 12 B. 431 (1887).

(4) Gaurishankar *v.* Atmaram, 18 B. 611 (1893).

(5) Stone *v.* Smith, 35 Ch. D. 188: but if original plea in the alternative, see Kingdon *v.* Kirk, 37 Ch. D. 141.

(6) Indur Chunder *v.* Radha Kishore, 19 C. 507 (1892); s. c., 19 I. A. 90.

(7) Lakshmibai *v.* Hari, 9 B. H. C. R. 1 (1872).

(8) Soorjo Koomar *v.* Gungadhur Roy, 12 W. R. 80 (1869); in the cases referred to in this report, it was not shown that the alternative right had not been pleaded.

(9) Ishan Chunder *v.* Sharoda, 12 W. R. 487 (1870); see Doorga Narain *v.* Brojo Kishore, 23 W. R. 172 (1875), where amendment was allowed, but the lower Court erred in not allowing the defendant to meet the fresh allegations.

(10) Nobin Chunder *v.* Mohesh Chunder, 12 W. R. 69 (1869).

(11) Gobind Mohapattur *v.* Madhub Persad, 6 W. R. 211 (1866); s. c., B. L. R. (F. B.) 581.

(12) Nila Bibee *v.* Sonai Bibee, 21 W. R. 422 (1874).

(13) Kishen Chunder *v.* Kaleenath, 18 W. R. 507 (1872).

(14) Lalji Ratanji *v.* Gangaram, 2 B. H. C. R., A. C. J., 176 (1864). A claim may, however, be made in the alternative, either upon the ground of ownership or easement: Narendra Nath Baruri *v.* Abhaya Charan Chattopadhya, 4 C. L. J. 437 (1906), F. B.

(15) Govindrav *v.* Ragho, 8 B. 543 (1884).

(16) Ramanadan *v.* Pulikutti, 21 M. 288 (1898).

(17) Huro Soondaree *v.* Unnopoorna, 11 W. R. 550 (1869).

(18) Mohadeo *v.* Zeenutoonissa, 11 W. R. 169 (1869); Gobind Row *v.* Girdharee Sahoo, 24 W. R. 355 (1875).

declaratory decree; (1) claim as whole owner by purchase from A.; claim as heir or joint purchaser with him; (2) claim for possession based on *kobala*, which was in reality a mortgage; claim for repayment of advances; (3) claim by second mortgagee for sale, ignoring title of first mortgagee; claim reserving rights of prior mortgagee; (4) claim for property as devisee under will; claims for same on ground of want of title in testator to devise; (5) claim as mortgagee, alleging that she had advanced the money out of her own funds; claim that money came from reputed husband, and that the transaction was by way of gift or provision for her; (6) right to execute mortgage-decree; claim to redeem mortgage; (7) claim by co-sharer landlord for proportionate share of rent; claim for individual share of plaintiff or full rent.(8)

In the following cases amendments were allowed: in a suit for a declaratory decree, an amendment so as to make the suit one claiming consequential relief; (9) altering a suit from one under Act VIII. (B. C.) of 1869 into an ordinary civil suit; (10) claim to redeem property mortgaged in 1841; claim for redemption on previous mortgage of 1837, in case mortgage of 1841 were not proved.(11) In an action on a promissory note, the suit was dismissed on the ground that part of the consideration was illegal; the plaint was allowed to be amended in appeal so as to recover so much of the consideration as was not illegal.(12) Where the plaintiff claimed an easement by prescription the claim has been decreed on the presumption of a title arising from a grant.(13) A suit for direct possession has been changed into a suit for possession conditional on the defendant's failure to redeem; (14) and a suit for possession into one to redeem.(15) It has already been pointed out that a plaintiff may from the

(1) Musst. Doolhun *v.* Lall Beharee, 19 W. R. 32 (1872).

(2) Doss Ram *v.* Mohendro Roy, 18 W. R. 274 (1872).

(3) Rajah Saheb Perhlad Sein *v.* Baboo Budhoo, 12 Moo. I. A. 275 (1869); and see Murngaser *v.* De Soysa, App. Cas. (1891) 69.

(4) Salig Ram *v.* Har Charan, 12 A. 548 (1890); dist., Muhammad Niamat *v.* Ghaffar Muhammad, 21 A. 272 (1899).

(5) Mylapore Iyasawmy *v.* Yeo Kay, 14 C. 801 (1887); s. c., 14 I. A. 168.

(6) Bhowan Doss *v.* Sheikh Mahomed, 13 M. I. A. 346, 352 (1871).

(7) Hari Ravji *v.* Shapurji, 10 B. 461 (1886); s. c., 13 I. A. 66.

(8) Lala Ram *v.* Nem Narain, 6 C. W. N. 326 (1902).

(9) Limba *v.* Rama, 13 B. 548 (1888); Chonni *v.* Umma, 14 M. 46 (1891); Abdul Kadar *v.* Mahomed, 15 M. 15 (1890) [dist. in Narayana *v.* Shankunni, 15 M. 255 (1891), which was not a case where the objection was taken for the first time in appeal]; Ragho *v.* Vishnu, 5 Bom. L. R. 329 (1903); Bai Anope *v.* Mulchand, 9 B. 355 (1885) [amendment by insertion of prayer for an account].

(10) Gobind Chunder *v.* Bykuntnath, 19 W. R. 61 (1873).

(11) Parashar *v.* Ganu, 5 Bom. L. R. 643 (1903).

(12) Joseph *v.* Solano, 18 W. R. 424 (1872); s. c., 9 B. L. R. 441; ref., Proby *v.* Bell, 20 W. R. 6 (1873).

(13) Rajrup Koer *v.* Abul Hossein, 6 C. 394 (1880); Punja Kuvarji *v.* Bai Kuvar, 6 B. 20 (1881); Koylash Chunder *v.* Sonatun Chung, 7 C. 132 (1881).

(14) Rupchand Dagdusa *v.* Davlatvav, 6 B. 495 (1882); Kasimunnissa *v.* Nilratna, 8 C. 79 (1881); Nilakant Bancrji *v.* Suresh Chandra, 12 C. 414, 422 (1885); s. c., 12 I. A. 17; Dullabhdas *v.* Lakshmandas, 10 B. 88 (1885); the Court, however, has a discretion in the matter exercisable with reference to the particular facts of the case: see Murngaser *v.* De Soysa, App. Cas. (1891), p. 69.

(15) Sankana *v.* Virupakshapa, 7 B. 146 (1883); but see Dirgopal *v.* Bolakee, 5 C. 269 (1879).

commencement raise an alternative case. Where he has not done so he may have leave to amend his plaint and to state his case correctly therein if the Court thinks that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake or misconstruction of documents.(1) Where in a suit for the recovery of a sum due on account, the defendant raised a plea of limitation, leave was granted to amend the plaint by setting out an acknowledgment signed by the defendant within the period of limitation.(2) Where in a suit for rent the plaintiffs described themselves as "executors and trustees of the properties of an endowment" they were allowed to describe themselves as "*de facto* managers and persons interested in the endowment."(3) Where it was argued that an amendment allowing an alternative case to be raised converted the suit into one of another and inconsistent character, it was held that the alternative claim which arose out of, and was immediately connected with, the same transaction was not inconsistent; (4) the Court, however, adding that the proviso to this section in the last Code must be read with sects. 42 and 45 of that Code, and was not intended to interfere with them. *Sed quære* as to whether this was not stated too broadly. It does not follow that because a plaint might have originally been brought in a particular form, but was not, that therefore it must be amended into that form. If so, the object of the provision might in some cases be defeated.

As already pointed out, the section has been now amended. In all cases the Court has a discretion.(5) In exercising that discretion, it will, following the English practice, in general refuse an amendment which changes the action into one of a substantially different character which would more conveniently be the subject of a fresh action. The question thus becomes one of discretion and not subject to a rigid rule. Whether amendment should be allowed must depend on the circumstances of each case. Mere technical arguments showing a conversion of character will not be given effect to. There are such cases of conversion where amendment may be properly allowed. On the other hand, any substantial change in the claim made, making it more convenient that they should be the subject of a fresh action, will be refused.

Costs.—In England the amendment may be allowed "on such terms as may be just."(6) And the Courts may, therefore, there impose terms as to other matters than costs.(7) In this country the Courts could formerly, by the terms of the former section, impose terms only in regard to costs. As to these, they are entirely in the discretion of the Court, and they are sometimes (particularly when the application is made before trial) reserved.(8) The section has, however, now been amended in conformity with the English rule.

(1) Lakshmibai *v.* Hari, 9 B.H.C.R. 1 (1872).

(2) Gunnaji *v.* Makanji, 34 B. 250 (1909).

(3) Dhanpat *v.* Juarmul, 13 C. L. J. 289 (1910).

(4) Saral Chand *v.* Mohun Bibi, 25 C. 371 389, 390 (1898); s. c., 2 C. W. N. 201 [suit to enforce mortgage; plea of infancy; amended claim that defendant was not by reason of fraud entitled to rely on this defence].

(5) O. 28, r. 1.

(6) Gunnaji *v.* Makanji, 34 B. 250 (1909).

(7) See King *v.* Cooke, 1 Ch. D. 57.

(8) In appeal and in ordering a remand, a party amending has been ordered to deposit all costs up to date within a specified time: Dhani Ram *v.* Bhagirath, 22 C. at p. 713 (1895).

ORDER VII.

Plaint.

1. The plaint *shall* contain the following particulars :—

Particulars to be contained in plaint.

(*a*) the name of the Court in which the suit is brought ;

(*b*) the name, description and place of residence of the plaintiff ;

(*c*) the name, description and place of residence of the defendant, so far as they can be ascertained ;

(*d*) *where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect ;*

(*e*) *the facts* constituting the cause of action and when it arose ;

(*f*) *the facts showing that the Court has jurisdiction ;*

(*g*) the relief which the plaintiff claims ;

(*h*) *where* the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished ; and

(*i*) *a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.*

2. *Where* the plaintiff seeks the recovery of money, the plaint *shall* state the precise amount *claimed :*

In money suits.

But where the plaintiff sues for mesne profits, *or* for *an* amount which will be found due to *him* on taking unsettled accounts between him and the defendant, the plaint *shall* state approximately the amount sued for.

3. *Where the subject-matter of the suit is immoveable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.*

Where the subject-matter of the suit is immoveable property.

When plaintiff sues as representative.

4. *Where* the plaintiff sues in a representative character, the plaint *shall* show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (*if any*) necessary to enable him to institute a suit concerning it.

Defendant's interest and liability to be shown.

5. The plaint *shall* show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Grounds of exemption from limitation law.

6. *Where* the *suit is instituted after the expiration of* the period *prescribed* by *the* law *of limitation*, the plaint *shall* show the ground upon which exemption from such law is claimed.

Plaint.—The object of a plaint is simply to state the grounds and relief upon and in respect of which a suitor seeks the assistance of the Court. Its essential parts are: (i) the title, or, as it is sometimes called, the caption; (ii) the statement; and (iii) the relief; the first of which is referred to in clauses (*a*), (*b*), (*c*), and (*d*) of rule 1, the second in clauses (*e*) and (*h*), and the third in clause (*g*). The provisions of sect. 50 which these rules replace was criticized as not complete. Thus it has been said it is "a general rule, and the section appears to presuppose that the capacity of parties suing or sued should be alleged in the plaint, but it does not provide for such allegations expressly. Similarly, in the case of joinder of causes of action, the circumstances allowing the joinder should be stated, but there is no provision as to that. There appears to be no doubt, however, that on the analogy of the practice of other countries all such facts should be stated in the plaint, notwithstanding the last clause of sect. 53, clause (*b*) (ii), which provides for a return of the plaint for amendment if it contains particulars other than those mentioned in this section. It is held in the United States that the fact of partnership should be alleged in the plaint, as partnership demands and liabilities being joint, such allegation is necessary to authorize the joinder of parties. So, also, the value of suit and the locality of its subject-matter and of its cause of action, and other circumstances on which the jurisdiction of the Court may depend must be alleged. Thus the Bombay High Court Circulars (Chap. I. r. 4) expressly lay down, that in every suit the Court shall require the plaintiff to state clearly in the plaint how the value of the suit has been arrived at, and that in a suit for the price of goods sold retail, the plaint should either set out the account in detail, or should be accompanied by a copy of the account to be served upon the defendant. Similarly, if any law authorizes a suit only after the plaintiff has taken some other proceedings, given some notice, or received leave or sanction of some Court, or obtained a certificate of some officer, the plaint must state that those proceedings have been taken, notice given, leave or sanction received,

or certificate obtained, as the case may be." (1) The amended section adds a statement of the value of the subject-matter.

"**Shall contain.**"—The word formerly used was "*must*," and was held to be a strong imperative.(2)

Title. Rule 1, clauses (*a*), (*b*), (*c*), (*d*).—The name should be given, if possible, in full and to the extent necessary to fully identify the party. If there be more than one plaintiff, or more than one defendant, the name of each must be given. As to cases of agents, assignees, benamidars, partners, and others, see notes to O. I. rr. 1, 4. And as regards suits by or against Government and public officers,(3) aliens and foreign native rulers,(4) corporations and companies,(5) trustees and executors,(6) firms,(7) minors,(8) and military men,(9) see also the portions of the Code noted.

"If a person sues in a representative or official capacity, the capacity should be indicated in the title. The same should also be done when he sues merely as a member of a firm, or as secretary or agent of some corporation; or on behalf of a larger number of persons. And the capacity is generally indicated by adding to the name of the party a designation denoting the special character or capacity which he sustains. But the designation may be taken as merely *descriptio personæ*, unless it is preceded by the word 'as' or some equivalent of it.(10) And the general rule appears to be that the capacity in which a party sues or be sued should not only be indicated in the title, but stated in the body of the plaint also." (11)

To describe the plaintiff as residing in Chitpore Road in the town of Calcutta, is not a sufficient description of his place of abode; nor is it sufficient under this section to describe the defendant as formerly of Calcutta without alleging that the plaintiff has been unable to ascertain his place of residence more definitely.(12) Where it was contended that the plaint was bad as the claim was set out by G. W. H., manager (of a bank), but the words should have been "The Mussoorie Bank, Limited," it was held to be no ground for returning the plaint, as the intention and meaning of the plaint was clear that the circumstances set out applied to the bank, and the words were not capable of any other meaning.(13)

(1) Hukm Chand, C. P. C. 584. It may, however, be perhaps contended that some of the matters referred to would come within clause (*e*). Other cases might be met by other portions of the Code, as *e.g.* s. 80, which requires a plaint to allege the giving of notice or by other Acts.

(2) Sheo Prasad *v.* Lalit Kuar, 18 A. 403, 405 (1896).

(3) Ss. 79-82, O. XXVII.

(4) Ss. 83–87.

(5) O. XXIX.

(6) O. XXXI.

(7) O. XXX.

(8) O. XXXII.

(9) O. XXVIII.

(10) Hukm Chand, C. P. C. 587. Thus the words "Deputy Sheriff" following a person's name were held not to denote that he was a party to the suit merely as "deputy sheriff:" Greig *v.* Clements, 20 Colo. 168 (Amer.). So also where the plaintiff described himself as B assignee of D & Co., it was held that the action was brought in his individual capacity: Butterfield *v.* Macomber, 22 How. Pr. 150 (Amer.), cited ib.

(11) Hukm Chand, C. P. C. 587, 588.

(12) Bibee Soloman *v.* Abdool Aziz, 4 C. L. R. 366 (1879).

(13) Mussoorie Bank, Ld. *v.* Barlow, 9 A. 188 (1886).

The defendant's name is given in the plaint in the same manner as the plaintiff's.

All those titles by which a party is generally known ought to be given, and it is not the true construction of the section "to say that where a man has titles, the claim to which titles cannot rationally be disputed, by which he is generally known, all that the Code requires is that he should be described in such a way" as may be sufficient for identification.(1) In the case cited, an order rejecting the plaint because plaintiff did not amend it, so as to give the full titles to the defendant, was held to be correct, their Lordships of the Privy Council observing that "if a plaintiff, from animosity, from pique, or anything, in fact, but a *bonâ fide* dispute as to the right to a title, obstinately refuses to give his adversary that title by which he is generally recognized, the Court ought not to permit or sanction that species of insult."

Where a practice existed in the Madras Courts to give as part of the description the age as well as the father's name, and these were not given, the High Court refused to interfere with an order rejecting the plaint.(2) It is not sufficient to describe the defendant merely as formerly of Coloolollah in Calcutta, without alleging that the plaintiff has been unable to ascertain his present residence.(3) Where a plaint described the defendant as "Mrs. S. G. B. of Mussoorie," and stated that she was executrix of the deceased B., it was held not to be open to objection, as it was clear that the defendant was stated to be executrix of the deceased, and the suit was brought against her in that capacity.(4)

There is no provision in the Code as to how the defendant is to be sued and named in the plaint when his real name is not known to the plaintiff, and cannot be ascertained by reasonable diligence.(5) Names are only used to designate persons and as a means of identifying them. The action is not against the name, but against the person designated thereby. If therefore the real defendant has been properly served with a summons in a fictitious name, and he does not appear to defend the suit, a judgment rendered against him in such name will be as effective against him as if his true name had been given in the proceedings in the action.(6)

It is one of the first essentials of a suit that the parties, and specially the defendant, must be alive at the time of the institution of the suit. If the person named as defendant is found to have been dead at the time of the presentation

(1) Maharaja of Vizianagram *v.* Raja Lakshmi Chollaya, 12 B. L. R. 443; s. c., 18 W. R. 301 (1872), reversing the decision of the High Court in 3 M. H. C. R. 31 (1866). In this case the Privy Council, though pointing out that the case was distinguishable, appeared to disapprove of Kishen Chand *v.* Meghraj, 12 W. R. 450 (1869), in which the Court refused to insist on the insertion of the words "Roy Bahadur."

(2) Somayajula *v.* Suvayya, 7 M. L. J. Rep. 81 (1897).

(3) Bibee Soloman *v.* Abdul Aziz, 3 C. L. R. 366 (1879).

(4) Mussoorie Bank, Ld. *v.* Barlow, 9 A. 188 (1886).

(5) It is stated in Hukm Chand, C. P. C. 589, 590, that most of the Codes of the United States allow the defendant to be designated by a fictitious name, amending it by substituting the true name when discovered.

(6) Ib.

of the plaint, the Court will have no jurisdiction over it,(1) and must refuse to proceed further, leaving the plaintiff to begin *de novo* against any person against whom he may have a right to proceed.(2) It has even been held in the United States that if one of the defendants was dead the judgment will be void as against the other defendants also.(3) And the principle appears to be of a general application. Thus Freeman, in his work on Judgments,(4) observes that "no sort of jurisdiction can be obtained against one who was dead when suit was commenced against him as a defendant, or in his name as plaintiff; and that no judicial record can be made which will estop those claiming under him from showing that he died before the action was begun; and that a judgment for or against him must necessarily be void." It is stated (5) that the Courts in several States of the American Union have held the same, even in suits against a corporation, commenced after its being dissolved,(6) though the rule does not appear to have been there applied with the same strictness in the case of a plaintiff.(7) Thus a judgment in a suit instituted in the name of a party who is dead at the time the suit is brought, has been held in some cases to be only voidable.(8) And Mr. Black, in his work on Judgments,(9) observes that "if an action is commenced in the name of a person already dead in interest, or if one of several joint claimants is dead before action brought, it is held that the defendant must take advantage of the fact by plea in abatement, at the peril of being estopped by his silence, and the judgment for plaintiff will not be disturbed." (10)

A description of a party as insane in the plaint is not evidence that he was excluded from the inheritance by reason of insanity when the succession opened.(11)

The statement. Rule 1, clauses (*e*), (*h*).—A plaintiff when he files his suit must allege the cause of action in the manner prescribed in this rule, and must prove the necessary allegations in so far as they are not admitted by the defendant.(12) The whole object of pleadings is to bring the parties to an issue, and thus to secure that both shall know before the cause comes on for

(1) Mohun Chunder *v.* Azeem Gazee, 12 W. R. 45 (1869).

(2) Moharance Surno Moyee *v.* Bykunt Chunder, 25 W. R. 17 (1875).

(3) Weis *v.* Aaron, 21 South (Miss.) Rep. 763 (Amer.); cited in Hukm Chand, C. P. C. 588, from which this note is taken. In this case a judgment against the principal debtor and the surety was held void against the former also, although the latter alone was dead at the time of the institution of the suit.

(4) § 153.

(5) Hukm Chand, C. P. C. 588.

(6) Taylor *v.* Elliott, 52 Ind. 588 (Amer.); Reid *v.* Holmes, 127 Mass. 326 (Amer.); Crosley *v.* Hutton, 98 Mo. 196 (Amer.); Jacobson *v.* Campbell, 12 S. W. Rep. 784 (Amer.).

(7) Meril *v.* President of Suffolk Bank, 51 Me., 57 (Amer.).

(8) McMillan *v.* Hickman, 35 W. Va. 705 (Amer.).

(9) § 204.

(10) And this, it is stated, has been followed by the Supreme Court of West Virginia in Watt *v.* Brookover, 3 W. Va. 323; Barannon, J., observing that "the fact that defendant did not know of his death can make no difference as to this point."

(11) Ran Bijai *v.* Jagatpal, 18 C. 111 (1890); s. c., 17 I. A. 173.

(12) Gano *v.* Sidheswar, 4 Bom. L. R. 58 (1901); and he must include all the existing grounds on which the suit can be based, for a second suit, on grounds which existed at the time the first was brought, will not be allowed: Premanund *v.* Ram Churn, 20 W. R. 482 (1873).

trial what is the real point to be discussed and decided.(1) The two points to be attended to are the form of, and then the contents of, the statement. As to the first, the former section states that the language must be both plain and concise.(2) This is a matter now dealt with in O. VI. r. 2. The material parts should be stated in a summary form, clearly and precisely, yet briefly and succinctly. While a liberal construction should be given to pleadings, so as to give effect to their meaning to be collected from their whole tenor, they ought to be expressed with sufficient definiteness to enable the opposite party to understand the case he is called upon to meet.(3) To avoid prolixity, the pleader should omit every allegation which is immaterial and unnecessary, as also all unnecessary details when alleging parts which are material.(4) A certain amount of detail is necessary. "Although pleadings must now be concise, they must also be precise." (5)

The statement of facts must be with specific particularity, and not by way of vague generalizations. As observed by Reed, J., in the opinion of the Supreme Court of Colorado in Robinson *v.* Dolores,(6) "the conclusions of the pleader, stated as facts, broad generalizations, sweeping and comprehensive assertions of conspiracy, fraud, mismanagement, and incompetency, cannot be made, in pleading, to supply the wants of specific facts."

Thus it is a settled rule, that in an action for false and fraudulent misrepresentation, the statement of claim should state the details of each alleged misrepresentation.(7) In fact, it is a general rule, that where fraud is intended to be charged, its details must be specified; and general allegations, however strong, are insufficient to constitute an averment of it.(8) See O. V. r. 4. In the first cited case, Lord Selborne observed, that "with regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are

(1) *Per* Jessel, M.R., Thorp *v.* Holdsworth, 3 Ch. D. 639.

(2) In Bisheshur Pershad *v.* Ram Churun, 5 A. H. C. R. 25 (1873), at p. 28, Stuart, C.J., said: "I do not desire to apply strict rules of pleading or any unnecessary refinements of legal art in order to work out the requirements of our Code of Procedure, but I must insist upon the allegation of all relevant facts being clearly and coherently stated, and it is, in my judgment, no part of the duty of a Court to help litigants by suggesting what their meaning is in effect, or by inferring their right of relief from confused statements, which at best only suggest but do not distinctly express, the legal claims."

(3) Indur Chunder *v.* Radha Kishore, 19 I. A. 90, 93 (1892); s. c., 19 C. 507.

(4) Annual Practice, 1905, p. 236; and see Hukm Chand, C. P. C. 591 *et seq.*, where the subject is more fully considered, and Odgers on Pleading. The subject of pleading generally is now dealt with in O. VI., *ante*.

(5) *Per* Kay, J., *In re* Parton, 30 W. R. (Eng) 287.

(6) 29 Pac. Rep. 750 (Amer.); cited in Hukm Chand, C. P. C. 611.

(7) Seligmann *v.* Young, 1884, Eng. W. N. 93.

(8) Wallingford *v.* Mutual Society, 5 App. Cas. 697; cited in Gunga Narain *v.* Tilukram, 15 C. 533, 537 (1888); s. c., 15 I. A. 119; Lawrence *v.* Norreys, 15 App. Cas. 221. The Panjab Chief Court, in its "Instructions to Judicial Officers" (s. 2, r. 8 (iii.)), laid down "Plaints containing vague and loose statements of a general character alleging 'fraud,' 'collusion,' 'deceit,' 'illegal and fraudulent acts,' and the like, which are never made to take a definite shape and are frequently impossible to prove, are frequently admitted. This should not be allowed. Where fraud is alleged, the particular facts showing that it has actually been committed must be plainly and definitely set forth; the plaint being returned for amendment in this respect when necessary."

stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice." This was cited with approval in the Privy Council,(1) by Lord Watson, who said: "When fraud is charged against the defendants, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. There can be no objection to the use of such general words as 'fraud' or 'collusion,' but they are quite ineffectual to give a fraudulent colour to the particular statements of fact in the plaint, unless these statements, taken by themselves, are such as to imply that a fraud has actually been committed." Thus a plaint to set aside an award must definitely state some fraud or other malpractice of the opposite party.(2) The decision of the Privy Council cited, was acted upon in a case (3) in the Bombay High Court, Fulton, J., observing that the plaint ought, immediately on presentation, to have been rejected or returned for amendment, as it did not disclose a cause of action. A charge of fraud must be substantially proved as laid.(4) and it must be so proved at the hearing of the case, and cannot be reserved and proved in the course of taking accounts.(5)

Facts must be stated as facts. Modern pleadings are merely concise statements of the facts. Inferences of law should not be pleaded. Pleadings should not contain mere arguments.(6) A plaintiff thus cannot aver that "he is entitled to" property, for this is a conclusion of mixed fact and law. He must state the facts which, in his opinion, give him that title. The material facts only should be pleaded. But each party must always state his whole case, and all the facts which are essential to the cause of action, but not the evidence by which they are to be proved,(7) though "there are many cases in which facts and evidence are so mixed up as to be almost undistinguishable." (8) In other words, only operative facts, as distinguished from probative or evidential facts, should be pleaded, and, of the former, only the ultimate facts.

The plaint should include all the existing points on which the plaintiff can succeed.(9) And a plaintiff is only entitled to succeed upon the cause of action alleged by him in his plaint.(10) It is not, however, necessary for the plaintiff to state in what form of action he sues.(11)

Where the plaint discloses all the facts constituting the cause of action, the form of the action is immaterial. Thus, in a suit for mortgage money and interest by the enforcement of the mortgage lien, even if the hypothecation is not proved, a personal decree may be given for the amount claimed as damages

(1) Gunga Narain *v.* Tiluckram, 15 I. A. 119; s. c., 15 C. 73.

(2) Hurchuran Das *v.* Hajari Mull, 1 Ind. Jur., O. S. 12 (1864).

(3) Krishnaji *v.* Wamnaji, 18 B. 141 (1893).

(4) Abdul Hossein *v.* Turner, 11 B. 620 (1887); and the evidence must be confined to the allegations: Krishnaji *v.* Wamnaji, 18 B. 144 (1893).

(5) Advocate-General *v.* Bai Punjabai, 18 B. 551 (1893).

(6) Bishen Sahaye *v.* Beer Kishore, 8 W. R. 295 (1867).

(7) Annual Practice, O. 19, r. 4; see O. VI. r. 2, *ante*.

(8) Smith *v.* West, W. N. (1876) 55; Roberts *v.* Owen, 6 T. L. R. 172.

(9) Hanmer *v.* Flight, 24 W. R. 346 (Eng.).

(10) Premanund *v.* Ram Churn, 20 W. R. 482 (1873); Denobundhoo *v.* Kristomonee, 2 C. 152 (1876).

(11) Sheo Prasad *v.* Lalit Kuar, 18 A. 403 (1896).

for breach of the contract to give possession of the mortgaged property; (1) the Court observing, in the latter cited case, that it was immaterial whether the demand was regarded in the light of a suit for compensation in damages for breach of the contract, or for money had and received for the plaintiff's use, or for money lent. So also, in a suit for rent on a *kabulyat*, if the *kabulyat* is not proved, a decree may be given for rent at the rate proved to be paid before the alleged *kabulyat* if there should be evidence of that,(2) even though that may not have been expressly claimed in the plaint. In the under-mentioned case (3) this was not done, as there was no such evidence; but the Full Bench said: "It is in the discretion of the Court to amend the plaint or the issues, and to allow it (*i.e.* the alternative claim for rent paid before) to be tried. And where the omission to make the claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to do so." Where in a suit for possession of certain land on the basis of a lease granted to plaintiff in 1234, it was alleged that the plaintiff had continued to hold it since then as a lessee from year to year, he was allowed a decree on the ground of the facts proved showing that he had an occupancy right, such alternative title not being inconsistent with the alleged title under the lease.(4)

Nextly, as to the contents of the statement. A defendant is entitled at the earliest stage of the hearing to obtain the declaration of the Court upon the question whether the plaint discloses a cause of action.(5)

Among ultimate operative facts, the plaintiff's title or right which has been infringed must be first stated. The expression "*cause of action*" has been understood to be used in this section in its broad sense, as including both the infringement and the right infringed, which latter must therefore be set out in the statement of the plaintiff's cause of action. Thus, in a suit for redemption of a mortgage, the mortgage must be stated.(6) In a suit for a declaration of title to a property which the plaintiff admits was sold to the defendant's ancestors, and to which the plaintiff cannot establish a right without setting aside that sale, the plaintiff should allege the circumstances which he relies upon for avoiding it.(7) And where the plaintiff's right to the thing sued for is derived by assignment, the fact of the assignment ought to be stated in the plaint.(8) A plaintiff suing for possession of land by redemption of the mortgage, must show in his plaint the existing title he intends or hopes to prove, and upon which he relies as entitling him to the relief which he asks.(9) It is a general principle, that a plaintiff suing for possession must

(1) Mahesh Singh *v.* Chauharja Singh, 4 A. 245 (1882); Sheo Narain *v.* Jai Gobind, 4 A. 281 (1882).

(2) Roushan Bibee *v.* Hurray Kristo Nath, 8 C. 926.

(3) Lukhee Kanto Das *v.* Sumeeruddi, 13 B. L. R. 243 (1874).

(4) Surjoo Pershad *v.* Kashee Rawat, 21 W. R. 121 (1873).

(5) Unnamoyee *v.* Raj Kristo, 3 C. W. N. 220 (1889).

(6) Sheo Prasad *v.* Laht Kuar, 18 A. 403 (1896).

(7) Azimudda Khan *v.* Zia-ul-Nisa, 6 B. 309 (1882).

(8) Brooke *v.* Gibbon, 21 W. R. 17 (1873).

(9) Parmanand *v.* Sahib Ali, 11 A. 438 (1889). In the case cited, Edge, C.J., with whom the other Judges concurred, observed that it would not have been sufficient to state "that a mortgage of the land in question had been granted to the defendant, or his ancestors, and that they, as the assignees of the mortgagor's right, were entitled to redeem on

show that at the date of the suit he was entitled to that relief.(1) It has thus been held that the owner of demised land cannot sue to eject even a trespasser so long as the lease is outstanding.(2) The Punjab Chief Court, in its Instructions (3) to Judicial Officers, laid down that "it should appear in the plaint that the persons, if more than one, who sue together as plaintiffs, all, either jointly, severally, or in the alternative, claim the right which it is the object of the suit to vindicate."

Where the plaintiff's right alone constitutes the cause of action, it will be sufficient to allege only that right. Thus, in an action for partition, the plaint should state the titles and interests of the co-tenants, plaintiff, and defendant; but it is neither necessary nor proper to show any derangement of the plaintiff's title.(4) But where the suit has been necessitated by any act done to jeopardize the plaintiff's right or evidence of it, that act should also be stated. Thus, in a suit for a declaration of right, the plaint should specify not only the title to that right, but also the act of interference with that right (5) and the circumstances which necessitate the application for the declaration.(6) Where in a suit by a relative of a minor against his administrator, the plaint merely stated that the conduct of the defendant was improper, and that the plaintiff had suspicions that the defendant would waste the property of the minor, but failed to specify any instance of malversation, or to give any reason, plausible or otherwise, for believing that the defendant would waste the estate; the plaint was rejected.(7) Similarly, in a suit to compel one's neighbours to agree to a particular line of boundary being marked out between plaintiffs' lands and theirs, it must be stated that they have by some overt act transgressed that boundary.(8) In a suit to have a contract cancelled, and the plaintiff's deposit returned with damages, the plaint only alleged that the contract was "caused by one of the parties to it being under a mistake as to a matter of fact," and the High Court held that as that would not have made the contract voidable, the plaint did not disclose a cause of action, and that it should have been returned for amendment on that ground.(9)

the ground that the mortgage-debt had been discharged by usufruct. Such a plaint would not show the circumstances constituting the cause of action, or when it arose, or, in fact, that any cause of action of right to sue existed at the commencement of the suit."

(1) Ramanadan *v.* Palikutti, 21 M. 288 (1898).

(2) Davis *v.* Abdul Hamed, 8 W. R. 55 (1867).

(3) S. 2, r. ii.

(4) Phill. Code Plead., § 324; cited in Hukm Chand, C. P. C. 605.

(5) *Vide* Muhammadi *v.* Jiwani, 1898, P. R. No. 42.

(6) Syud Khadim Ali *v.* Nazeer Begum, 3 A. H. C. R. 262 (1871).

(7) Damodardas *v.* Utamaram, 10 B. H. C. R. 414 (1873); Westropp, C.J., observing that "the plaint should specify one or more such acts, or should assign some satisfactory reason for apprehending an injury to the estate of the minor by the administrator."

(8) Ameeroonnissa Begum *v.* Gopal Sahoo, 22 W. R. 134 (1874).

(9) Dayabhai *v.* Lakhmichand, 9 B. 358 (1885); Birdwood, J., in the judgment of the Court, adding, that "it should either have alleged a mistake, common to both parties, as to an essential matter of fact, by which the agreement between them was rendered void, and on the discovery of which the deposit was claimed, or else relief should have been claimed (if that was really plaintiff's case) on the ground that he had been induced to enter into the agreement by the fraud of the defendant."

Where a suit is based on the actual infringement of a right, the infringement and the facts constituting the infringement should also be stated. Thus in a suit for damages for injury done, the nature of the injury should be set out.(2) And a suit to fix a boundary should show that the boundary has been transgressed.(3)

The plaintiff may base his claim on alternative titles which are not inconsistent with each other; (4) as, for example, when a person claims possession of certain land by hereditary *guzashta* right, or, in the alternative, by the right derived from adverse possession for twelve years; (5) or upon a mortgage and deed of sale.(6) And a mortgagor suing for redemption may aver that the mortgage money has been repaid, and that if anything be found to be due, that he will pay it.(7) But inconsistent titles, it has been held, should not be allowed to be put forward, as, for example, a claim to hold a *hat* on the ground of title by prescription, and of proprietary right to the land where the *hat* is held.(8) In the case below,(9) the gist of the plaintiff's charge against the defendant was that she never executed a deed of sale in his favour, and that the document set up by him was a forgery; and it was observed that it was not competent to the plaintiff to combine with that charge as an alternative the wholly inconsistent charge that if the plaintiff executed the document no consideration was received by her, or that fraud had been practised on her. The Bombay High Court has held that inconsistent assertions of fact cannot be permitted in the pleadings, but that on the same basis of facts two distinct titles may be put forth.(10) The decision cited of the Madras High Court was dissented from by Allahabad High Court in a case (11) in which the claim was for a declaration that a bond was not executed by the plaintiff, or, at least, that it was null and void for want of actual and valid consideration; and the Court observed that the Code did not authorize the rejection of a plaint containing prayers for such reliefs, and that it was unable to follow the Madras High Court "in holding that a Court has power to throw out a suit on the ground that, in its opinion, the plaint sets up two inconsistent cases." It, however, stated, that if a plaintiff chooses to come into Court on a plaint which contains allegations inconsistent with one another, this circumstance might militate strongly against the plaintiff succeeding in the suit though it would not justify the Court on this ground alone in dismissing it. In England, the old rule of pleading (12) was that a plaintiff could not plead inconsistent facts.

(2) Mohesh Chunder *v.* Ramdhun Pal, 13 W. R. 248 (1870); Hukm Chand, C. P. C. 605.

(3) Ameeroonnissa Begum *v.* Gopal Sahoo, 22 W. R. 134 (1874).

(4) Woodit Singh *v.* Buldeo Singh, 21 W. R. 12 (1873); Mt Gulab Koer *v.* Badshah Bahadur, 13 C. W. N. 1197 (1909); Lakshmi *v.* Maru Devi, 37 M. 29 (1914).

(5) Ib.

(6) Ramgutty *v.* Abdool Ali, 20 W. R. 73 (1873).

(7) Butchanna *v.* Varahalu, 24 M. 408 (1901).

(8) Rajah Bijoy Keshub *v.* Obhoy Churn, 16 W. R. 198 (1871); in which case the Court said the Munsif would have done well to have refused to receive the plaint on his file at all. In Ameeroonnissa *v.* Woomarooddeen, 14 W. R. 49 (1870), however, the Court thought there was no inconsistency, but said that even if there were, it did not see why the plaintiff should not succeed.

(9) Iyappa *v.* Ramalakshamma, 13 M. 549 (1890); following Mahomed Baksh *v.* Hosseini, 15 C. 684, 692 (1888); s. c., 15 I. A. 86.

(10) Ningappa *v.* Shivappa, 19 B. 323, at p. 327 (1894) [suit for recovery of possession on allegation of partition; suit for partition].

(11) Jino *v.* Manon, 18 A. 125 (1895).

(12) See Rawlings *v.* Lambert, 1 J. & H. 458, 466; and cases cited in Bagot *v.* Easton, 7 Ch. D. 1, 4, 5.

But the Judicature Act has enlarged the liberty of the plaintiff in claiming relief, and it is held that there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative,(1) and ever since the Judicature Act inconsistent defences, such as never indebted and payment, are daily pleaded. It is to be observed, however, that there are differences between the position of a plaintiff and a defendant. The plaintiff often has a personal knowledge of the facts which the defendant may not have, and while it is open to a plaintiff under certain circumstances to reserve a ground of claim, a defendant failing to insist on a ground of defence in one action cannot raise it afterwards in another action at the suit of the same party. The defendants may be complete strangers to the transactions and the defences raised may have reference to matters not necessarily or probably within their own knowledge. So a Hindu wrote his will, devising certain ancestral property to his wife, and on the following day he registered it and took the plaintiff in adoption. The testator died shortly afterwards. It was found that the plaintiff's natural father was aware of the dispositions contained in the will, and that the testator would not have adopted the plaintiff but for the consent of the natural father to those dispositions. The defendants who claimed under a gift from the wife had denied the adoption in their written statement, and on appeal raised the further plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in: *held*, that the defendants were not precluded from succeeding on the latter of these inconsistent pleas.(2)

Probably having regard to the scope of the Code, the rule which should be followed is that inconsistent and alternative claims are allowable if arising out of facts which are not inconsistent, and that a plaintiff should probably not in any case, and certainly not where the facts are presumably within his knowledge, be allowed to plead inconsistent facts but should be called upon to elect so that the defendant may know what case he has to meet, and that a defendant similarly should not be allowed to plead inconsistent defences unless he is a stranger to the transaction, and the true state of facts is not within his personal knowledge. Thus it has been held that a Mahomedan plaintiff who first claimed the property in suit as the heir of his father, on the ground that his mother had no title to it, could not in the same suit contend that his daughter had acquired a good title to it from his mother and that therefore he was entitled to it.(3)

A plaintiff must be limited to the case which he puts forward in the plaint, but he may put forward therein an alternative case from the commencement as the defendant will then know that he has more than one case to meet, and will not be taken by surprise.(4) The different titles should be set out in the alternative for a claimant who has failed to recover property under one title may be barred from bringing a second suit to recover the same property by a

(1) Annual Practice, 1905, p. 237. It is, however, to be noted that under O. 19, r. 27, the Court has power to strike out embarrassing pleadings. This rule is now reproduced in O. VI. r. 16 of this Code.

(2) Narayansami *v.* Ramasami, 14 M. 172 (1890).

(3) Abdul *v.* Miakhan, 35 B. 297 (1911).

(4) Lakshmibai *v.* Hari, 9 B. H. C. R. 1 (1872); as to amendment for purpose of raising an alternative case, ib.; Shib Kristo Sircar *v.* Abdool Hakeem, 5 C. 602 (1879). In Balmakund *v.* Dalu, 25 A. 498 (1903), the alternative case was held to have been made from the commencement.

different title.(1) Where in an action of ejectment against a tenant holding over, the lease sued on was inadmissible in evidence for want of registration, and the plaint was not amended to one containing an alternative claim for partition: *held*, that the plaintiff could not be allowed to fall back upon his general title and obtain a decree for partition.(2)

As to the place where a cause of action must be deemed to arise, see notes to sects. 19 and 20, *ante*. The date of accrual is a question of substantive law; it should be given as correctly as practicable.(3) In the case cited, the suit was for possession, and it was held that the date of the plaintiff's dispossession must be given as accurately as possible, especially when one of the issues was whether he had been in possession within twelve years. As to relinquishment, see O. II. r. 2, *ante*, and as to set-off, O. VIII. r. 6, *post*.

Technical objections, however, should not, unless where it is absolutely necessary, be allowed to prevail. Thus where it was objected that a plaint had been drawn for rectification of a compromise instead of a decree, it was held that this was a mere technicality, since rectification of the decree would follow if the plaint was successful.(4) In the under-mentioned case,(5) Couch, C.J., said: "The plaint in this case is drawn, as so many plaints are, in a very improper manner with reference to the cause of suit, but this Court cannot allow a plaintiff to be defeated in his suit on account of the improper form of the plaint, if, looking at the whole of it, we can say what is the cause of suit. Of course we are not to allow a plaintiff to succeed upon a cause of action which is not in the plaint, but the language of these plaints is not to be read too strictly, and we certainly are not willing to give effect to any technical objections arising upon it." This and similar cases were decided many years ago, and stricter rules have been now enacted in O. VI. A document referred to in the plaint is not necessarily a part of it.(6)

Relief. Rule 1, clause (*g*).—The object of a suit is to obtain some particular remedy or relief. This is stated in the prayer of the plaint, for just as the defendant is entitled to know what facts the plaintiff relies on and intends to prove, in order that he may meet them, for the same reason he is entitled to know what use the plaintiff intends to make of his alleged facts; and the Court should know the nature of the plaintiff's demand, which, when obtained, is embodied in its judgment. In the corresponding provision of the New York Code, "judgment" is substituted for "relief" in order to exclude from the plaint prayers for provisional remedies which, it has been said, need not find room in it.(7) Mention need not be made in it of that which is machinery for the grant of the relief prayed for. Thus it has been held that a demand for money will include a prayer for its recovery by the sale of the property held in mortgage for it,(8) and it is not necessary to mention the sale in the

(1) Denobundho Chowdhry *v.* Kristomonee Dossee, 2 C. 152 (1876) [dist., Thakore Becharji *v.* Thakore Pujaji, 14 B. 31 (1889)]; Kalidhun *v.* Shiba Nath, 8 C. 483, 501 (1882).

(2) Ramchandra *v.* Vasudev, 10 B. 451 (1886).

(3) Boydonath Surmah *v.* Ojan Bibee, 11 W. R. 238 (1869).

(4) Srish Chandra Pal Chowdry *v.* Triguna Prasad Pal Chowdry, 40 C. 541 (1913).

(5) Kalee Narain *v.* Chunder Narain, 23 W. R. 228 (1875).

(6) Toulton *v.* Gwyther, 1 Bourke, 273 (1865).

(7) Hukm Chand, C. P. C. 615.

(8) Kasinath *v.* Sadasiv, 20 C. 805 (1893).

plaint. In a suit for contribution, the amount due from each defendant should be specified; but where this cannot be done, the ascertainment of the amount should form a portion of the relief sought.(1) A suit, it was held, is often brought only for accounts, and a subsequent suit for the balance.(2) It is preferable and more convenient, however, that the suit should be not only for an account, but for an adjustment of accounts and for payment of the balance that may be found due. This is the usual practice on the Original Side of the Presidency High Courts; and it is specially desirable in regard to suits against agents in cases in which, as under Bengal Act VIII. of 1869, the period of limitation runs from the date of the termination of the agency; because the agent may make delay in giving the accounts, so that the subsequent suit for balance may be barred.(3) The object as to which a relief is claimed should be described with sufficient fulness, so that there may be no doubt or difficulty as to its identification. Thus, where the object of a suit is to prevent the plaintiff's rights over certain lands from being infringed upon, the boundaries of the lands should be given in the plaint.(4) See the new third rule in this Order and notes to O. XX. r. 9, *post*. But it has been held that a plaintiff's suit did not necessarily fail upon the ground that there were no boundaries given in the plaint when they asked merely for a declaratory decree in respect of their title.(5) And the mere omission from the schedule annexed to a plaint of the boundaries or other specifications of land will not exclude from the operation of the decree matters which are by name strictly claimed in the plaint, and referred to as such in the decree.(6) So, also, in a

(1) Rujaput Rai *v.* Mahomed Ali Khan, 5 N. W. P. H. C. R. 215 (1873).

(2) Gobind Mohun *v.* Sheriff, 7 C. 169 (1881).

(3) Shoshi Bhooshun Pal *v.* Guru Churn, 7 C. 89 (1881).

(4) Ajoodhia Lall *v.* Gumani Lall, 11 C. L. R. 134.

(5) Raj Narain Das *v.* Chowdhry Shama, 3 C. W. N. 162 (1899).

(6) Shib Narain *v.* Ram Narain, 20 W. R. 142 (1873). The corresponding section (26) of the Code of 1859 expressly provided that "when the claim is for land, or for any interest in land, the nature of the tenure or interest must be specified; and if the claim be for land forming part of a village or other known division, or for a house, garden, or the like, its situation shall be described by the setting forth of boundaries, or in such other manner as may suffice for its identification." It has been pointed out (Hukm Chand, C. P. C. 616) that though it did not appear why this provision had been omitted in the Code of 1882, it was obviously desirable to have regard to it in the preparation of plaints, and to so describe the land to which the suit relates, that there might be no difficulty in its identification. And it was held under that Code, that where a small area of land within another area was claimed, the boundaries of the land claimed ought to be given: Mahomed Ismail *v.* Dhundur Kishore Narain, 25 W. R. 39 (1875); and that in a suit for a village, the plaintiff should make his plaint more precise by filing a survey map of villages: Ram Doyal Khan *v.* Ajoodhia Ram Khan, 11 C. 1 (1876). However, where the boundaries of one of the plots were not given, but determined by the Amin in the course of the inquiry, it was held that the suit could not be dismissed for the defect, though the plaint might have been returned for amendment: Jonab Ali *v.* Golam Assad, 21 W. R. 187 (1874). Where the plaint did not contain a specification of the quantity of land in the defendant's possession, it was held that the plaint might have been amended, but after the defendant had appeared the suit could not be dismissed on that ground: Syud Reza Ali *v.* Purnanund, 6 B. L. R. App. 84 (1870); it was also held sufficient so to describe the property as to identify it: Meer Ataboodeen *v.* Shumsoodeen, 18 W. R. 461 (1872). In the North-West the fields are numbered and their position is given, S. D. N. W. (1857),

suit for obstruction to a private right of way, the plaint ought to show with reasonable precision and exactitude the termini of the right of way and the course which it takes.(1)

It has been held that alternative reliefs inconsistent with each other may be demanded, there being nothing in the Code against the joinder of such reliefs.(2) In the case cited, the plaintiff prayed to be declared the proprietor of the whole village, and, failing that, to be declared its occupancy tenant; and it was held that the plaint could not be returned for amendment, though, if it became necessary to consider whether the second relief could not be granted for want of jurisdiction in a Civil Court, the suit might have to be dismissed.

It is usual to insert a prayer for such further and other relief, than the specific relief claimed, as the Court may hold the plaintiff entitled to. A plaintiff may in such case have relief according to what he has alleged and proved. The prayer for general relief will support any relief consistent with the case made in the plaint, provided that there is no surprise on the defendants, and that they suffer no inconvenience by it.(3) So under the general prayer the Court has granted an injunction.(4) But under a prayer for general relief a plaintiff is not entitled to any relief which is inconsistent with his plaint.(5) It must be considered as limited by the facts alleged and by the prayer for express relief.(6) Under r. 7 it is not now necessary to ask for general relief.

Relief not founded on the pleadings should not, as a rule, be granted. But where substantial matters which constituted the title of all the parties are touched in the issues, and have been fully put in evidence and formed the main subject of discussion and decision in the Courts, the case does not come within the rule, and a declaration of the rights of the parties, though not founded on the pleadings, may be made.(7)

Mesne profits.—This clause does not apply where mesne profits are claimed only from the date of the suit.(8)

Suit as representative (Rule 4).—Whether the suit is brought by the plaintiff in his personal or representative capacity must be determined from the statements in the plaint, and not merely from the words indicative of the capacity in the title. So where the averments in, and the frame of, a plaint

p. 112. Some of these cases were discussed and distinguished in Rajnarain Das *v.* Chowdhury Shama, 4 C. W. N. 162 (1899), *ante*. Notwithstanding the omission of the provision in the Code of 1859, effect was still given to it in the preparation of plaints in suits relating to lands, and now clause (3) has been added to the section. And see Luchmi Narain Bhairedar *v.* Hoare, Miller and Co., 17 C. W. N. 1098 (1913).

(1) Harris *v.* Jenkins, 22 Ch. D. 481.

(2) Kabir Khan *v.* Khawani, 1887, P. R. 41.

(3) Walpole *v.* Orford, 3 Ves. 402; see also Serrao *v.* Noel, 15 Q. B. D. 549.

(4) Kristo Mohincy *v.* Kally Prosonno, 6 C. 485 (1880); but see Ningappa *v.* Shivappa, 19 B. at p. 327 (1894).

(5) Hiralal Mullick *v.* Matilal Mullick, 5 B. L. R. 682 (1870); so in Jugul Kissore *v.* Kartic Chunder, 21 C. at p. 120 (1892), it was held that the frame of the suit precluded the plaintiff from claiming particular relief under the general prayer.

(6) Debi Dayal *v.* Bhau Protap, 31 C. at p. 440 (1903).

(7) Sri Mahant Gobind Rao *v.* Sita Ram Kesho, 2 C. W. N. 681 (1898).

(8) Ramkrishna *v.* Bhimabai, 15 B. 416 (1890).

are such as to affix to the plaintiff a representative character, and to show that a cause of action, if any, devolved upon him solely in that character, the omission in the title of the word "as" between the name of the plaintiff and the words descriptive of his representative capacity, will not be deemed to negative his claiming in that capacity.(1)

The plaint must show not only an actual existing interest, but also that the plaintiff has taken the steps necessary to enable him to sue. The Indian Succession Act of 1865 (sect. 187) provides that no right as executor or legatee can be established without probate or letters of administration, and (sect. 190) no right to an intestate's property can be established without letters of administration. As regards, however, Hindus and Mahomedans, neither of whom are governed by this Act, the general rule is that there is no law which obliges a person claiming under a will to obtain probate.(2) Nor generally are letters of administration necessary. Upon this general rule, however, are engrafted two special provisions. Sect. 187 has since been embodied in the Hindu Wills Act, 1870, but it was excluded from the Probate Act, 1881. The result is, that sect. 187 applies to cases governed by the Hindu Wills Act, but does not apply to wills executed by Mahomedans or by those Hindus who are not governed by the Hindu Wills Act, and an executor of theirs can sue without taking out probate.(3) Further, no Court can pass a decree against a debtor (4) of a deceased person or proceed to execute a decree against such debtor except upon the production of probate, letters of administration, or certificate mentioned in the Succession Certificate Act.(5) A certificate may be obtained in respect of particular debts due to

(1) Hukm Chand, C. P. C. 619, citing Beers *v.* Shannon, 73 N. Y. 292 (Amer.); Beralzheimer *v.* Strauss, 7 Civ. Pro. Rep. 225 (Amer.); Marshall *v.* Blesler, 1 How. Pr. N. S. 217 (Amer.); and see Mussoorie Bank *v.* Barlow, 9 A. 188 (1887), *post*.

(2) Bhagvansang *v.* Bichardas, 6 B. 73 (1881); Krishna Kinkur *v.* Rai Mohun, 14 C. 37 (1886).

(3) Shaik Moosa *v.* Shaik Essa, 8 B. 241 (1884) [subject to the provisions of Act XXVII. of 1860, which then took the place of the Succession Certificate Act; the suit, however, was held not to be for the recovery of a debt].

(4) In a suit . a person claiming to be entitled to the effects of a deceased person, and for recovery of a debt due to the estate and not otherwise: Srimant Raja *v.* Makerla, 20 M. 162 (1897) [right of succeeding trustee to collect]; s. c., 24 I. A. 73. A curator under Act XIX. of 1841, is not a person claiming to be so entitled: Babasab *v.* Narsappa, 20 B. 437 (1895); and a plaintiff does not require a certificate where his claim is for family property by survivorship: Jagmohandas *v.* Allu Maria, 19 B. 338 (1894); Patoshuri *v.* Bhagwati, 17 A. 578 (1895); Subramanian *v.* Rakku, 20 M. 232 (1897). Further, the suit must be in respect of a debt: Subbanna *v.* Munekka, 18 M. 457 (1894) [suit for damages for wrongful detention; but see Torregrosa *v.* Pragji, 16 B. at p. 521 (1892)]; Sabju *v.* Noordin, 22 M. 139 (1898) [unliquidated claim not debt]; accrued during lifetime of deceased: Ranchordas *v.* Bhagubhai, 18 B. 394 (1893); Baid Nath *v.* Shamanand, 22 C. 143 (1894) [decree for sale not a decree against debtor for payment of his debt]. A certificate may be granted in respect of a specified debt, *In re* Indarman, 18 A. 45 (1895), but not for the collection of part only of a debt Muhammad *v.* Puttan, 19 A. 129 (1896).

(5) Act VII. of 1889, held not to apply to proceedings instituted before the Act: Ammanna *v.* Gurumurthi, 16 M. 64 (1892); but see Fatch Chand *v.* Muhammad Baksh, 16 A. 259 (1894); dist. this case. The Act applies to suits in a village Munsif's Court: Rasibi *v.* Olaga, 21 M. 115 (1897). An application by the representative of a

a deceased person, as distinguished from probate or letters of administration, which create a representative title to recover all the effects of such person.(1) It is not necessary for the *institution* of a suit that the plaintiff should have taken out a certificate under the Succession Certificate Act.(2) The Act, however, enacts that no Court can "*pass a decree* against a debtor of a deceased person for payment of his debts to a person claiming to be entitled to the effects of the deceased person or to any part thereof" unless he has obtained a certificate under the Act. The Courts have construed this provision so as to hold that, unless the certificate is produced, a decree may not be passed even with the defendant's consent; (3) nor in a suit in which a partner of the deceased has joined the legal representative of the latter; (4) or even when the suit is brought solely by an assignee of the legal representative,(5) for the assignee is in no better position than the assignor. It is quite sufficient, however, that the certificate is obtained and produced in the Court after the institution of the suit during the course of the proceedings. And this is so also in the case of a suit continued by a legal representative. Administration is not necessary for revival.(6) And where a certificate was granted by a Court in a native State, and a true copy of it signed by the Political Agent of the State, and stamped with the court-fee required by the Court Fees Act, was produced by the plaintiff, but there was nothing to show that the Political Agent intended to grant a certificate under the Succession Certificate Act, it was held that though a decree should not have been granted, yet time should have been allowed for the production of a proper certificate.(7) It is doubtful whether the Act applies to the case of a person who has been substituted as plaintiff for one who, having taken out a certificate, has died pending the suit.(8) See also next paragraph.

Defendant's liability to be shown (Rule 5).—A suit against Mrs. S. G. B., Mussoorie, which stated in the body of the plaint that she was executrix of the debtor, is a suit against her as executrix.(9) Where a defendant is liable as a representative of another, the fact of his liability as a representative should be stated clearly in the plaint; as the effect of a sale in execution of a decree is limited to the judgment-debtor's interest, where it does not appear on the face of the proceedings that he was sued in a representative capacity; and it is only in cases where it is manifest that the judgment-debtor must have been sued as a representative, that a sale in terms of the interests of the judgment-debtor is allowed to convey the interests of other persons.(10)

judgment-creditor to obtain a certificate under this Act is not a step in aid of execution within the meaning of the Limitation Act: Murgapa Muduvalappa *v.* Basawantrao, 37 B. 559 (1913).

(1) Karuppasami *v.* Pichu, 15 M. 419, at p. 420 (1891).

(2) Kaminathi *v.* Mangappa, 16 M. 454 (1893).

(3) Santaji *v.* Ranji, 15 B. 105 (1891).

(4) Ram Narain *v.* Ram Chunder, 18 C. 86 (1891).

(5) Karuppasami *v.* Pichu, 15 M. 419 (1891).

(6) Torregrosa *v.* Pragji, 16 B. 519 (1892).

(7) Manasing *v.* Amad Kunhi, 17 M. 14 (1894).

(8) Baid Nath *v.* Shamanand, 22 C. 143 (1894).

(9) Mussoorie Bank *v.* Barlow, 9 A. 188 (1887).

(10) Nugenderchunder Ghose *v.* Kaminee Dossee, 11 M. I. A. 241 (1867); Baijun Doobey *v.* Brij Bhookun, 2 I. A. 275 (1875); Deendyal Lal *v.* Jugdeep Narain, 4 I. A. 247 (1877); Loki Mahto *v.* Aghoree, 5 C. 141 (1880).

The liability of the legal representative of a deceased debtor to be sued is absolute, and not dependent on the assets having come into his hands; it being sufficient to give a decree against him that there are assets of which he may have become possessed, though he will be liable under the decree only as a legal representative.(1) A decree obtained against a brother and an aunt of the deceased debtor, and proceedings taken in execution against them, will give to the plaintiff no title to the property forming the estate; and if after the sale a person takes letters of administration to the deceased, he will be entitled to the proceeds of the sale in execution held by the Court in preference to the decree-holder.(2) In Baswantapa *v.* Ranu,(3) it was held that a decree against a person who is not an heir of the deceased, and even a sale in execution of such a decree, can give no right to the decree-holder, or to the purchaser at the execution-sale, to the property which belonged to the deceased or to his real heir or legal representative. In a suit by a creditor against the estate of a deceased debtor who has died leaving a will, his heirs in intestacy do not represent his estate, and the suit is bad unless the estate is represented.(4) If a Hindu sues as representing a joint family he should state it in the plaint.(5) And a widow, if sued as representative of her deceased husband, should be so described.(6) And this is a general rule where a person is sued as a representative, as where defendants are sued as representatives of a *tarwad*.(7) A decree against a Hindu widow may bind a son adopted during the litigation, but not brought on the record.(8) On the death of one member of a joint Hindu family subject to Mitakshara law, his widow cannot represent him so as to make the joint property liable to his debts.(9) As to widow's estate in moveables inherited from her husband, and the liability of such property for her debts after her death, see below.(10)

Limitation (Rule 6).—This rule recognizes the principle, that a plaintiff must not only show that he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act.(11) It has been said that under this provision, a plaintiff cannot take advantage of any ground of exemption from the law of limitation which has not been set up in the plaint.(12) But it has been recently held that this is not an inflexible

(1) Rayappa Chetti *v.* Ali Sahib, 2 M. H. C. R. 336 (1865); Girdharlal *v.* Bai Shiv, 8 B. 309 (1884).

(2) Sukh Nandan *v.* Rennick, 4 A. 192 (1882).

(3) 9 B. 86 (1885).

(4) Matangini Chooneymoney, 22 C. 903 (1895).

(5) Gan Savant *v.* Narayan, 7 B. 467 (1883).

(6) See Girdharlal *v.* Bai Shiv, 8 B. 309 (1884); Loki Mahto *v.* Aghoree, 5 C. 144 (1879).

(7) Sankaran *v.* Parvathi, 12 M. 434, at p. 437 (1889); but a decree against a manager for a debt due by the family has been held to bind the rest: Hari Vithal *v.* Jairam Vithal, 14 B. 597 (1890).

(8) Hari Saran *v.* Bhubaneswari, 16 C. 40 (1888); 15 I. A. 195.

(9) Phoolbas Koonwur *v.* Lalla Jogeshur, 1 C. 226 (1876); 3 I. A. 7.

(10) Bai Jamna *v.* Bhaishankar, 16 B. 233 (1891).

(11) Secretary of State *v.* Vira Rayan, 9 M. 175 (1880). It is not sufficient to say "the Act does not apply," or that "the case has been taken out of the Act." The facts should be stated. See Forsyth *v.* Bristowe, 8 Exch. 350.

(12) Jogeshwar Roy *v.* Rajnarain Mitter, 31 C. 195 (1903); s. c., in first Court, 7 C. W. N. 651; foll. Delhi Jagannadha Row *v.* Brundavanam Seshayya, 17 M. L. J. 281 (1907).

rule. If the plaint shows the ground of exemption, the requirements of the Code are satisfied; but the plaintiff is not precluded from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground.(1)

Relief to be specifically stated.

7. *Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief, which may always be given as the Court may think just, to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.*

Relief.—This rule is new, and is taken from English O. 20, r. 6. The plaintiff should always claim in the one action every kind of relief to which he is entitled—be it damages or an injunction, a declaration or a receiver, for he will not be allowed to bring a second suit on the same cause of action to obtain relief which he might have obtained in the first action.(2) A Court in refusing a decree for specific performance may give a decree for the refund of the deposit with interest, though the plaintiff had not sought this alternative relief.(3) In a suit for the sale of mortgaged property, the Court may (in certain circumstances) pass a decree for redemption.(4) As regards prayer for general relief, see notes to preceding rules.

Relief founded on separate grounds.

8. *Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly.*

Separate grounds.—This rule is new, and is the first sentence of English O. 20, r. 7.

Procedure on admitting plaint.

9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a *list* of the documents (if any) which he has produced along with it; and, if the plaint *is* admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief *claimed* in the suit, in which case he shall present such statements.

Concise statements.

(1) Hargu *v.* Heramba, 13 C. L. J. 139 (1910).
(2) See Ann. Pr., notes on this rule.
(3) Raghu Nath *v.* Chandra Protap, 17 C. W. N. 100 (1912).
(4) Balkisen Lal *v.* Tapesur, 17 C. W. N. 219 (1911).

(2) *Where* the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such *list* and copies or statements if, on examination, he finds them to be correct.

"**Concise statements.**"—Act VIII. of 1859, sect. 38. For forms of concise statements and Register of civil suits, see Schedule IV. of the Code of 1882. As to separate registers for suits between landlords and tenants, see sect. 146, Act VIII. of 1885 (Bengal Tenancy), and sect. 66, Act IX. of 1883 (Central Provinces Tenancy).

10. (1) The plaint shall *at any stage of the suit* be returned to be presented to the Court *in which the suit should have been instituted.*

Return of **plaint.**

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Procedure on returning plaint.

When plaint may be returned.—The words of the rule are imperative.(1) The section which this rule replaces did not, however, state at what stage of the suit the order could be made. The section itself was differently construed as applicable to any stage of the suit, and as referring merely to the time of presentation. The Calcutta High Court held that its provisions might be put in force at any stage of the hearing, and that it is not limited to the time of presentation, or before the defendant has been called on to state his case, for the objection, if to valuation, would not appear upon the face of the plaint itself, but would naturally come from the defendant. Therefore, a Court was held to have erred which, after hearing the evidence on both sides, found that the suit had been undervalued, but instead of returning the plaint dismissed the suit.(2) It has thus been held that the plaint should be returned, and the suit not dismissed after evidence in the first Court; (3) and after trial in the first Appellate Court, or even in the High

(1) Bhadeshwar *v.* Gaurikant, 8 C. 834 (1882); Muttirulandi *v.* Kottayan, 10 M. 211 (1887).

(2) Bhadeshwar *v.* Gaurikant, 8 C. 834 (1882). The contrary was held in an early case under the Code of 1859, it being determined that the suit should have been dismissed: Shaikh Muzhur *v.* Musst. Basoo, 8 W. R. 46 (1867).

(3) Ram Gutty *v.* Goonomonee, 11 W. R. 177 (1869); Kartick Nath *v.* Roy Nundeput, 23 W. R. 263 (1875).

Court itself.(1) The same views were entertained by the Madras High Court.(2) The Bombay (3) and Allahabad (4) High Courts held, that while the section, corresponding to this rule, only contemplates the return of a plaint, should error be patent when it is first presented, yet there was nothing in the Code which forbade the return of a plaint at a later stage after the plaint has been admitted and the trial begun, or even concluded, it being a general principle that a Court, on finding, whenever that may be, that it has not jurisdiction, should decline to proceed further in a cause placed before it. The shape, however, in which a suit is originally instituted is the test of jurisdiction, and a Court, after exercising jurisdiction by amending the plaint, cannot afterwards aver want of jurisdiction with regard to the plaint so amended.(5) The words "*at any stage of the hearing*" have now been inserted and remove all doubt on the question raised in the cases cited.

The former section was held, however, not to apply to High Courts in the exercise of their original jurisdiction. The practice on the Original Side of the High Court at Bombay has been to retain a plaint when further proceedings in a suit have been stopped for want of jursdiction, and a plaint is not returned except when, on presentation, the Judge is of opinion that it discloses no cause of action, or, it appears to him, that the suit ought to be brought in another Court.(6) A similar practice prevails in the Calcutta High Court.

It was held, prior to the Limitation Act, that the date of a suit must be taken to be that on which the plaint was originally filed, and not that on which it was filed in another Court as a plaint returned to be filed in that Court.(7) It has been held that where a Court returns a plaint under this rule the Court to which the plaint is afterwards presented is bound to give credit for the fee levied in the first instance.(8) When a plaint has been returned the suit when

(1) Musst. Edoo *v.* Shaikh Hefazut, 13 W. R. 358 (1870); Prosad Doss Mullick, 7 C. 157 (1881); Joynath Roy *v.* Lall Bahadur, 8 C. 126 (1881) [it is, however, to be noted that in this case the lower Court both dismissed the suit and returned the plaint]; s. c., 10 C. L. R. 146; Moshingan *v.* Mozari Sajad, 12 C. 271 (1885) [which dealt also with the question of costs]. In Ledgard *v.* Bull, 9 A. 191 (1886), the Privy Council stated that the Court should have given the plaintiff the alternative of having his suit dismissed or of withdrawing, with leave to bring a new action.

(2) Khimji *v.* Purushotum, 7 M. 171 (1883); Kandu *v.* Konda, 8 M. 62 (1884); Chandu *v.* Kombi, 9 M. 208 (1885); Najamma *v.* Subba, 11 M. 197 (1887); even if the proper Court of presentation is a Revenue Court: Muttirulandi *v.* Kottayan, 10 M. 211 1887).

(3) Prabhakarbhat *v.* Vishwambhar Pandit, 8 B. 313, F. B. (1884) [overruling Jagjivan *v.* Magdum, 7 B. 487 (1883)]; Babaji *v.* Lakshmibai, 9 B. 266 (1884); Bai Makhor *v.* Bulakhi Chaku, 1 B. 538 (1874); Vasudev *v.* Narayan, 4 B. 642 *n.* (1878). In Bai Amrit *v.* Hanbhai, 8 B. 380, it was held that the first-mentioned ruling did not govern the case where decrees had been passed on the plaint.

(4) Abdul Samad *v.* Rajendro Kishor, 2 A. 357 (1879); see Khooshul *v.* Palmer, 1 Agra, 280 (1866). In Nidhi Lal *v.* Mazhar Hossein, 7 A. at p. 245 (1884), it was pointed out that the words "on or before the first hearing," are not in this action.

(5) Motabhai *v.* Surat Municipality, 20 B. 675 (1895).

(6) Bai Amrit *v.* Hanbhai, 8 B. 380 (1884).

(7) Khellat Chunder *v.* Nusseebunnissa, 16 W. R. 47 (1871); see s. 14 of the Limitation Act.

(8) Visweswara *v.* Nair, 35 M. 567 (1911).

presented to the proper Court is a new suit and not a continuation of the former proceeding.(1)

"**Should have been instituted.**"—In the Code of 1882 specific cases were mentioned in which the Court might return a plaint. Where, however, a lower Court rejected a suit, but refused to return a plaint on the ground that the case did not fall within the provisions of this section, it was held, on appeal, that the circumstances of the case came within clauses (*a*) and (*c*) of the corresponding section of the Code of 1882; but even were it not so, in every case where the Court has no jurisdiction to try the suit the proper procedure was to return the plaint.(2) This is now made clear, the second set of italicized words in the first clause being substituted in lieu of the specific clauses (*a*), (*b*), (*c*) of the last Code.

Appeal.—An appeal lies under O. XLIII. r. 1 (*a*). Under the circumstances of the case cited,(3) a party was held estopped from appealing against an order returning the plaint.

11. The plaint shall be rejected in the following cases :—

Rejection of **plaint.**

(*a*) *where it does not disclose a cause of action;*

(*b*) *where* the relief *claimed* is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :

(*c*) *where* the relief *claimed* is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so :

(*d*) *where* the suit appears from the statement in the plaint to be barred by any law.

Applicability of rule.—It was held that clauses (*b*) and (*c*) did not apply to High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction.(4) An opinion was also expressed that they did not apply to the High Courts in their appellate jurisdiction.(5) But sect. 582A was, since that decision, added to the Code of 1882 by Act VI. of 1892. See now sect. 149, *ante*.

Rejected.—Clause (*a*) is taken from sect. 53 of the last Code. The Court must see whether a cause of action is disclosed in the plaint. Firstly, as to the mode in which this is to be done. Apparently this is to be ascertained from a reading of the plaint itself. The Code of 1859 provided (6) for rejection,

(1) Mohidin Rowthan *v.* Nallaperumal Pillai, 21 M. L. J. 1900 (1911).

(2) Ladhaji *v.* Hari, 1 Bom. L. R. 176 (1899).

(3) Beni Madhub Das *v.* Jotendra Mohun Tagore, 11 C. W. N. 765 (1907); s. c., 5 C. L. J. 580.

(4) And see now O. XLIX. r. 3, *post*.

(5) Balkaran Rai *v.* Gobind Nath, 12 A. at p. 149 (1890).

(6) S. 32 (*a*).

if upon the face of the plaint, or after questioning the plaintiff,(1) it appeared that there was no cause of action, or that the right of action was barred.(2) It was held that for this purpose the Court should not refer to documents or facts not stated in nor annexed to the plaint (a ruling which equally applies now), nor ascertained by it (under the practice which then prevailed), by interrogation of the plaintiff.(3)

The Court has then merely to see whether there is a question to be tried. The rule does not contemplate any forms of action, but requires only that a plaint should contain facts describing a cause of action, and a plaint that does so must be heard.(4) The facts must be so alleged that all the constituent facts may be implied, and unless this is so there will be no cause of action disclosed.(5) A cause of action is deemed stated whenever sufficient facts to sustain an action "can be fairly gathered from all the averments in the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language." (6) Insufficiency can only be sustained "when it appears that, admitting all the facts alleged, the complaint presents no cause of action whatever. It is not sufficient that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are argumentatively averred." The plaint is deemed to allege what can be implied from the allegations therein by reasonable and fair intendment.(7) So a cause of action will be considered disclosed if there are sufficient facts stated to warrant an inference as to its existence, even though all the facts constituting it may not be expressly stated.(8)

A plaint may be rejected if it does not disclose a cause of action against any of the defendants, unless the plaintiff amends by striking off the name of that defendant;(9) and if it is presented by a person not authorized to do so.(10) The Court, however, cannot reject a plaint on the ground that the plaintiff is not likely to succeed; (11) not on any ground except that of want of cause of

(1) See Man Gobind *v.* Umbika Monee, 16 W. R. 218 (1871); Girdharlal *v.* Jagannath, 10 B. H. C. R. at p. 185 (1873). In Gunga Narain *v.* Tiluckram, 15 C. at p. 537 (1888), the Privy Council held, in a case under the present Code, that the Subordinate Judge rightly examined the plaintiff's pleader to ascertain whether he was in a position to make an amendment which would introduce a cause of action. But see as to this, *post*, p. 774.

(2) See Udaya *v.* Nayar, 1 M. H. C. R. 322 (1863), where the plaint was held not to show on its face that it was barred; and Chetti *v* Sundaram, 2 M. H. C. R. 51 (1864), in which it was held that a Court might reject a plaint as barred even though it has been registered; such an act being of a ministerial nature only.

(3) Girdharlal *v.* Jagannath, 10 B. H. C. R. 182 (1873).

(4) Muhammad Sharif *v.* Shamsher Khan, 1891, P. R. No. 11; cited Hukm Chand, C. P. C. 625.

(5) Hukm Chand, 626; Ramasami *v.* Sellattammal, 4 M. 375 (1881).

(6) Ib., citing Zabriskie *v.* Smith, 13 N. Y. 322 (Amer.).

(7) Ib., citing Marie *v.* Garrison, 83 N. Y. 23 (Amer.).

(8) Ramasami Ayyan *v.* Ramu Mupan, 3 M. H. C. R. (1867), where the statement of the subject-matter imported that the charge was false to the knowledge of the defendant, though there was no express allegation of malice and want of reasonable and proper cause.

(9) Shridhar Hari *v.* Chima, 10 B. H. C. R. 17 (1873).

(10) Venkatrav *v.* Madhavrav, 11 B. 53, 56 (1886).

(11) Lakshmi *v.* Tikaram, 1 M. H. C. R. 240 (1863).

action.(1) The existence or non-existence of a cause of action depends on the provisions of the substantive law applicable. If the plaint discloses a cause of action, but it is barred, it should be rejected under rule 11, clause (*d*). If no cause of action is disclosed, the plaint might have been rejected under the last Code, if this was done before the issues were settled. Rule 11 contains no limit of time. And the order may apparently be made at any time. The plaint should not be returned for amendment.(2) There would, however, appear to be no objection to the Court amending itself the plaint on the spot,(3) though in a large number of cases this may not be found to be practicable. According to the practice of the Original Side of the High Court, the sufficiency of a plaint is allowed to be discussed after it has been filed, on an application made by the defendant to take it off the file.(4) It was held under the last Code that the original Court might not reject or return a plaint for amendment after the settlement of the issues, but where it had proceeded to the trial of the suit should dispose of it on the merits.(5) If a plaint is not rejected before settlement of issues, and it is then discovered not to allege a cause of action, the Court should either amend it under clause (*c*) of sect. 53 of the last Code or determine the case on the evidence.(6) In the latter event it would, if the plaint and evidence disclose no cause of action, dismiss the suit.(7) If the plaint does not disclose a cause of action, but the Court does not reject it on that ground, an objection may be taken for the first time on appeal; (8) though if the appeal is from a decision on the merits, the Appellate Court cannot dismiss the suit simply on the ground that the plaint discloses no cause of action, if such a cause is shown by the evidence on the record.(9) Nor can the Appellate Court dismiss a suit merely on the ground that the plaint does not show how far the several parties sued for contribution are individually liable, if the evidence produced is enough to determine that. The real test in such cases being whether the

(1) As where a plaint asks for a money decree against the mortgagor and the mortgaged property only is liable: Umasundari *v.* Umacharn, 6 B. L. R. App. 117 (1871). Under the Code of 1859, however, the Courts rejected plaints for misjoinder: Raja Ram *v.* Luchmun Pershad, 8 W. R. 15 (1867); s. c., B. L. R. (F. B.) 731; whereas now it should return for amendment as also where the plaint is obscure (see Mahomed *v.* Potun, 20 W. R. 147) or prolix (Bishen Sahaye *v.* Beer Keshore, 8 W. R. 295 (1867)). In Luckymonee Dossie *v.* Khetter Coomary, 2 Ind. Jur. N. S. 117 (1867), the plaint consisted of only two counts, and the first did not show the subject of the claim without reference to a schedule and the second did not show a right in the plaintiff.

(2) Nagar Mull *v.* Macpherson, 3 A. 766 (1881).

(3) See Gunga Narain *v.* Tiluckram, 15 C. at p. 536 (1888), where it is added "or within a reasonable time;" but this would seem to imply return, as to which, see last Code.

(4) Gobind Chandra *v.* Ganga Dhye, 7 B. L. R. at p. 335 (1871).

(5) Damodar Das *v.* Gopal Chand, 7 A. 79, F. B. (1884); Kishna Ram *v.* Rakmini, 9 A. 221 (1887); *contra*, Modhe *v.* Dongre, 5 B. 609 (1881); Prabhakarbhat *v.* Vishwambhar, 8 B. 313 (1884). So far as the power of the Court itself to amend at any time which is referred to in these cases, this was settled by clause (*c*), introduced by s. 9, Act VII. of 1888, into the last Code.

(6) As to the latter course, see Ramsami *v.* Ramu, 3 M. H. C. R. 372 (1867).

(7) See Nurdin *v.* Alavudin, 12 M. 134 (1888).

(8) See Colvin *v.* Elias, 2 B. L. R. 212 (1869).

(9) Shah Ahmed *v.* Tarco Rai, 7 C. 343 (1881); Golam Ali *v.* Futtick Chunder, 10 W. R. 460 (1868); Bakhtawar Begam *v.* Husaini Khanam, P. C., 19 C. L. J. 477 (1914).

Judge, after the adjudication of the case, can pass a decree which shall operate as one against each party sought to be made liable for his respective quota.(1) Where the plaint does not disclose a cause of action the proper order to be passed on appeal, where the suit is dismissed without taking evidence in the first Court, is to reject the plaint and not dismiss the suit so that the plaintiff can present a fresh plaint if he subsequently should find himself in a position to make averments which would give relevancy to his action.(2) For it is to be noted that rejection is distinct from dismissal, inasmuch as the former, according to O. VII. r. 13, leaves the plaintiff free to present a fresh plaint, while the latter would ordinarily bar a new suit. It was held under the former section that a Court could not reject a plaint in part.(3)

Form of Order.—Rejection of the plaint, and not dismissal of the suit, is the proper order to pass.(4) In a suit in a Munsif's Court it was found, after issues were fixed and some evidence recorded, that the claim had been under-valued, and that if properly valued it would be beyond the Court's jurisdiction; it was held that the proper order was to reject the plaint and return it, so that the plaintiff might add the additional stamps required and sue in the proper Court.(5)

When order may be made.—A plaint can be rejected after it has been registered, and at any stage of the suit; (6) but not after the case has been finally decided, so far as the Court is concerned.(7)

Clauses (*b*), (*c*).—It is competent to a Court to reject after it has been admitted and registered.(8) The power of rejection given by this section does not arise merely because the plaint is written upon paper insufficiently stamped; but there must be the additional circumstance of a failure on the part of the plaintiff to supply the requisite stamp paper within the period fixed.(9) Reading this section with sect. 12 of the Court Fees Act of 1870, the Court is not justified in rejecting a plaint without giving the plaintiff an opportunity of affixing the proper stamp.(10) *Quære*, whether "insufficiently stamped" in clause (*c*) refers to or includes a wholly unstamped paper.(11) See also next paragraph. As to mistake or inadvertence as to Court fee, see cases cited.(12) If a plaint be presented upon insufficient stamp and the

(1) Bhono *v.* Pallan, 11 W. R. 131 (1867).

(2) Ganga Narain *v.* Tiluckram, 15 C. 532 (1888); s. c., 15 I. A. 119.

(3) Raghubans Puri *v.* Jyotis Swarupa, 29 A. 225 (1907).

(4) Muhammad Sadik *v.* Muhammad Jan, 11 A. 91 (1888); Balvantrao *v.* Bhimashankar, 13 B. 517 (1889). For a comparison of orders passed under this section, and ss. 5 and 12 of the Court Fees Act, see Balkaran Rai *v.* Gobind Nath, 12 A. 129 (1890).

(5) Ram Gutty *v.* Goonomonee, 11 W. R. 177 (1869).

(6) Kishore Singh *v.* Sabdal Singh, 12 A. 553 (1889); Venkatesa Tawker *v.* Ramasami Chettiar, 18 M. 338 (1895); Karaman Sing *v.* Cockell, 1 C. W. N. 670 (1897); Brahmomoye *v.* Andi Si, 27 C. 376 (1899); Padmanand Singh *v.* Anant Lal Misser, 4 C. L. J. 421 (1906), F. B.; dissenting from Habibul Hossein *v.* Mahomed Reza, 8 C. 192 (1881); Valiya Kesara *v.* Suppannair, 2 M. 308 (1880).

(7) Mahadei *v.* Ram Kishen, 7 A. 528 (1885).

(8) Padmanund Sing *v.* Anant Lal Misser, 34 C. 20, F. B.; s. c., 11 C. W. N. 38; 4 C. L. J. 421.

(9) Dhondiram *v.* Savadan, 5 Bom. L. R. 198 (1902); s. c., 27 B. 330.

(10) Bai Anope *v.* Mulchand, 9 B. 355 (1885).

(11) Bishnath Prasad *v.* Jagarnath Prasad, 13 A. 305, at pp. 308, 309 (1891).

(12) Ram Tahal Singh *v.* Dubri Rai, 28 A. 310 (1905); Chatarpal *v.* Jagram, 27 A. 411 (1904); and as to the Court's power to revise plaintiff's valuation, see Musst. Bibi Umatul *v.* Nanji Koer, 11 C. W. N. 705 (1907); s. c., 6 C. L. J. 427.

deficit Court-fee be not put in within the time allowed by the Court, the latter ought to reject the plaint. But if on the date on which the deficit Court-fee is ultimately put in, the suit is not barred, the plaint may be regarded as if it was presented for the first time on that date, and the suit ought to be proceeded with.(1)

"**Time to be fixed.**"—The time fixed for making up stamp-duty on a plaint may extend beyond the period of limitation for the suit. If a plaint improperly stamped is given back to have a proper stamp fixed, the date of the suit is the date on which it was filed,(2) and therefore no question of limitation can arise. There is nothing in the Code to render a presentation ineffectual because the plaint was insufficiently stamped.(3) The view, however, has also been expressed that the presentation of an insufficiently stamped document, which if sufficiently stamped could be treated as a plaint, cannot be regarded as the institution of a suit within the meaning of sect. 4 of the Limitation Act, or of the Code.(4) Therefore, when a Court fixes a time under clauses (*b*) or (*c*) of this section, it must be a time within limitation, and this section does not give a Court power to extend the ordinarily prescribed period of limitation for suit.(5) But in a recent case in the Bombay High Court where a memorandum of appeal insufficiently stamped was filed on the last day allowed by the law of limitation and the Court refused time to pay and rejected the memorandum, this order was reversed on appeal, and it was held that the Court had a discretion under sect. 149, limited only by clause (*c*) of this rule.(6) Apart from the question of limitation, the Court can extend the period originally, granted after the time originally fixed has expired.(7) If, however, the order is not complied with within the time allowed, the plaint will be rejected. So a plaint was filed one day before the expiry of the period of limitation, but the Court-fees were deficient and the plaintiff was ordered to pay the deficient Court-fees within a week. This order was complied with one day after the expiry of the time allowed and the plaint was registered. Held, that the suit was barred by limitation, as the deficient Court-fees were not supplied within the appointed time, and that the

(1) Hara Kumar Pal *v.* Shaikh Safatullah, 9 C. W. N. 844; s. c., 2 C. L. J. 970 (1905).

(2) Mt. Begee Begum *v.* Yusaf Ali, 6 A. H. C. R. 139 (1874); Skinner *v.* Orde, 6 I. A. 126 (1879); Mengur *v.* Baboo Huree, 23 W. R. 447 (1875); Syud Ambur *v.* Kali Chand, 24 W. R. 258 (1875); Moti Sahu *v.* Chatri Das, 19 C. [illegible] (1892); Huri Mohun *v.* Naimuddin, 20 C. [illegible] (1892); Chennappa *v.* Raghunatha, 15 M. 29 (1891); Surendra Kumar *v.* Kunja Behary, 27 C. 814 (1900); s. c., 4 C. W. N. 818; Assan *v.* Pathumma, 22 M. 494 (1897), *per* Subramania Ayyar, J.; Dhondiram *v.* Savadan, 27 B. 330 (1902); s. c., 5 Bom. L. R. 198; Rajkishori *v.* Madan Mohan, 31 C. 75 (1903); diss. from Balkaran Rai *v.* Gobind Nath, 12 A. 129 (1890).

(3) Jhanda Khan *v.* Bahadur Ali (1893), P. R. No. 3.

(4) Jainti Prasad *v.* Bachu Singh, 15 A. 65, 70 (1893).

(5) Ib.; Venkatramayya *v.* Krishnayya, 20 M. 319 (1897); Muhammad Ahmad *v.* Muhammad Sirajuddin, 23 A. 423 (1901); Durga Singh *v.* Bisheshar Dyal, 24 A. 218 (1898); but see cases cited *ante*, n. (2), and in particular, Assan *v.* Pathumma, 22 M. 494 (1897), *per* Subramania Ayyar, J., who disagreed with Venkatramayya *v.* Krishnayya, *supra*.

(6) Achut Ramchandra Pai *v.* Nagappa Bab Balgya, 38 B. 41 (1913).

(7) Bhugwandas Bagla *v.* Haji Abu, 16 B. 263 (1891); see also Raj Kishori *v.* Madan Mohan, 31 C. 75, at p. 78 (1903); Amir Hossain *v.* Babu Nanak, 14 C. W. N. 882 (1910).

fact of the plaint being registered did not prevent its rejection under sect. 54 (corresponding with this rule), the terms of which are imperative and mandatory.(1) It has been held by a Full Bench of the Madras High Court that the suit is not barred by limitation if the deficiency is supplied within the time fixed by the Court after the expiry of the period of limitation.(2)

Clause (*d*).—The words of the rule are imperative. So the plaintiff is bound to satisfy the Court that his right of action is not barred.(3) The Court also is bound to take notice of such a bar, if it exists.(4) So far as rejection under this rule is concerned, it is incumbent only when "from the statement on the plaint" the suit appears to be barred.(5)

Where a plaint in a Civil Court alleges facts which, if true, would show that the dispute or matter involved in the suit was one to which sect. 93 or sect. 95 of Act XII. of 1881 would apply, the plaint should be rejected under clause (*d*) of this rule, or possibly in some cases returned under O. VII. r. 10.(6) The language of sect. 80 is imperative, and absolutely debars a Court from entertaining a suit instituted without compliance with the provisions of the section. A Court cannot, under such circumstances, stay proceedings and allow time to the plaintiff to serve the requisite notice, but its only course is to reject the plaint under clause (*a*) of the rule.(7) Where the plaintiff sued to establish a *mul-raiyati* right which by a Government order was not granted, and also sought for the position of a *mustajir* and to set aside the executive orders of the Commissioner and the Deputy Commissioner, and the lower Courts rejected the plaint under sect. 54 (the present rule): held, that upon the allegations made in the plaint the suit ought to have been tried and the plaint could not be rejected on the ground of the suit being barred by any positive rule of law.(8)

No rejection in other cases.—Neither this nor any other rule authorizes the dismissal of a suit on the ground that the land in dispute as described in the plaint cannot be identified.(9) It was even held, in the under-mentioned case,(10) that the plaint ought not to have been rejected. The actual decision may be supported on the ground that the identification was in fact held to be sufficient; but apart from this the order was in form as the plaint had been returned for amendment and was refiled without amendment. A plaint should not be rejected because a wrong date is given for the cause of action.

(1) Brahmomoyi Dasi *v.* Andi Si, 27 C. 376 (1899); the question of limitation did not necessarily arise as the rejection was under the terms of this section.

(2) Gavaranga Sahu *v.* Boto Krishna, 32 M. 305 (F. B.) (1909).

(3) Rajah Perhlad Sein *v.* Rajender Kishore, 12 W. R. 6, 18, 19 (1869); s. c., 12 M. I. A. 292.

(4) Moru *v.* Gopal, 2 B. 120, 123 (1877).

(5) See Saluji *v.* Rajsangi, 2 B. H. C. R. 162 (1864); appd. in Balava *v.* Shidgonda, 7 B. H. C. R. 99, 101 (1870); decided under the Code of 1859. It was said that there was a duty imposed on the Court of taking any objection that may exist in point of law, not merely apparent on the plaint, but which might be elicited by questioning the plaintiff.

(6) Tarapat Ojha *v.* Ram Ratan Kuar, 15 A. 387 (1893).

(7) Bachchu Singh *v.* Secretary of State, 25 A. 187 (1902).

(8) Nawab Singh *v.* Charan Rana, 6 C. W. N. 411 (1901).

(9) Kazim Sheik *v.* Danesh Sheik, 1 C. W. N. 574 (1897); Jaladhar *v.* Kinoo, 1 C. W. N. clxxxix. (1897).

(10) Durga Churn *v.* Kala Chand, 7 C. W. N. 615 (1903).

Provided the action is not barred, it should be amended ; (1) as also where in a suit for a *kabulyat* the date of the commencement of the *kabulyat* is not given.(2) A plaint should not be rejected or the suit dismissed simply because strictly accurate language has not been used in describing the cause of action ; (3) nor because costs in respect of a former suit have not been paid ; (4) nor because the document on which plaintiff sues has not been filed with the plaint ; (5) nor if presented to the wrong Court, for in that case it should be returned.(6)

Appeal from order rejecting plaint.—An order rejecting a plaint is a decree,(7) and is therefore appealable unless there is any statutory prohibition to the contrary.(8) Whether there is such a prohibition depends upon the construction to be placed on sect. 12 of the Court Fees Act (VII. of 1870), which enacts that "every question relating to valuation" shall be decided by the Court in which a plaint or memorandum of appeal is filed, and such decision shall be final as between the parties to the suit. According to one view which has been taken, it was the intention of the framers of the Code that whenever a plaint is rejected under this section, and in every case falling within it, there is an appeal,(9) the Court Fees Act not contemplating a case when the Court refuses to hear a suit.(10) Therefore when a plaint is rejected under this rule, either because the relief sought is undervalued or because although the relief sought being properly valued a sufficient Court-fee stamp has not been paid, there is an appeal.(11) This view appears to proceed on the ground that the Code has removed the finality declared by sect. 12 of the Court Fees Act.(12) According to another view which has been taken, the operation of sect. 12 of the Court Fees Act is not affected by the Code, but in certain cases there is no "question relating to valuation" within the meaning of that section, and there is therefore an appeal under sect. 96 of the Code.(13) It has thus been held that the Court Fees Act applies merely to decisions as to the valuation of a suit in a particular class when there is no question of the article in the schedule governing the case, but that an

(1) Rajah Sherraj *v.* Nur Khan, 7 A. H. C. R. 354 (1875).

(2) Golam Mohamed *v.* Asmut Alu, 10 W. R. (F. B.) 14 (1868) ; s. c., B. L. R. (F. B.) 974.

(3) Inglis *v.* Ram Singh, W. R. (F. B.) 159 (1864).

(4) Luckeymonee *v.* Khetter Coomary, 2 Ind. Jur. N. S. 117.

(5) *Ex parte* Pavachand, 2 B. H. C. R. 369 (1865).

(6) Khandu *v.* Shivji, 5 B. H. C. R. 212 (1868) ; and this even after the trial has been concluded : Prabhakarbhat *v.* Vishwambhar, 8 B. 313 (1884).

(7) S. 2, *ante*.

(8) S. 96.

(9) Muhammad Sadik *v.* Muhammad Jan, 11 A. 91 (1888).

(10) Omrao *v.* Jones, 12 C. L. R. 149, 150 (1882).

(11) Ib. ; Ajoodhya *v.* Gunga, 6 C. 249 (1880), when the Court held that the plaint was insufficiently stamped, and there appears to have been no question of the article or schedule under which the case came.

(12) See last case and Muhammad Sadik *v.* Muhammad Jan, *supra* ; as regards the latter case, Edge, C.J., in Balkaran Rai *v.* Gobind Nath, 12 A. 129, at p. 154 (1890), stated that in so far as it decided that an appeal lay from a decision, which was a decision within the meaning of s. 12 of the Court Fees Act, it was erroneous.

(13) See Balkaran Rai *v.* Gobind Nath, 12 A. 129 (1890), at p. 153, where it was pointed out that what the class of cases next referred to decide, is that a question of category is not a question "relating to valuation," and therefore not one declared to be final.

appeal lies against a decision as to the class to which a suit belongs, and therefore *à fortiori* when a plaint is rejected or a suit dismissed, on this ground sect. 96 has operation, there being no prohibition to the contrary.(1) The Bombay High Court, doubting the distinction drawn in the first of the Madras cases cited, has said that where there really is a valuation to be made by a Judge in order to determine a variable proportional fee, it cannot be said that his reasoned choice amongst the several categories of suits is not as essential an element of his valuation as the subsequent arithmetical computation by which it is completed; and that where the Judge can enter on a valuation at all, the determination of the one factor, as much as of the other, must be a "question relating to valuation," and as such a question closed as between the parties by the Judge's decision.(2) But in some cases under the Court Fees Act a suit is one admitting of valuation by a Judge, in other cases the valuation rests with the plaintiff. Again, in some cases the fee is *ad valorem*, thus admitting an inquiry by the Court, in other cases the fee is fixed. The cases therefore where a Judge can enter on a valuation are quite different from those where an inquiry is quite gratuitously entered into, either because the matter rests in the discretion of the plaintiff or because the fee is fixed.(3) The Bombay High Court has therefore held that on the question whether or not any particular suit was one admitting of valuation by the Judge an appeal lies.(4) An appeal has also been allowed where the Court of first instance rejected the plaint without giving the plaintiff an opportunity of affixing the proper stamp.(5) In a suit for taking accounts valued at Rs.130, it was held that the appeal from the order, rejecting the plaint, lay to the District and not the High Court.(6) Where excess stamps have been filed in consequence of an overvaluation of the appeal the surplus amount should be refunded.(7)

Revision.—A decision on valuation was, notwithstanding its declared finality, formerly held subject to revision.(8)

Procedure on rejecting plaint.

12. *Where* a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

"**Record.**"—The words "*with his own hand*" have been omitted.

(1) Gunga Monee *v.* Gopal Chunder, 19 W. R. 214 (1873); Chunia *v.* Ramdial, 1 A. 360 (1877); Annamalai Chetti *v.* Cloete, 4 M. 204 (1881); Omrao *v.* Jones, 12 C. L. R. 149 (1882); Kanaran *v.* Komappan, 14 M. 169 (1890); Studd *v.* Mati Mahto, 28 C. 334 (1901); Prokash *v.* Bishambhar, 14 C. W. N. 343 (1909).

(2) Vithal *v.* Balkrishna, 10 B. 610, 614 (1886); and see remarks in Muhammad Sadik *v.* Muhammad Jan, 11 A. 91, at p. 93 (1888).

(3) Vithal *v.* Balkrishna, *supra*, at p. 615.

(4) Ib., at pp. 615, 616. See Dada Bhau *v.* Nagesh, 23 B. 486, 490 (1898); Kashinath *v.* Govinda, 15 B. 82 (1890); Balvantrao *v.* Bhimashankar, 13 B. 517 (1889); Sardarsing *v.* Ganpatsing, 17 B. 56 (1892).

(5) Bai Anope *v.* Mulchand, 9 B. 355 (1885); see Thakoor Patuck *v.* Ramsoomrun, 1 A. H. C. R. 17 (1869).

(6) Vithal *v.* Balkrishna, 10 B. 610, 616 (1886); Annamalai Chetti *v.* Cloete, 4 M. 204 (1881).

(7) Bai Amba *v.* Pranjivandas, 19 B. 198 (1894).

(8) *In re* Grant, 14 W. R. 47 (1870).

13. The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Where **rejection of plaint does not preclude presentation of fresh plaint.**

Effect of rejection.—The rule, which corresponds with sect. 36 of the Code of 1859, and sect. 56 of the last Code, says, "*of its own force.*" The claim may, however, of course, become, after rejection, barred by lapse of time.(1) It is to be observed that the rule applies to rejection on any of the grounds hereinbefore mentioned—that is, the grounds in r. 11. It has been held that where a plaint has been rejected for default of appearance in the Mamlatdar's Court under sect. 13, Bombay Act III. of 1876, the rule of *res judicatâ* applies.(2) Such a rejection is analogous rather to the procedure under O. IX. r. 9.

Documents relied on in plaint.

14. (1) *Where* a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Production of document on which plaintiff sues.

(2) *Where* he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents.

Document sued upon.—This is a very wise provision, its object being to prevent the dishonest fabrication of documents,(3) and to give the defendant notice of the documents relied on so as to enable him to reply to the claim.(4) All documents sued upon must be produced, such as pottah (5) and title-deeds.(6) A defendant is entitled under the Madras High Court Rules to be furnished with a copy of documents sued on, which are deposited with the plaint.(7) It was held in an early case,(8) that all documents delivered should be received and filed with the plaint, though, if not admissible in evidence, they will afterwards be rejected and returned. And the law is still the same, that the mere production or filing of a document does not operate as its admission in evidence, and that it will not be put on the record unless it is duly admitted in accordance with the rules prescribed.

(1) Kadumbee *v.* Unnopoorna, 14 W. R. 289 (1870).

(2) Ramchandra *v.* Bhikibai, 6 B. 477 (1882); ref., Rajaram *v.* Ganesh, 21 B. 91, 97 (1895); Parushottam *v.* Chatargir, 25 B. 82 (1900); dissented from on the ground that a dismissal *in limine* does not give rise to the plea of *res judicata*: Ramchandra *v.* Narsinhacharya, 24 B. 251, at pp. 253, 254 (1899).

(3) Premsook *v.* Rajkisto, 1 Hyde, 145, 146 (1863).

(4) Panjab Ch. C. Instr., s. 2, r. 10.

(5) Atta Oollah *v.* Sukecooddeen, 1864, W. R. 271.

(6) Lekhraj Roy *v.* Mutty Madhub, 14 W. R. 95 (1870).

(7) Haji Mahomed *v.* Subba Naidu, 21 M. 490 (1897); see as to Bombay N. W. P. and Panjab Rules, Hukm Chand, C. P. C. 654.

(8) Roshun Jehan *v.* Enayut Hossein, Marsh. 127 (1864).

Document relied on.—The rule requires a plaintiff to file with his plaint a list of all the documents on which he relies; that is, which he is then in a position to know to be essential to his case, whether in his possession or power, or not.(1) These words will therefore [as they now expressly state, and was formerly held (2) under the corresponding sect. 39, clause (1) of the Code of 1859] include all the documents the plaintiff intends to use in evidence, and not only those which are the essence of the claim and on which the suit is based,(3) which are provided for by the first paragraph. They do not include, however, documents tendered merely for comparison of handwriting.(4)

Penalty.—The penalty for not producing these documents when called on to do so is not the rejection of the plaint, but that prescribed in r. 18. viz. not being able to put them in without the special leave of the Judge.(5)

Inspection.—The Bombay High Court has held that it has not been the practice to order the plaintiff to give inspection of documents other than those relied on in the plaint, and included in the list of documents annexed to the plaint as required by this rule, till after the written statement is filed; but that this is not, however, an inflexible rule in all cases. There may be cases where it would be imperative to order the plaintiff to produce and give inspection to the defendant of a document which he may not have mentioned in the plaint or enumerated in the list of documents annexed thereto.(6)

Statement in case of documents not in his possession or power.

15. *Where* any such document *is* not in *the* possession or power *of the plaintiff*, he shall, if possible, state in whose possession or power it is.

Suits on lost negotiable instruments.

16. *Where* the suit *is* founded upon a negotiable instrument, *and* it *is* proved that the instrument is lost, and an indemnity *is* given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may *pass* such decree as it would have *passed* if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

"**Negotiable instrument.**"—Act V. of 1866, sect. 14. A suit will lie on the ground that the indorser refused to give a new cheque for one lost, or to refund the money paid for it. The drawer should be made a party.(7)

(1) Minakshi *v.* Velu, 8 M. 373, 374 (1885).

(2) Premsookh *v.* Rajkisto, 1 Hyde, 145 (1863).

(3) As was held under the first Code in Kameenee *v.* Hurromoney, Coryton, 151 (1864-5).

(4) Minakshi *v.* Velu, 8 M. 373, 374 (1885).

(5) Gopal Gundapa *v.* Vishnu Krishna, 22 B. 971 (1897).

(6) Khetsidas *v.* Narotum Gordhundas, 9 Bom. L. R. 1084 (1907).

(7) Baldeo Prasad *v.* Grish Chandar, 2 A. 754 (1880).

[s. 62.]

Production of shop-book.

17. (1) *Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where* the document on which the plaintiff sues *is* an entry in a shop-book or other *account* in his possession or power, the plaintiff shall produce the book *or account* at the time of filing the plaint, together with a copy of the entry on which he relies.

Original entry to be marked and returned.

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if *it is* found correct, *certify it to be so and* return the book to the plaintiff and cause the copy to be filed.

Production.—It was held that sect. 39 of Act VIII. of 1859, which corresponds with this rule, did not require the Court to inspect the document, but only that it should be marked for identification and the copy compared with the original.(1) If the book is not produced before the suit is registered, but a day is fixed for its production, the Court cannot, even on a contumacious non-production of it, reject the plaint, the only effect of the non-production being that provided in the next rule as to the inadmissibility of the book in evidence at any subsequent stage.(2)

[s. 63.]

Inadmissibility of document not produced when plaint filed.

18. (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this *rule* applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

Scope of rule.—This rule is intended not to prevent a person from commencing his suit until he has collected all his documentary evidence, but merely to place a check upon the fabrication of evidence by excluding documents not produced in the first instance unless a good and sufficient reason is given for their non-production at that time; and therefore if a document is not produced or entered in the list, the plaint itself cannot be rejected.(3)

"**Ought to be produced.**"—See rr. 14–17, *ante*, and notes thereto.

(1) Atmaram *v.* Amirchand, 3 B. H. C. R. 92, 93 (1866).

(2) Gopal Gundapa *v.* Vishnu Krishna, 22 B. 971 (1897).

(3) *Ex parte* Rayachand, 2 B. H. C. R., A. C. 369 (1869); Mewa Lal *v.* Kunerji, 13 C. W. N. 797 (1909).

"**Shall not.**"—The words are imperative,(1) and prohibit a plaintiff from using any document which he ought to have, but did not produce or enter ; (2) unless the Court exercises the discretion given to it under this rule.(3) But, as already stated, if a document is not produced or entered, the plaint itself cannot be rejected.(4)

"**Leave.**"—Where documents were referred to an Ameen to inspect, and were ultimately acted upon by the Court, this was held to be abundant proof of "sanction," the term used in the Code of 1859.(5) It is a sufficient reason for the grant of leave that the plaintiff was in ignorance of the existence of the document when the plaint was filed ; (6) that the document was with the Collector, to whom it had been sent for the purpose of being stamped ; (7) or that the Court is satisfied of its *bonâ fide* nature and reliableness ; (8) or if there is no doubt of the existence of the document at the date of suit.(9) The question of reception is one of discretion, which will not be interfered with on appeal.(10) Where, however, *khusra* papers which formed the very essence of the action were not filed or produced, the Court was held to have been justified in rejecting them when subsequently tendered in evidence.(11)

"**Received in evidence.**"—Merely giving a document to a witness to refresh his memory is not receiving it in evidence, for a document may be so used which is not evidence in itself.(12) Such a document is therefore expressly excluded from the section.

Appeal.—The reception of evidence afterwards with leave is not a ground of appeal.(13) The admission is conclusive even when no reasons are given, and the Appellate Court cannot refuse to consider the admitted documents as evidence ; (14) though, of course, the Appeal Court may attach such weight to the document as it thinks proper, or say whether it ought to be treated as evidence as against particular parties to the suit.(15) But the refusal to receive a document may be a good ground of appeal.(16)

(1) Ritchie *v.* Gladstone, 1 Ind. Jur., O. S. 125 (1862).

(2) Premsook *v.* Rajkristo, 1 Hyde, 145 (1862-63).

(3) Lopez *v.* Driberg, W. R., 1864, Act X., 67 (1863).

(4) *Ex parte* Rayachand, 2 B. H. C. R., A. C. 369 (1865) ; Gopal *v.* Vishnu, 22 B. 971 (1897).

(5) Gosain Tota *v.* Raja Rukminiballab, 3 B. L. R., P. C. 34 (1869) ; s. c., 13 M. I. A. 77, 83. The Allahabad High Court Rules, 46 (i), require that the leave, together with the reasons, therefore be given by a written order signed by the Judge.

(6) Ritchie *v.* Gladstone, 1 Ind. Jur., O. S. 125 (1862).

(7) *Ex parte* Rayachand, 2 B. H. C. R., A. C. 369 (1865).

(8) Atta Oollah *v.* Sukecooddeen, 1864, W. R. 271 (1863).

(9) Devidas *v.* Pirjada, 8 B. 377 (1884).

(10) Atta Oollah *v.* Sukecooddeen, *supra*, *vide post.*

(11) Amur Chand *v.* Ram Ruttun, 18 W. R. 515 (1872).

(12) Ramji *v.* Rangayya, 1 M. H. C. R. 168 (1863).

(13) Gosain Tota *v.* Raja Rukminiballab, 3 B. L. R., P. C. 34 (1869) ; s. c., 13 M. I. A. 77.

(14) Minakshi *v.* Velu, 8 M. 373 (1885).

(15) Akbur Ali *v.* Bhyea Lal, 6 C. 666 (1880).

(16) Mahadevappa *v.* Srinivasa Rau, 4 M. 417 (1881) ; Devidas *v.* Pirjada, 8 B. 377 (1884). In Atta Oollah *v.* Sukecooddeen, 1864, W. R. 271, the Lower Appellate Court received the document and the High Court declined to interfere in special appeal.

ORDER VIII.

Written Statement and Set-off.

Written statement.

1. The *defendant* may, *and if so required by the Court, shall* at or before the first hearing *or within such time as the Court may permit, present a* written statement of *his defence.*

"**The defendant.**"—The rule has been reconstructed and shortened. It formerly commenced "*The parties.*" Ordinarily this was the defendant. But a plaintiff may, after he has filed a plaint, put in a written statement, or it may be called for by the Court under r. 9, *post.* A Court has no authority to receive a written statement in a suit from one who is not a party, or to permit such a person to appear at the hearing.(1) A third party will not be allowed to file a statement for a plaintiff or defendant who has neglected to do so himself.(2) But if the parties are present in person or by pleader, the mere fact that the defendant has not filed a written statement does not warrant the trial of the suit *ex parte.*(3) As to the presumption of authenticity, see below.(4) The corresponding section to this in the Code of 1859 was sect. 120.

"**At or before the first hearing.**"—See notes to r. 9, *post.* Under the Code of 1859 the word "*before*" did not occur, and it was therefore held that the admission of written statements on several dates was wrong.(5) Written statements may now be received at any time, provided it is before the first hearing or by order of Court under rr. 6 and 9. Reasonable time should be given to a defendant to file his written statement.(6)

"**Present.**"—The word formerly used was "*tender.*" The production of the written statement at the trial was held (7) to be the tendering under

(1) Moharance Surnomoyee *v.* Bykunt Chunder Mustofee, 25 W. R. 17 (1876).

(2) Denomoyee Dossee *v.* Tara Churn Coondoo, Bourke, 153 (1865) [application by son to file written statement, alleging his interest as reversioner, his father, the plaintiff, having gone away without filing a written statement after he had been ordered to do so].

(3) Sivarajadhani *v.* Kuppagantulu, 2 M. H. C. R. 311 (1865).

(4) Soorendronath Roy *v.* HeeromoneeBurmonee, 10 W. R. P. C. 35, at p. 42 (1868); Radha Prasad Sing *v.* Lal Sahab Rai, 13 A. 53, 64 (1890).

(5) Ali Nukee *v.* Torab Ali, W. R. (1864), p. 44.

(6) Lokhenath Thakoor *v.* Sobanath Misser, 5 W. R. 39 (1866).

(7) Keshavji Naik *v.* Nasarvanji Ardesir, 10 B. H. C. R. 425, 427 (1873).

the Code of 1859. But now it would appear to be the presentation of the written statement, whenever that may be.

"**Written statement.**"—It has been said that English rules are to be applied with discretion in this country, where a strict system of pleading has not hitherto been followed; but here, as everywhere, the first object of pleading is to inform the persons against whom the suit is directed what the charge is that is laid against them. The principle is equally valid as applied to either party in the cause. Amendments have, however, now been introduced into the Code to secure a stricter and more accurate system of pleading. Under O. XIV. r. 3, *post*, the Court frames the issues according to the allegations in the plaint and written statement.(1) As to the nature of a written statement, see notes to O. VI. r. 2. The effect of a written statement may be considered from the point of view of the plaintiff or defendant. As regards the former, he has to prove his case. He may, however, be dispensed from doing this, in whole or in part, by the admission of the defendant. What is not admitted must be proved.(2) An admission may not only operate to relieve the plaintiff in his proof, but it may shift the burden to the defendant.(3) It has sometimes been supposed that no portion of a defendant's written statement can be read against him without the whole statement being read. The true rule, however, is this: that if a man makes a qualified statement (4) you cannot use the statement against him apart from the qualification; not that if a man makes a series of independent unqualified statements any particular one of those statements cannot be used against him.(5) A written statement cannot, of course, be read against any party save him by whom it has been made or those who are bound by his admission.(6) An admission by one defendant does not bind the others.(7) Looking at the matter from the point of view of the defendant, the written statement is, of course, not evidence so as to dispense the defendant from proving the facts stated; (8) nor is it evidence in the defendant's favour, so that if a defendant admits one fact, and thereby dispenses with proof of it, he is not entitled to say that the plaintiff has relied on his statement as evidence, and that he, the defendant, is in consequence in a position to claim that the whole of it may be read as evidence in his favour.(9) Pleadings

(1) Burjorji Cursetji *v.* Muncherji Kuverji, 5 B. 143, 152, 153 (1880).

(2) See Burjorji Cursetji *v.* Muncherji Kuverji, 5 B. 143 (1880); Brojo Rajkishore *v.* Bishonauth Dutt (1864), W. R. 305, 306.

(3) See Maniklal Baboo *v.* Ramdas Mazumdar, 1 B. L. R., A. C. 92 (1868).

(4) Poolin Beharee Sein *v.* Watson & Co., 9 W. R. 190 (1868) [overruling Nobeen Kishen *v.* Shofatoollah, 1 W. R. 24]; Radha Churn Chowdhry *v.* Chunder Monee Sikdar, 9 W. R. 290 (1868); Rajah Nilmoney Singh *v.* Ramanoograh Roy, 7 W. R. 29 (1867).

(5) Baikanthanath Kumar *v.* Chandra Mohan Chowdhry, 1 B. L. R., A. C. 133, 137 (1868).

(6) Juggessur Mookerjee *v.* Gopee Kishen, 5 W. R. 50 (1866).

(7) See ib.; Lachman Singh *v.* Tansukh, 6 A. 395 (1884); Azizullah Khan *v.* Ahmad Ali, 7 A. 353 (1885); Kali Dutt Jha *v.* Abdul Ali, 16 C. 627, 635 (1888).

(8) Ijjutoollah Khan *v.* Ram Churn Gangoolee, 12 W. R. 39 (1869); Mookta Keshee *v.* Koylash Chunder Mitter, 7 W R. 493 (1867); Juggessur Mookerjee *v.* Gopee Kishen, 5 W. R. 50, 51 (1866); Shaikh Shurfuraz *v.* Shaikh Dhunoo, 16 W. R. 257 (1871).

(9) Shaikh Shurfuraz *v.* Shaikh Dhunoo, *supra*.

in Indian Courts have not hitherto been construed with the same strictness as pleadings in English Courts,(1) and therefore a mere omission to deny an allegation has not always been taken as an admission of it so as to dispense the plaintiff from proof of the fact alleged.(2) Stricter rules have now been introduced (see O. VIII. r. 5). As against the party affected his statement primarily operates by way of admission and not estoppel.(3) If a party wishes to give evidence of a fact of which he became aware after he has filed his plaint or written statement, as the case may be, he should file a written statement or supplementary written statement before the hearing.(4) If leave is given to file a further written statement on or before a particular date, it will not, if filed after that date, be ordered to be taken off the file if the opposite party has delayed to make an application until the trial.(5) Where an additional written statement sought to be admitted was inconsistent with the original written statement, the Court said that in such cases there was a difference between an application by the plaintiff and by the defendant. The plaintiff would not be allowed to file such a statement. It allowed the filing on payment of all costs, observing, however, that the supplementary written statement would rightly be the subject of strong comment at the hearing.(6) The Code, it was held, did not contemplate the filing by a plaintiff of a written statement after seeing the written statement of the defendant and by way of rejoinder thereto (7); but rr. 6 and 9 refer to written statements in answer to claims of set-off. A written statement, whether it be called for by the Court after the first hearing or is filed by the parties under this rule at or before the first hearing, need not be stamped.(8)

New facts must be specially pleaded.

2. *The defendant must raise by his pleadings all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.*

Specially pleaded.—"It often is not enough for a party to deny an allegation in his opponent's pleading; he must go further and dispute its

(1) Nawab Nazim *v.* Omrao Begam, 21 W. R. 59, 60 (1874), and case cited in next note.

(2) Natha Singh *v.* Jodha Singh, 6 A. 406, 413 (1884).

(3) See Abdul Rahim *v.* Madhavrav Apaji, 14 B. 78, 82 (1889); Maharajah Mirza Ananda *v.* Pidaparti, 13 I. A. 32, 42 (1885); Mina Konwari *v.* Juggut Setani, 10 C. 196 (1883) [petition]; Madhopersad *v.* Gajadhur, 11 C. 111 (1884).

(4) Munchershaw Bezonji *v.* New Dhurrumsey, etc., Co., 4 B. 576 (1880).

(5) The New Fleming and Spinning, etc., Co. *v.* Kessowji Naik, 9 B. 373, 381 (1885).

(6) Dasimani Dasi *v.* Srinath Ghose, 3 B. L. R. App. 11 (1869). See, however, observations of P. C. in Douglas *v.* Collector of Benares, 5 M. I. A. 271, at pp. 289, 290 (1851).

(7) Jadub Ram Deb *v.* Ram Lochun Muduck, 5 W. R. 56 (1866).

(8) *In re* Cherag Ali, 12 C. L. R. 367 (1882); Nagu *v.* Yeknath, 5 B. 400 (1881).

validity in law, or set up some affirmative case of his own, in answer to it. In the technical language of the old pleaders, it will not serve his turn to merely *traverse* the allegation; he must *confess and avoid*. Thus, if the plaintiff sets up a contract which was in fact made, it will be idle for the defendant merely to *traverse* (*i.e.* deny) the making of the contract; he should *confess* (*i.e.* admit) that he made the contract, but *avoid* the effect of that confession by pleading the Statute of Frauds or Limitations, or setting up that the contract has been duly performed or rescinded. A defendant, however, is not bound to admit an allegation which he seeks thus to *avoid*, or which he alleges to be bad in law. He may at the same time deny its truth, so long as he makes it quite clear how much he is denying. He may, indeed, take all three courses at once; the allegation may be traversed in point of fact, and objected to as bad in law, and at the same time collateral matter may be pleaded to destroy its effect. Any number of defences may now be pleaded together in the same action without leave, although they are obviously inconsistent." (1) A defendant may "raise by his defence, without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision" (2) contained in O. VI. r. 16, as to striking out embarrassing matter. And a defence is not embarrassing merely because it contains inconsistent averments.(3) But all these various defences must be clearly and distinctly pleaded and the facts upon which each is grounded should be stated separately. As a rule each defence should form a separate paragraph. The defendant must make it quite clear what line of defence he is adopting. Any plea which wears a doubtful aspect will be struck out as embarrassing.(4) Above all, special defences of this kind must not be mixed up with traverses or insinuated into pleas which deny the facts alleged by the plaintiff.(5) "The office of a traverse is to contradict, not to excuse or justify, the act complained of; its object is to compel the plaintiff to prove the truth of the allegation traversed, not to dispute its sufficiency in point of law. All matter in confession and avoidance, all matter justifying or excusing the act complained of must be specially and separately pleaded; so must all matters which go to show that the contract sued on is illegal or invalid, or which, if not expressly stated, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings. And no evidence of such matters can be given at the trial if they be not expressly pleaded. This is only fair play." (6)

Denial to be specific.

3. *It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.*

"**It shall not be sufficient.**"—This is one of the greatest improvements

(1) Annual Practice, notes to O. 19, r. 15.

(2) *Per* Thesiger, L.J., in Berdan *v.* Greenwood, 3 Ex. D. p. 255.

(3) *Re* Morgan, 35 C. D. 492.

(4) Ann. Pr. *loc. cit.*; Stokes *v.* Grant, 4 C. P. D. 25.

(5) Belt *v.* Lawes, 51 L. J. Q. B. 359.

(6) Ann. Pr. *loc. cit.*

introduced by the Judicature Act. Formerly the defendant was allowed to plead what was called "the general issue," *i.e.* "that he was not guilty," or "that he never was indebted as alleged," both of which were conclusions of mixed law and fact. Now a defendant may no longer deny generally the facts alleged in the Statement of Claim. He must take each matter which is alleged against him separately, and either admit it, or deny it, or say that he does not admit it. "It is not merely denial which is meant; the rule covers non-admission" as well. Whether the defendant says "I deny" or "I do not admit," he is equally bound to deal specifically with each allegation of fact of which he does not admit the truth.(1) This is the general principle which now governs every traverse. And in order to make this general principle quite clear, special instances are given in subsequent rules (English).(2) "In actions for a debt or liquidated demand in money, comprised in O. 3, r. 6 (English), a mere denial of the debt shall be inadmissible" (English O. 21, r. 1). "In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact, *e.g.* the drawing, making, endorsing, accepting, presenting or notice of dishonour of the bill or note" (English O. 21, r. 2). "In actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed; in an action for money had and received, it must deny the receipt of the money, or the existence of those facts which are alleged to make such receipt by the defendant, a receipt to the use of the plaintiff" (English O. 21, r. 3).

"**Deal specifically.**"—What is meant by dealing specifically with an allegation of fact? It means that the party pleading must make it perfectly clear how much he admits, and how much of it he denies. If he does this the Court will not quarrel with the phrase which he uses. He must not deny *en bloc* everything alleged against him. A defendant may not now plead "that he denies specifically every allegation contained in the Statement of Claim (or plaint)." Still, in order to deny specifically, it is not necessary to write out every sentence in the Statement of Claim and traverse it in detail. It is sufficient when dealing with matters of inducement or any other allegations which do not go to the gist of the action, to plead that "the defendant denies each of the allegations contained in paragraph 8." This will have the same effect as copying out the whole paragraph and constantly inserting "not." But when the pleader comes to those allegations which are of the gist of the action, he must be more precise. He must plead: "The defendant never agreed as alleged," or "never spoke or published any of the said words," or "never made any such representation as is alleged in paragraph 2 of the Statement of Claim" (3)

Sometimes, in order to obey the rule and to deal specifically with every allegation of fact of which he does not admit the truth, it is necessary for the defendant to place on the record two or more distinct traverses to one and the same allegation. Thus, if he pleads, "The defendant never broke or entered the plaintiff's close," he thereby admits that the close in question belongs to

(1) *Per* Jessel, M.R., in Thorp *v.* Holdsworth, 3 C. D. p. 640.

(2) Annual Practice, notes to O. 19, r. 17.

(3) Ib.

the plaintiff. If he intends at the trial to deny that the plaintiff owned or possessed that close, he must say so distinctly and in a separate plea. If he wishes to raise both defences—*i.e.* to deny the act complained of, and also the plaintiff's title to the land—he must put on the record two separate paragraphs, *e.g.*: 1. "The defendant never broke or entered the said close." 2. "The said close is not the close of the plaintiff." Merely to deny an allegation in terms will often be ambiguous and therefore evasive. The pleader must always answer "the point of substance" alleged against him, otherwise his pleading will be deemed evasive (r. 19, corresponding with next rule). And, if an allegation be made against him, with details of time and place, etc., he must deny the substance of the allegation and not confine himself to denying it along with those inessential details.(1)

"**Each allegation of fact.**"—Only allegations of fact should be denied; matter of law should not be traversed. And the defendant should never traverse matter not alleged against him: he should be content to answer what is laid against him in the Statement of Claim and not trouble about any other matters which the plaintiff might have, but has not raised.(2) Moreover, it is no part of his duty, when drafting his defence, to anticipate what the plaintiff may hereafter allege in his reply.(3)

"**Except damages.**"—"No denial or defence shall be necessary as to damages claimed, or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted" (English O. 21, r. 4). This rule applies to damage of all kinds whether special or general, and whether the alleged damage is part of the cause of action or not.(4)

Evasive denial.

4. *Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances.*

Evasion.—The pleader must deal specifically with every allegation of fact made by his opponent—that is, he must either admit it frankly or deny it boldly. Any half-admission or half-denial is evasive. Thus a defence in these words, "The terms of the arrangement were never definitely agreed upon as alleged," was held evasive. Jessel, M.R., said: "The defendant is bound to deny that any agreements or any terms of arrangement were ever come to, if that is what he means; if he does not mean that, he should say that there

(1) Annual Practice, notes to O. 19, r. 17. See next rule.

(2) Rassam *v.* Budge (1893), 1 Q. B. 571.

(3) Ann. Pr., note O. 19, r. 18.

(4) Ib.; Wilby *v.* Elston, 8 C. B. 142 (1849); 18 L. J. C. P. 320; and see the remarks of Hawkins, J., in Wood *v.* Earl of Durham, 21 Q. B. D. p. 508.

were no terms of arrangement come to except the following terms, and then state what the terms were." (1)

"**Point of substance.**"—Again, a traverse often becomes evasive if it follows too closely the precise language of the allegation traversed. Thus, in Tildesley *v.* Harper (2) the Statement of Claim alleged that the defendant offered the plaintiff a bribe of £500. The defendant pleaded, following the exact words of the Statement of Claim, that "the defendant had never offered the plaintiff a bribe of £500," which would have been true if he had offered £400 or £499, or any other sum. Fry, J., held that the substance was that a bribe had been offered and that that was not fairly or substantially denied. The defendant should have pleaded that he never offered "a bribe of £500 or any other sum." Leave to amend was eventually given.(3)

"**Along with those circumstances.**"—That is to say, if the plaintiff alleges that he "paid the defendant £500 at 35, Fleet Street, on March 3rd, 1904, in the presence of A.B.," it is an evasive traverse for the defendant to plead: "The plaintiff did not pay the defendant £500 at 35, Fleet Street, on March 3rd, 1904, in the presence of A.B." For he might have paid the defendant £500 on another day or in another place, or when A.B. was not present. And these details are only "circumstances"; they are not of the essence of the allegation. It is sufficient and proper for the defendant to answer the point of substance and to plead: "The plaintiff never paid the defendant £500 or any other sum." (4)

5. *Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :*

Specific denial.

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

Answering opponent's pleading.—The rules of O. VI.-VIII. have defined both the manner in which each party should state his own case, and also prescribe how he should answer his opponent's pleading. The main object of the latter rules (5) is "to secure that each party in turn should fully admit or clearly deny every material allegation made against him so that they may promptly arrive at an *issue*. With this object three general principles are declared:—

1. It is not sufficient to deny generally the matters alleged by the opposite party, but each party must deal specifically with each allegation of fact of which he does not admit the truth (O. VIII. r. 3).

2. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively but answer the point of substance (O. VIII. r. 4).

(1) Ann. Pr., note to O. 19, r. 19; Thorp *v.* Holdsworth, 3 C. D. p. 641.
(2) 7 C. D. 403.
(3) 10 C. D. 393.
(4) Ann. Pr., note to O. 19, r. 19.
(5) Ib., r. 13.

3. Every allegation of fact in any pleading shall be taken to be admitted if it is not denied specifically or by necessary implication, or stated to be not admitted (O. VIII. r. 5).

This rule is taken from English O. 19, r. 13, but the Legislature has modified the rigour of the rule by providing, in accordance with sect. 58 of the Evidence Act, that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who relies on it.

Admissions.—A defendant ought not to deny plain and acknowledged facts which it is neither to his interest not in his power to disprove.(1) Where allegations are denied or not admitted, which ought, in the opinion of the Judge, to have been admitted, he may make such order as to any extra costs occasioned thereby as shall be just (English O. 21, r. 9). The discretion under this proviso indicates that the effect of a failure to deny in a written statement an allegation of fact in a plaint does not necessarily amount to a proof in the plaintiff's favour.(2) It is in the discretion of the Court to allow or disallow an application for amendment of a plaint.(3) There is no difference in effect between *denying* and *not admitting* an allegation.(4) The distinction usually observed is that a party denies any matter which, if it has occurred, would have been within his own knowledge, while he refuses to admit matters which are alleged to have happened behind his back. But whether he denies or does not admit, he must make it perfectly clear how much he disputes and how much he admits.(5)

Particulars of set-off to be given in written statement.

6. (1) *Where* in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceed*ing* the pecuniary limits of *the* jurisdiction *of the Court*, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, *present* a written statement containing the particulars of the debt sought to be set off.

Effect of set-off.

(2) *The written statement* shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment *in respect* both *of* the original *claim and of the set-off:* but *this* shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(1) *Per* Malings, V.C., Lee Conservancy Board *v.* Button, 12 C. D. 383, affirmed 6 App. Cas. 685.

(2) Satyes Chandra Sarkar *v.* Monmohini Dasi, 19 C. L. J. 518 (1914), p. 523, *per* Jenkins, C.J.

(3) Ib.

(4) *Per* Grove, J., in Hall *v.* L. & N. W. Ry. Co., 35 L. T. 848.

(5) Thorp *v.* Holdsworth, 3 C. D. p. 640; Harris *v.* Gamble, 7 C. D. 877; British Land Association *v.* Foster, 4 Times Rep. 574; Rutter *v.* Tregent, 12 C. D. 758; and see O. VIII. r. 3.

(3) *The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.*

Illustrations.

(*a*) A bequeaths Rs.2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs.1,000 as surety for D; then D sues C for the legacy. C cannot set off the debt of Rs.1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs.1,000.

(*b*) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(*c*) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set off. The amount not being ascertained cannot be set off.

(*d*) A sues B on a bill of exchange for Rs.500. B holds a judgment against A for Rs.1,000. The two claims being both definite pecuniary demands may be set off.

(*e*) A sues B for compensation on account of trespass. B holds a promissory note for Rs.1,000 from A and claims to set off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers, both sums are definite pecuniary demands.

(*f*) A and B sue C for Rs.1,000. C cannot set off a debt due to him by A alone.

(*g*) A sues B and C for Rs.1,000. B cannot set off a debt due to him alone by A.

(*h*) A owes the partnership firm of B and C Rs.1,000. B dies, leaving C surviving. A sues C for a debt of Rs.1,500 due in his separate character. C may set off the debt of Rs.1,000.

Defence or set-off founded on separate grounds.

7. *Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.*

New ground of defence.

8. *Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.*

Set-off.—This is sect. 111 of the former Code with the amendments noted in italics, and with the omission of the second paragraph of the former section dealing with inquiry. The limitations in jurisdiction which it contained have been transferred to the first clause, and the rest of the paragraph was probably

considered unnecessary. The third clause has been added. R. 7 is taken from English O. 20, r. 7. R. 8 is new.

This rule deals with the cross claim known as legal set-off, and which is a claim or demand which the defendant in an action sets off against the claim of the plaintiff, as being his due, whereby he may extinguish the plaintiff's demand, either in whole or in part, according to the amount of the set-off.(1) It is to be distinguished from a plea of payment.(2) The defence of payment does not admit that the demand sued upon is just; it attacks the plaintiff's claim, and urges matter to defeat or at least reduce it on account of some matter connected therewith. But set-off arises out of a transaction extrinsic of the plaintiff's cause of action, being a mutual independent claim. Again, while set-off is the creation of law, payment is an act of the defendant's consent, express or implied.(3)

There is a distinction, also, as regards the mode of pleading. A set-off is a cross debt or claim, on which a separate action may be sustained. Payment can only be the subject of defence to another's action. Set-off may be pleaded or not, at the defendant's pleasure. Failure to do so will not bar a suit by him for the amount of the set-off, as is the case with the defence of payment. Set-off must be specially pleaded, and the facts constituting it proved by the defendant as if he were himself the plaintiff to another action.(4) Recoupment, which is the keeping back of something due because there is an equitable reason to withhold it, is also to be distinguished both from payment and set-off. It can only extinguish the plaintiff's demand in whole or in part, and can never lead to a decree in the defendant's favour.(5)

Common law did not recognize any right of set-off. A defendant who had any cross claim could not raise it in the plaintiff's action. He had to bring a cross action. Legal set-off is the creation of Statute; that is, to be allowed a set-off, it must be shown that there is a statutory right.(6) Successive but limited Statutes were enacted to remove the defect and inconvenience arising from this non-recognition and consequent circuity of action, and the right to plead a set-off was first conferred by 2 Geo. II. c. 22. A set-off was allowed in certain cases.(7) It was a *defence* proper to the plaintiff's action, defeating or reducing a plaintiff's claim. It was a shield and not a sword.(8) It was allowed only in a limited number of cases, and when established its effect was to show that the plaintiff could not recover at

(1) Black Dict., p. 422. See Ishri *v.* Gopa Saran, 6 A. 351, 355 (1884), as to the general principle of set-off which has been held applicable in a case not provided for by the Code, and is recognized in other sections, viz. 216, 221, 246, 247.

(2) Koonjo Behary *v.* Nilmoney, 4 C. L. R. 296 (1879).

(3) See Hukm Chand, C. P. C. 751.

(4) Waterman on Set-off, § 2; Hukm Chand C. P. C. 752; Dale *v.* Sollett, 4 Burr. 2133; Dinwiddie *v.* Bailey, 6 Ves. 142; and as to the difference between a right of account and set-off, see Ranger *v.* Great Western Ry. Co., 5 H. L. Cas. 91. A plaintiff cannot compel a defendant to set-off: Ramdeo *v.* Pokhiram, 21 C. 419 (1893).

(5) See the subject fully discussed in Hukm Chand, C. P. C. 754–758.

(6) Liskeard, etc., Ry. Co. *v.* Caradon Ry. Co., 18 Times Rep. 1.

(7) See the note in Ann. Pr., 1905, pp. 232 and 281, on the subject of set-off and counter-claims by Mr. Blake Odgers, K.C.

(8) *Per* Cockburn, C.J., in Stooke *v.* Taylor, 5 Q. B. D. 575.

all, or was entitled to recover less than what was claimed, and if the debt due from the plaintiff to the defendant exceeded the amount due from the defendant to the plaintiff, the defendant could not before 1875 recover the difference in the plaintiff's action; he could only set off an amount equal to the plaintiff's claim, and had to bring a cross action for the balance.

Equity, however, allowed a set-off subject to certain restrictions and limitations. Equitable set-off was allowed where the party seeking the benefit of it showed some particular equitable ground for being protected against his adversary's demand. The existence of any particular condition was not considered absolutely necessary for allowing the set-off, though the mere existence of cross demands was not considered sufficient. Some of the grounds most often shown for equitable set-off were the common origin of and connection between the demands; mutual credit; the inability of the defendant otherwise to recover, and in cases of assignments and trusts.(1) Up to the date of the Judicature Act, 1873, there was thus both the statutory or legal set-off and equitable set-off, both of which were subject to certain limitations.

Though the old law as to set-off still remains in force, the Judicature Act created the modern counterclaim. A set-off remains precisely what it was before the Act, and every other kind of cross claim is a counterclaim. The differences between the two are very considerable.

A set-off was allowed only in certain cases. Legal set-off was confined to the cases mentioned by the Statutes. Equitable set-off applied only when the cross claim arose out of the same transaction, no set-off being allowed unless defendant's claim had some relation to the plaintiff's demand; but every cross claim of whatever kind can now in England be pleaded as a counterclaim. The claim and counterclaim may arise out of entirely different transactions, so long as they can conveniently be tried together. Thus a claim founded on tort may be opposed to one founded on contract, and *vice versâ*. Nextly, a counterclaim is not, like a set-off, a mere defence; it is substantially a cross action. The effect of this is that if the defendant's claim exceeds that of the plaintiff he will be entitled to a decree for it in the plaintiff's action, and need not bring a separate action for the securing of the excess of his claim over the plaintiff's claim.

To sum up: there were thus in English law three varieties of cross claims—(a) *set-off*, which might be (*a*) *legal* where the amount to be set off was a liquidated demand within the Statute, and (*b*) *equitable* where, though the amount was unliquidated, the cross claim arose out of the *same* transaction as that sued upon; and (b) *counterclaim*, which goes beyond both, and allows all sorts of cross claims, even those arising out of *different* transactions, subject merely to the convenience of trial.

In this country, however, there is no counterclaim in the sense stated.(2)

(1) See Hukm Chand, C. P. C. 759–767. The subject of set-off and counterclaim will be found fully discussed in this Author's notes to sect. 111 of the last Code.

(2) See Abul Hasan *v.* Gohra Jan, 5 A. 301 (1883), where Straight, J., pointed out that the Indian Law of Procedure did not sanction a set-off or counterclaim in all the cases contemplated by the English Supreme Court Rules; and Secretary of State *v.* Madane Lal, 13 A. 296, 299, 300 (1891), *per* Mahmood, J.; Roulet *v.* Fetterle, 18 B. 717 (1894) [under the

Set-off, however, had long been, prior to the enactment of sect. 121 of the Code of 1859, recognized. A rule of legal set-off in India is contained in this rule which is only an amplified version of sect. 121 of the Code of 1859, as that section was construed by the Indian Courts. It has, however, been held that that section and the section in the last Code corresponding with the present rule only laid down a rule of procedure in regard to cases of set-off, but were not exhaustive of those cases, and that it was not intended to take away any rights of set-off, whether legal or equitable, which parties would have independently of it.(1) And it is well settled that Indian Courts may allow equitable set-off in cases in which Equity Courts in England allow the same, even though such cases do not fall within the language of the present rule.(2) Cross claims are thus in this country limited to cases of set-off (as distinguished from counterclaim), whether such set-off is legal or equitable. It is, however, to be observed that under this rule a set-off is treated as a plaint in a cross action, so that the defendant may get a decree for it, whereas, as already pointed out, set-off, prior to the Judicature Act, could only reduce or extinguish the plaintiff's claim, and a separate action would have had to be brought to recover the amount of any excess beyond the plaintiff's claim.

In pleading a set-off the defendant assumes the position of a plaintiff, and is required to prove the same facts which he would be required to prove if he had brought an original action on his demand. The plaintiff cannot, by taking a dismissal of the suit, avoid an inquiry into the merits of the set-off. *Vide post.* In a suit for rent due on a *mokurari* tenure held by the defendant, the defence was that he was entitled to set off against the plaintiff's claim a certain sum due to him on a decree passed by the Privy Council between the same parties. It was held that the set-off could be entertained and inquired into, the decree of the Privy Council not being under execution, and sect. 246 of the last Code being inapplicable to the case.(3)

The present rule does not, of course, affect the special provisions relating to set-off in proceedings in insolvency (4) and in the winding-up

Code a cross claim cannot be set up as a defence, except when it arises out of the very transaction sued upon, and is in the nature of a set-off]; Fakir Chandra Dutta *v.* Gisborne, 8 C. W. N. 174 (1903), where a set-off was disallowed as being based upon a separate transaction. S. 128 (*c*) allows of rules being made.

(1) Clark *v.* Ruthnavaloo, 2 M. H. C. R. 296 (1865); Kistnasamy Pillai *v.* Municipal Commissioners of Madras, 4 M. H. C. R. 120 (1868); Kishor Chand Champalal *v.* Madhowji Vissam, 4 B. 407 (1879); Rookminy Bulbub *v.* Mulk Jamania, 9 C. 914, 918 (1883); Bhagbat *v.* Ramdeb, 11 C. 557 (1885); Pragi Lal *v.* Maxwell, 7 A. 284 (1885); Chisholm *v.* Gopal Chunder, 16 C. 711 (1889); Gobind Parshad *v.* Murree Brewery, 1885, P. R. No. 47. This view received statutory recognition by the addition in 1888 of the last paragraph in s. 216 of the last Code: Subramanian Chettiar *v.* Muthuswami Aiyangar, 17 M. L. J. 481 (1907); Kalanand Singh *v.* Sri Prosad Das, 19 C. L. J. 152 (1913).

(2) Brojendra Nath Das *v.* Budge Budge Jute Mill, 20 C. 527 (1893); Niaz Gul Khan *v.* Durga Prasad, 15 A. 9 (1893) [foll. Nand Ram *v.* Ram Prasad, 27 A. 145 (1904)]; and *vide post*: Dobson & Barlow *v.* Bengal Spinning, etc., Co., 21 B. 126, 135 (1896); Fakir Chandra Dutta *v.* Gisborne & Co., 8 C. W. N. 174 (1903).

(3) Bharath Prosad Sahi *v.* Rameshwar Koer, 8 C. W. N. 118 (1903); s. c., 30 C. 1066.

(4) See Insolvent Act, 11 & 12 Vict. c. 21, s. 39; Miller *v.* Beer, 6 C. L. R. 294 (1880) [dist. Young *v.* Bank of Bengal, 1 M. I. A. 87 (1836)]; Miller *v.* National Bank of India, 91 C. 146 (1891).

of limited companies (1) which have been embodied in the Acts governing these proceedings in India. As to the Transfer of Property Act,(2) and the special cross claim (3) provided for by sect. 95, see below. As to the decree when set-off is allowed, and effect of decree as to sum awarded to defendant, see O XX. r. 19, *post*.

Equitable set-off.—It has already been stated (4) that this rule does not take away any rights of equitable set-off (5) which parties would have independent of it. The statutory rule of set-off is absolute in its terms, and where a case is within it a set-off is given as of right; but equitable set-off, from its very nature, depends on the equities of each particular case, and therefore on the discretion of the Court. It cannot be claimed as of right, and will be allowed only where the Court deems it equitable to allow it in any case,(6) though the Court will be guided in the exercise of its discretion by the decisions of the English Equity Courts, which have been recognized in this country.(7) Equitable set-off exists not only in cases of mutual debts and credits, but also where the cross demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross suit.(8) Thus unascertained damages for partial breach of a contract may be set-off in answer to a claim for money due on that contract, so far as it was fulfilled, as the cross demands in such a case are connected with the same transaction, and arise out of one and the same contract; (9) and in a suit for arrears of salary there has been allowed to be set off the value of goods and property damaged, lost or not accounted for, by the plaintiff.(10) Where a defendant set up an agreement to the effect that the rents payable on account of lands held by the plaintiff

(1) See Act VI. of 1882, s. 150.

(2) See Shiva Devi *v.* Jaru Heggade, 15 M. 290 (1891) [waste by mortgagee in possession].

(3) Roulet *v.* Fetterle, 18 B. 717 (1894).

(4) *Vide ante*, p. 738.

(5) As to the meaning of, see also p. 737, *ante*.

(6) Dobson and Barlow *v.* Bengal Spinning, etc., Co., 21 B. 126, at p. 135 (1896), where the proposed set-off was disallowed, there being no equitable grounds for admitting it, and there being likely to be great delay in investigating it.

(7) See Hukm Chand, C. P. C. 778; equitable set-off was very early recognized, *vide ante*, p. 738; and Ramagopal *v.* Mallikkarjanudu, 1 M. H. C. R. 396, where the Court observed that the question should be dealt with on the principles of English Courts of Equity.

(8) Clark *v.* Ruthnavaloo, 2 M. H. C. R. 296 (1865); Kalanand Singh *v.* Sri Prosad Das, 19 C. L. J. 152 (1913); Fakir Chandra Dutta *v.* Gisborne & Co., 8 C. W. N. 174 (1903), where, however, the set-off was disallowed as being based upon a separate transaction; and see Hosseina Bibee *v.* Smith, 13 B. L. R. 440 (1874), where, however, the Court, as pointed out (Hukm Chand, C. P. C. 777 *n.*), took a very restricted view of the equity. As to whether it is inequitable will, of course, depend upon the facts of each case: Dobson and Barlow *v.* Bengal Spinning, etc., Co., 21 B. 126, at p. 135 (1896).

(9) Kistnasami Pillai *v.* Municipal Commissioners, Madras, 4 M. H. C. R. 120 (1868); Radha Ram Deb *v.* James, 20 W. R. 410 (1873); Gauri Sahai *v.* Ram Sahai (1875), N. W. P. H. C. R. 157; Pragi Lal *v.* Maxwell, 7 A. 284 (1885); Gobind Pershad *v.* Murree Brewery, 1885, P. R. No. 47; Neaz Gul Khan *v.* Durga Prasad, 15 A. 9 (1893); Brojendra Nath Das *v.* Budge Budge Jute Mill, 20 C. 527 (1893).

(10) Chisholm *v.* Gopal Chunder, 16 C. 711 (1889).

under the defendant were credited to the plaintiff on account of rent due to him from the defendant, it was held that the plea was one of payment and of account and set-off in a general sense, and not one of set-off under sect. 111 of the last Code (now represented by rule 6 of this Order).(1)

"**Suit for the recovery of money.**"—Thus no set-off may be claimed in a suit for property, or for a declaratory decree or injunction; (2) nor is a suit for moveable property one for the recovery of money, even though a money value be assigned in the plaint to the property, and the decree may contain a provision of an alternative character for the payment of the money by the defendant in case of default in the delivery of the property. It has been doubted, but not decided, whether a suit for an account can be held to be for recovery of money within the meaning of this section; (3) but a suit for dissolution of partnership, with a prayer that the balance due should be paid, is within the section.(4) It is to be observed that there is a difference in the wording of the rule as regards the plaintiff's demand and the defendant's set-off. The latter must be of an ascertained sum. The suit, however, need not be for an ascertained sum, the words "recovery of money" including claims for unliquidated damages and mesne profits. See illustration (*e*) to the rule.(5) Even in the case of a set-off not falling within the provisions of this section, the claims must both be for money, as is indicated by the terms, O. XX. r. 19, *post*.

"**Claims to set-off.**"—A defendant cannot be permitted to carry on two suits for the same demand at the same time, and using a demand in set-off is a bar to a subsequent suit for that demand. A defendant may, however, it has been submitted, claim a set-off of a demand during the pendency of a suit for the same demand.(6)

"**Ascertained sum.**"—The word "debt" was used in the Code of 1859. It was held restricted to an ascertained sum, and to exclude unliquidated damages and mesne profits as being damages.(7) Under the last and present Code the matter is clear, both from the use of the word "*ascertained*" and the addition of illustration (*c*) to the section. The sum sought to be set off under

(1) Edward Dalgleish *v.* Ramdin, 14 C. W. N. 170 (1909).

(2) Eberle's Hotels *v.* Jonas, 18 Q. B. D. 459; see Manby *v.* Manby, 14 W. R. 136 (1870).

(3) Nankaray *v.* Ho Htaw, 13 C. 124 (1886); s. c., 13 I. A. 48.

(4) Ramjiwan Mal *v.* Chand Mal, 10 A. 587 (1888).

(5) Under the Code of 1859 the suit must have been for a "debt," and a suit for mesne profits was held not to be such: Rotee Rumun *v.* Greeja Nund, 5 W. R. 160 (1866). This, however, is not so now [see Ill. (*e*)], though the result both of the claim and set-off must be a pecuniary liability. See Ahmedabad Advance, etc., Co. *v.* Lakshmishankor, 30 B. 173, 193 (1905).

(6) Hukm Chand, C. P. C. 782.

(7) Rutee Zummun *v.* Gurij Nund, 7 Wym. R. 218; Bachun *v.* Hamid Hossein, 14 M. I. A. 377, at p. 386 (1871); Gocool Coomar *v.* Bhichoock Singh, 22 W. R. 1 (1874); Scanlan *v.* Herrold, 10 W. R. 295 (1868); Hosseina Bibee *v.* Smith, 22 W. R. 15 (1874); s. c., 13 B. L. R. 440; Ram Dyal *v.* Ram Dhun Dass, 4 Agra 43 (1868); Kalee Coomar *v.* Huro Chunder, 17 W. R. 177 (1872) [as regards this case it has been said in O'Kinealy's C. P. C. that some stress seems to have been laid on the fact that the claims were altogether of another nature, but looking at Ill. (*e*), that would not by itself be a valid objection]: *vide post*.

this rule must be a sum ascertained; that is, liquidated, and not damages undetermined,(1) such as a liquidated amount due under a bond,(2) or a debt payable according to an award.(3) The sum to be set off must be ascertained before the set-off is claimed, and it is not sufficient that it may be ascertained on inquiry.(4) The claim is sufficiently certain if it is capable of being reduced to a certainty by simple calculation.(5) A sum decreed is ascertained and may be set off.(6) No decree by way of set-off can be awarded to a defendant for a sum to be ascertained on a settlement of accounts, even though the result of the suit shows that nothing is due to the plaintiff.(7) There is nothing in this rule to restrict the set-off to claims in respect of the same matter which forms the subject of the plaintiff's suit. The rule allows a set-off of every ascertained sum of money, and no restriction should be placed on that right which is not to be found in the section itself. Though the restrictions on equitable set-off of unascertained sums are proper, there is no reason, as there is no authority, for grafting them on to the law in regard to ascertained sums.(8) While it is a general principle of set-off at law that the amount claimed should be certain and ascertained, and that an unliquidated demand may not be set off even if it should arise on the same contract on which the plaintiff's demand is based, this is not so in the case of equitable set-off. This may be allowed in the case of unliquidated damages, that is, an amount which can only be ascertained by the decision of the Court (9) where the respective claims of the parties arise out of one and the same transaction.(10)

(1) Pragi Lal *v.* Maxwell, 2 A. 284 (1885); Raghu Nath Das *v.* Ashraf Husain, 2 A. 252 (1879) [this decision was, however, prior to the passing of the Transfer of Property Act; see Shiva Devi *v.* Jaru Haggade, 15 M. 290 (1891)]; Abul Hasan *v.* Zohra Jan, 5 A. 299, 301 (1883); Amir Zama *v.* Nathu Mal, 8 A. 396 (1883).

(2) Watson & Co. *v.* Brojo Soondaree Debia, 16 W. R. 225 (1871).

(3) Gouri Sahai *v.* Ram Sahai, 7 A. H. C. R. 157 (1875).

(4) Hukm Chand, C. P. C. 788; see Zummeeroonissa *v.* Gayer, 6 W. R. Civ. Ref. 26 (1866); the contrary was held in Warburton *v.* Anderson, 1876, P. R. No. 25, mainly on the ground that the amount spent in repairs, though not ascertained at the beginning of the inquiry, would be so at the time the inquiry contemplated by the section was finished, and the Court would have to make a decree, the amount being a debt if the tenant could show that he had not spent more than the landlord was bound to spend. However, if this argument were correct, then it has been pointed out (Hukm Chand, 789) every claim for unliquidated damages might be set off, as after inquiry the amount of such damages would also be an ascertained amount.

(5) See Hukm Chand, C. P. C. 789.

(6) See Ill. (*d*), Bhagawani Kunwar *v.* Lala Baijnath Prasad, 2 B. L. R., A. C. 84 (1868).

(7) Huro Soondaree *v.* Bungshee Mohun, 5 W. R. 32 (1866).

(8) Hukm Chand, C. P. C. 790, whose observations are supported by Ill. (*c*) to the section where the set-off is in respect of a different matter. As pointed out by him, any observations to a contrary effect in Abul Hasan *v.* Zohra Jan, 5 A. 299, 301 (1883); Amir Zama *v.* Nathu Mal, 8 A. 396 (1886), were not necessary. No grounds are given for the decision which was under the old Code, Heera Lal *v.* Bishen Suhaye, 1 W. R. 297 (1864), and it does not appear to have ever been followed.

(9) Kistnasamy Pillai *v.* Municipal Commissioners, Madras, 4 M. H. C. R. 120, 128, 129 (1868).

(10) Kishorchand Champalal *v.* Madhowij Visram, 4 B. 407 (1879), but not where the claims are wholly unconnected: Clark *v.* Ruthnavaloo Chetti, 2 M. H. C. R 296 (1865), *vide ante*.

"**Legally recoverable.**"—Set-off is allowed to prevent cross actions. It was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which are already enforceable in an action; and it has always been accordingly held that a set-off can only be successfully pleaded when an action could have been maintained for the same debt.(1) As the sum must be legally recoverable, a demand arising out of a transaction which is legally invalid cannot be the subject of a set-off. A defendant therefore cannot recover in respect of a claim without cause of action,(2) or barred under sect. 11, *ante* (3), or O. II. r. 2, or by the Limitation Act,(4) or based on a decree incapable of being enforced,(5) or in respect of an infant's debt.(6) In a suit for arrears of rent the amount of a new road cess paid by the defendant was held not to have been payable by the plaintiff under the terms of the lease, as a prior income tax was, and therefore not recoverable by the defendant from the plaintiff, and thus not liable to be set off.(7) In short, the claim sought to be set off must be one upon which a separate action could have been maintained. The money set-off must be of course recoverable from the plaintiff, not from any one else, and it must be due to the defendant, who cannot set up a right subsisting in a third party. The defendant's right of set-off of a demand against a person is not affected by the circumstance that the suit is brought not by that person but by an assignee of his. This is so, even where the assignment is by a sale in execution of a decree against him.(8) A cannot set off against a claim made by B, in respect of separate dealings between him and A, a debt due from a firm consisting of a father and two sons, one of whom is B.(9) Neither can a defendant set off against a claim of money any portion of an amount in respect of which the defendant, jointly with another, not a party to the suit, can claim contribution from the plaintiff.(10) Where in a suit by a company in liquidation it was argued that the defendant's claim was not legally recoverable as his remedy was only proof in liquidation, where probably he would recover not the whole of the ascertained sum but only a dividend, it was held that the words "legally recoverable" had no reference to the ability of the debtor to pay the demand in full, and that a sum was legally recoverable, though in the result the creditor must be satisfied with a dividend.(11)

"**The same character.**"—Mutuality of debts is required not only as

(1) Rawley *v.* Rawley, 1 Q. B. D. 460, at p. 466.

(2) Zumeerunneissa *v.* Gayer, 6 W. R. Ref. 26 (1866), subsisting when the suit was instituted; Gocool Coomar *v.* Bhichook Singh, 22 W. R. 1 (1874).

(3) See Amir Zama *v.* Nathu Mul, 8 A. 396 (1886), where it was held that the set-off was not barred under s. 13.

(4) Pragi Lal *v.* Maxwell, 7 A. 284 (1885); Heeralal *v.* Bishen Suhaye, 1 W. R. 296 (1864). And see Bachnan Lal *v.* Banarsi Das, 35 A. 228 (1913); 17 C. W. N. 1243 (a debt barred by Limitation Act but not by Punjab Act I. of 1904 allowed as set-off).

(5) Huro Pershad *v.* Fool Kishore, 16 W. R. 308 (1871).

(6) Rawley *v.* Rawley, 1 Q. B. D. 460.

(7) Surnomoyee Dabee *v.* Purresh Narain Roy, 4 C. 576 (1878); Shumbhu Nath *v.* Hurro Soondaree, 11 C. L. R. 140 (1882).

(8) Bhagawani Kunwar *v.* Lala Baijnath Prosad, 2 B. L. R., A. C. 84 (1868).

(9) Dhunpat Singh *v.* Forbes, 1 Ind. Jur. N. S. 354 (1862).

(10) Umanath *v.* Monsurali, 14 C. W. N. 786 (1910).

(11) Ahmedabad Advance, etc., Co. *v.* Lakshmishanker, 30 B. 173 (1904).

regards the identity of the parties, but also as regards the quality of their rights. The debts should not only be due to and from the same person, but in the same capacity. A party may act in different characters, and his private will be held different from his official character. So in a suit by a public officer in his official character, the defendant cannot set off a claim against him personally, and *vice versâ*. Similarly, a claim which the defendant has against the plaintiff individually cannot be set off against a claim due to plaintiff as trustee, though on account of the special nature of a trust he may set off a claim due to him individually against a claim due by him as trustee.(1) An account due as manager cannot be set off against a personal liability.(2) A legal representative of a deceased does not fill the same character as regards his own debts and the debts of the deceased. See illustrations (*a*) and (*b*) to rule. An executor or administrator, however, fills the same character as regards debts due to and from the deceased, and so in an action against the representative as such the latter may set off all claims against the plaintiff which his testator or intestate may have set off against him, and which, therefore, must have been due to the testator or intestate.(3) Where in the case of a company in liquidation each liability arose prior to the liquidation, though the amounts were ascertained after it, both parties were held to fill the same character.(4) A set-off was disallowed where the decree which was sought to be set off was a decree not against the plaintiffs but against third parties *benamidars* of the plaintiffs.(5)

Written statement.—The rule is that a set-off, if claimed, must be specially pleaded. If, however, the particulars are sufficiently set out, it is not necessary that it should be specifically stated that they are alleged by way of set-off. The written statement contemplated by this section is deemed a plaint for the sum sought to be set off, and must be stamped accordingly.(6) But these cases have been dissented from by Banerjee, J.(7) Where the defendant did not raise an issue as to set-off in the first Court, the Privy Council declined to entertain it.(8)

Jurisdiction in cases of set-off.—The amount claimed to be set off must not exceed the pecuniary limits of the Court's jurisdiction.(9) This proviso was in the last Code contained in the second paragraph, which is now omitted. It has been transferred to the first clause. The entire amount

(1) Hukm Chand, C. P. C. 824; Bhoirub Chunder Doss *v.* Hafezunissa Khatoon, 2 C. L. R. 414 (1878) [it is essential to the validity of a set-off that the debts should be mutual, due from and to the same parties, and in the same right].

(2) Abul Hasan *v.* Zohra Jan, 5 A. 299 (1883).

(3) See Chennappa *v.* Raghunatha, 15 M. 29 (1892); Watson & Co. *v.* Brjo Soondaree Debia, 16 W. R. 224 (1871); Grish Chunder Lahoory *v.* Koomaree Dabea, 1 W. R. Misc. 23 (1864).

(4) Ahmedabad Advance, etc., Co. *v.* Lakshmishanker, 30 B. 173 (1904).

(5) Tiluk Chandra Roy *v.* Jasoda Kumar Roy, 11 C. W. N. 215 (1906).

(6) Amir Zama *v.* Nathu Mal, 8 A. 396 (1886); Bai Shri Magirabai *v.* Narotam Hargovan, 13 B. 672 (1889); Chennappa *v.* Raghunatha, 15 M. 29 (1891).

(7) Fakir Chandra Dutta *v.* Gisborne & Co., 8 C. W. N. 174 (1903).

(8) Nan Karay *v.* Ho Htaw, 13 I. A. 48, 56 (1886); s. c., 13 C. 124.

(9) See in Ram Lal *v.* Lancaster, 3 A. H. C. R. 114 (1871); Brojendra Nath Das *v.* Budge Budge Jute Mill, 20 C. 527 (1893).

claimed to be set off must not exceed the limits of jurisdiction; the excess of such amount over the plaintiff's claim, for which the defendant may ask a decree in his favour, not being material in the question of jurisdiction.(1) And where a Court has two different pecuniary jurisdictions, the jurisdiction referred to in this rule will be that in which the suit is being taken cognizance of. Thus, where a Subordinate Judge, with unlimited pecuniary jurisdiction, was invested with Small Cause Court jurisdiction, and in the exercise of that jurisdiction took cognizance of a suit, it was held that the claim for set-off in it, of an amount exceeding the pecuniary limit of the Small Cause Court jurisdiction, could not be inquired into by him.(2) A question might arise whether a Court could entertain a set-off, a claim for which, though within its pecuniary jurisdiction, was otherwise not within it. It has been held that the rule does not refer to material jurisdiction in any way, or contemplate a case in which a suit for the amount claimed to be set-off is beyond the jurisdiction on account of its nature, as may be the case in some Provinces as regards claims for amounts for rent of agricultural lands.(3) It has, however, been also held generally that no Court can entertain a set-off if it would not have had jurisdiction to entertain a suit, if one had been brought to recover the money sought to be set off.(4) And see last paragraph.

Effect of set-off.—The set-off is to have the effect of a plaint (5) in a cross suit, and being treated as a cross action it is not affected by anything which relates solely to the plaintiff's claim. It is not necessary that the plaintiff's demand should actually exist. Thus the defendant may deny the plaintiff's claim, and also plead a set-off, and may obtain a decree for it, although no sum may be found due to the plaintiff.(6) And if a certain amount is found due to the plaintiff, but a greater sum is found due to the defendant, a decree will be made in favour of the defendant for the recovery of the balance.(7) And it has been held that the same rule applies in the case of a set-off which is not within the purview of this rule.(8)

An appeal will lie to the same Court as if the sum had been demanded in a separate suit.(9) So long as set-off was deemed a mere defence the plaintiff

(1) Thakurdas *v.* Nand Lal, 1890, P. R. No. 17.

(2) Barote Gaga *v.* Sepoy Pongu, 14 B. 371 (1889); apparently overruling in effect, Rampratab *v.* Ganesh Rangnath, 12 B. 91 (1887), which, however, was not referred to.

(3) Thakurdas *v.* Nand Lal, 1890, P. R. No. 17; and see Hukm Chand, C. P. C. 832, where it is said that the principle of connexity is considered sufficient to confer material jurisdiction in such cases.

(4) Beni Madho *v.* Gaya Prasad, 15 A. 404, 405 (1893).

(5) As to stamp, *vide ante*, "Written statement."

(6) Hayatkha *v.* Abdulakha, 6 B. H. C. R., A. C. 151 (1869); in an earlier case it was held that a decree could not be awarded for a sum to be ascertained in a suit for accounts, Hurro Soondaree *v.* Bungshee Mohun, 5 W. R. 32 (1866), but this was because there could be no set-off in respect of an unascertained sum.

(7) See O. XX. r. 19, *post*.

(8) Pragi Lal *v.* Maxwell, 7 A. 284 (1885), *per* Oldfield, J. [*contra*, Duthoit, J.]. The point was queried in Brojendra Nath Das *v.* Budge Budge Jute Mill, 20 C. 527 (1893); and now see last para. of s. 216, *post*.

(9) O. XX. r. 19, *post*, under which appeals from decrees relating to set-off lie to the Courts to which appeals in respect of the original claim would lie. See Ram Lal *v.* Lancaster, 3 A. H. C. R. 114 (1871); as to stamping of memorandum of appeal, see Chennappa *v.* Raghunatha, 15 M. 29 (1891).

could at any stage of the suit put an end to it by putting an end to the suit itself. It fell with the action to which it was an adjunct. However, as affirmative relief can now be given on a claim for set-off, the plaintiff cannot, by refusing to proceed with the case, defeat the defendant's right to recover under his set-off.(1) As to lien,(2) the rule seems to assume that it is usual for a decree to make costs payable to the pleader instead of to the party.(3)

Rules relating to written statements.—This clause is new; see notes to other rules of same order. Court fees must be paid on set-off claimed in written statement.(4) Where the case was not strictly one of set-off under the former section, so as to make applicable to it the provisions of the third paragraph of that section (corresponding with the second clause of this rule), it was held that the written statement need not be stamped as a plaint.(5)

Subsequent pleadings

9. *No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but* the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same. [s. 112.]

"No pleading," etc.—And to sect. 112 of the last Code shortened and remodelled. This rule corresponds to sect. 122 of the Code of 1859. By r. 1, *ante*, written statements must be filed before or at the first hearing, by which is meant that they must be filed before the parties have entered upon their case.(6) This is subject to r. 6. Accordingly an application to file a supplemental written statement after the case had begun was refused.(7) Where a written statement was improperly admitted, but without prejudice to the opposite party, the Court refused to interfere in appeal.(8)

"Court may at any time require."—This may be done at any time. In the Code of 1859 occurred the words "before final judgment," and it was accordingly held to mean that written statements could be called for only by the first Court and before judgment.(9) The written statement may be called for from either plaintiff or defendant. The Court was held justified in calling for a written statement which did not add to or vary the plaintiff's claim, but

(1) See English O. 21, r. 16.

(2) See Hukm Chand, C. P. C. 834; Ann. Pr., O. 65, r. 14; the general rule is that the right of set-off is not affected by the solicitor's ordinary lien for costs: Pringle *v.* Gloag, 10 Ch. D. 676.

(3) Brijnath Dass *v.* Juggernath Dass, 4 C. 742, 743 (1879).

(4) Guise *v.* Ananta Ram Rathe, 10 C. W. N. 199 (1905).

(5) Subramanian Chettiar *v.* Muthuswami Aiyangar, 17 M. L. J. 481 (1907).

(6) Munchershaw Bezonji *v.* New Dhurumsey Co., 4 B. 576, at p. 578 (1880).

(7) Ib.

(8) Lall Mahomed *v.* Dhoolee Ram, 22 W. R. 377 (1874).

(9) Juggeshur Mookerjee *v.* Gopee Kishen Sein, 5 W. R. 50 (1866).

simply supplied omissions in the plaint.(1) In the High Court an order directing the filing of a written statement is generally asked for and granted on the presentation of the plaint, and it was held that this was not such an order of Court as to subject the party to the penalty of contempt for non-compliance.(2) It was in an early case held that if a party neglects to file a written statement when ordered to do so the Court would examine him as to his grounds of defence, and confine him to such statements or adjourn the case at his expense.(3) But in other cases the Court refused to hear a party who having been ordered to file a written statement omitted to do so.(4)

Procedure when party fails to present written statement called for by Court.

10. *Where* any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may *pronounce judgment* against him, or make such order in relation to the suit as it thinks fit.

Default to present written statement.—The Court may either pass a decree against the defaulting party or make such other order as it thinks proper. Where, in a case before Peterson, J., the defendants, after ample opportunity, neglected to put in a written statement, that learned Judge stated that in future he should put the defendant into the box and examine him as to the grounds of his defence; and if on examination it should appear that a written statement was desirable, the case would be adjourned for that purpose at the expense of the defaulting party.(5) Defendant remained in Calcutta one month after it was ordered that he should put in a written statement, and then went on a pilgrimage. His son applied for leave to file a written statement, and his application was refused, as no cause was shown why his father had not filed it before he left Calcutta.(6) This rule corresponds with sect. 106, Act VIII. of 1859. It has been held that in Rules 105 and 106 of the Bombay High Court Rules (Original Side) there is nothing to prevent a defendant who has not filed his written statement from defending the suit at the hearing.(7)

(1) Jahangeer Buksh *v.* Bheckaree Lall, 11 W. R. 71 (1869).

(2) Moran and others *v.* Gladstone and others, Cal. H. C., May 14th, 1868, cited in Broughton, C. P. C. 130.

(3) Ramrutton *v.* Oriental Inland Steam Navigation Co., 2 Hyde, 89 (1864).

(4) Shamasoondurce Dossee *v.* Brindabadub Mitter, Cal. H. C., Aug. 10th, 1865; Sreenath Doss *v.* Rance Dossee, W. R. 27, 1865, cited ib.

(5) Ramrutton *v.* Oriental Inland Steam Navigation Co., 2 Hyde, 89 (1864).

(6) Denomoye Dossee *v.* Tarachurn Coondoo, 1 Bourke, 153 (1868).

(7) Jayantilal *v.* Nagnath, 15 Bom. L. R. 126 (1912).

ORDER IX.

Appearance of Parties and Consequence of Non-appearance.

1. On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing *is* adjourned to a future day fixed by the Court. [s. 96.]

Parties to appear on day fixed in summons for defendant to appear and answer.

"**Day fixed.**"—This refers to the day fixed for the first hearing of the suit.(1) An appearance under the Code is not the same thing as appearance as it used to be in the Supreme Court, and is now in the High Court where the English mode of entering appearance by attorney is recognized, and according to the practice of the High Court there is power to order a case to be set down at once in the general cause list if the defendant enters appearance by his attorney before the time for appearance fixed in the summons has expired. In any case a Court could by consent, and on the application of the defendant, issue a new summons altering the day for appearance.(2) When, however, dealing with the question of appearance, as that term is used in the Code for the purpose of determining whether the provisions in this Order apply, an objection by the defendant before the day fixed for hearing to the plaintiff's application for attachment before judgment is not an appearance on that date.(3)

Application of these provisions.—These provisions are, from their very nature and language, applicable to suits in their initial stage and not to proceedings taken in execution of decrees made in those suits. It was, however, at one time erroneously considered that sect. 647 of the Code (now 141) applied to execution proceedings as being proceedings of a miscellaneous character, and by virtue of that section these provisions were, so far as was practicable, made applicable to such proceedings. In order to overrule such decisions, sect. 647 was amended by Act VI. of 1892, by the addition of an Explanation declaring that that section did not apply to applications for the execution of decrees which are proceedings in suits. The application of sect. 647 having thus been prohibited to applications for

(1) Zain-ul-Abdin *v.* Ahmad Raza, 2 A. 67, 70 (1886); s. c., 5 I. A. 233.

(2) Cumming *v.* Green, 4 B. L. R. App. 75 (1870).

(3) Hira Dai *v.* Hira Lal, 7 A. 538 (1885) *vide post*, "Appearance."

execution, it was held that there was nothing in the Code as so amended which authorized a Court to apply at the stage of execution any of the procedure enacted in the corresponding Chapter of the last Code.(1) But that though this was so the Court might, where necessary, act under the inherent powers it possesses to make such just orders as are necessary for the proper disposal of the work given to it.(2)

Appearance.—The word "appear" must be interpreted in the same sense in all the following rules as in other parts of this Code in which it occurs, such as O. XVII. r. 2, *post*,(3) and whether the plaintiff or defendant is spoken of.(4) What then is appearance? If there is none, the judgment is *ex parte*. It has been said that in most cases the question whether a decree is *ex parte* or not is a question of fact.(5) It is necessary, however, to ascertain the law governing those facts. O. IX. r. 1 indicates what is meant by appearance, namely, the actual *attendance* in the Court-house *of the party in person* or by *pleader* or *recognized agent*, who, under O. III. r. 1, must be duly appointed to act on his behalf, or by a *co-party* under O. 1. r. 12. Under the terms of O. III. r. 1, an appearance by a recognized agent is equivalent to an appearance in person, unless the Court directs personal appearance. Plaintiffs must all be represented by the same pleader, or set of pleaders, and cannot be severally represented by different pleaders.(6) Defendants can, of course, be severally represented, though where such several representation is unnecessary, as where the interests are not in conflict, the Court will not allow more than one set of costs. Sect. 64 of the last Code, read with Form No. 117 of the Fourth Schedule of that Code, explained, it was held, the nature of the defendant's appearance in obedience to the summons to appear and answer. He was to appear in person *or* by a duly authorized pleader, *duly instructed and able to answer all material questions*, or who shall be *accompanied by some other person* (which includes a recognized agent) *able to answer* all such questions. He was further given notice that in default of his appearance—that is, appearance in either of the ways specified—the suit would be determined in his absence; that is, under this Chapter of the last Code. Thus, the appearance mentioned in that Chapter meant attendance in person or by an authorized co-party or by a pleader "duly instructed," etc., or by a recognized agent who intended to appear and did in fact appear for the party, whether he was able or not to answer all material questions.(7) The test of whether a defendant has or has not "appeared" is whether such of the requirements of the summons as relate to appearance have or have not been complied with.(8) On this principle it is held that when a pleader attends who is not duly instructed in

(1) Dhonkal Singh *v.* Phakkar Singh, 15 A. 84, 94 (1893); Hajrat Akramnissa *v.* Valiulnissa Begam, 18 B. 429, 431 (1893). See notes to s. 141, *post*.

(2) Dhonkal Singh *v.* Phakkar Singh, *supra*.

(3) Soonderlal *v.* Goorprasad, 23 B. 414, 420 (1898), *per* Strachey, J., whose judgment is the only reported one dealing systematically with the subject, and is deserving of careful study.

(4) Ib. 421.

(5) Cooke *v.* Equitable Coal Co., 8 C. W. N. 621, 624 (1904).

(6) Jankibai *v.* Atmaram, 8 B. H. C. R. 241 (1871).

(7) Muruga Chetty *v.* Rajasami, 22 M. L. J. 284 (1912).

(8) Enatulla Basunia *v.* Jibon Mohan Roy, 19 C. L. J. 535 (1914).

the suit he does not represent the defendant who in such case does not appear.(1) Inasmuch as appearance is attendance in the Court-house on the day fixed for hearing, it is clear that what is done before the day fixed in the summons and that the mere filing of a *vakalutnamah* is not appearing in person or by pleader; (2) nor is an "appearance," in the technical sense as used on the original side of the Court, by the entry of the name of the attorney on the record; nor was there appearance where the defendant had filed a *vakalutnama* and objected to attachment issuing before judgment, but did not appear as directed by the summons, nor on a further date when the case was decided.(3) Nor is merely putting in a written statement, but when the case comes on not attending in person or by pleader, an appearance.(4)

Nextly, the personal attendance at the day of hearing must be in accordance with law. If a person is ordered to attend in person, appearance can only be effected in this way, and if he does not, but sends a pleader, he will be considered absent, and there is no appearance. See O. IX. r. 12, *post*.(5) If there be no such directions he may appear either in person or by a co-plaintiff or co-defendant under O. 1. r. 12, or by a pleader or recognized agent under O. III. r. 1. They must, however, represent him, and therefore the appearance of an unauthorized pleader is not an appearance by the party.(6) There is, of course, no difficulty when there is no actual attendance by any of these persons; nor, indeed, where there is attendance, except in the cases to which reference will be made. If a party attends in person or by pleader there is appearance, though he may neither have filed a written statement (7) nor made a verbal one.(8) If the Court has refused to receive a written statement, but the pleader attends when issues are settled and cross-examines witnesses, there is an appearance.(9) It has even been held that where a decree is passed on a *solehnamah* and the defendant alleges that it is a forgery and that she had no notice of the suit, it is not *ex parte*.(10) But this has been dissented from, it being held that the defendant is entitled to go behind the decree and to show that it is in fact *ex parte*, and that the fact that the decree appears to be based on a compromise impugned as a forgery does not make sect. 108 (now O. IX. r. 13), *post*, inapplicable.(11) The appearance, moreover, is to answer, and if an application by a party who attends for leave to be heard is rejected and the defendant is not heard, then the judgment is *ex parte*.(12) Where both parties appeared and the case was gone through in their presence

(1) Soondurlal *v.* Goorprasad, 23 B. 414 (1898).

(2) Haloo *v.* Atwaro, 7 W. R. 18 (1867); Sheo Churn *v.* Heera Lall, 11 C. L. R. 537 (1882).

(3) Hira Dai *v.* Hira Lal, 7 A. 538 (1885).

(4) Purus Ram *v.* Juyuntee Pershad, 1 A. H. C. R. 154 (1869).

(5) And see Krishna Ram *v.* Gobind Prasad, 8 A. 20 (1885).

(6) Raj Kumar *v.* Jugal Kishore, 18 A. 241 (1896).

(7) Goluckbur *v.* Bishonath, Marsh. 32 (1864).

(8) Jankee Ram *v.* Chandrabully, 7 W. R. 295 (1867).

(9) Raghapa *v.* Parapa, 1 B. 217 (1875).

(10) Hemmo Moyee *v.* Watson, 14 W. R. 299 (1870).

(11) Bholai Naskar *v.* Alach Naskar, 1 C. W. N. cxxvii. (1897).

(12) Syud Mahomed *v.* Shaik Muntozul, 18 W. R. 400 (1872).

and nothing remained to be done except to hear arguments, the case was held not to be one which could be dealt with as for default of appearance.(1)

Contest has mainly arisen where either the party or his pleader or recognized agent does actually attend in court, but applies for an adjournment, and, when the adjournment is refused, withdraws from court. So far as these provisions are concerned, the only question is appearance or non-appearance. If the party has appeared in either of the ways specified, viz. in person or by authorized co-party, or by authorized pleader "duly instructed and able to answer," etc., or by a recognized agent who intends to appear and does in fact appear for the party, then he has appeared, and it is immaterial for what *purpose* he has appeared or what *action* he has taken on such appearance. If, therefore, a party is present in person and personally applies for an adjournment, he has appeared; the purpose for which he appeared, or the action which he took on appearance, is immaterial.(2) Appearance, however, by a pleader does not, as in the case of a party, mean mere presence. He must also be duly instructed and able to answer all material questions relating to the suit. Where, therefore, the party is absent, and an application for adjournment is made on his behalf by a pleader, who has no other instructions, and whose functions are at an end when the adjournment is refused, in that case the party has not appeared. If, therefore, the pleader in such case retires after an unsuccessful application for adjournment, the decree passed is *ex parte*.(3) In a recent case, after the plaintiff's case had been closed and the defendant's case part-heard, counsel for the defendant applied for an adjournment, mainly on the ground that two of his witnesses had not arrived, and this was granted, but he was warned that if

(1) Rai Chand *v.* Mathura Prasad, 3 A. 292 (1880).

(2) Soonderlal *v.* Goorprasad, 23 B. 414 (1898).

(3) Soonderlal *v.* Goorprasad, *supra*; Lalta Prasad *v.* Nand Kishore, 22 A. 66 (1899); Cooke *v.* Equitable Coal Co., 8 C. W. N. 621 (1904); Shankar Dat *v.* Radha Krishna, 20 A. 195 (1897) [no application for adjournment, but pleader stated that he had no instructions]; Ramtahal Ram *v.* Rameshwar Ram, 8 A. 140 (1886) [the same; it is not sufficient that the pleader be authorized to enter appearance, he must have instructions in the cause]; Bhimacharya *v.* Fakirappa, 4 B. H. C. R. 206 (1867) [the presence of a pleader who is not supplied with the means of answering cannot be held to be a representation of the defendant which will give to the suit the character of a defended action: foll., in Administrator-General *v.* Dyaram Das, 6 B. L. R. 688 (1871), which last case was followed in Doyal Mistree *v.* Kupoor Chund, 6 C. 318 (1878); and see Buldeo Misser *v.* Syud Ahmed, 15 W. R. 143 (1871); case dealt with was dissented from, Dhan Bhagat *v* Ramessur Dutt, 20 W. R. 53 (1873)]; Ramchandra Pandurang *v.* Madhav Purushottam, 16 B. 23, 24 (1891) [" If he (pleader) had said that he had received no instructions the Court could no doubt have held that there was no proper appearance "]. As was pointed out in Soonderlal *v.* Goorprasad, 23 B. at p. 417, the headnote in Rampertab Mull *v.* Jakeeram Agurwallah, 23 C. 991 (1896), is quite misleading. The Court did not, however, actually decide the question whether or not the case fell within s. 102 of the last Code, but dismissed the application on the merits. Where, however, a pleader has instructions, but says the brief came to him too late to prepare himself, this may be a good reason for adjournment, but is not, it has been said, a default of appearance: Chiranji Lal *v.* Kundan Lal, 20 A 294 (1898); foll. Ramchandra *v.* Madhav, 16 B. 23 (1891), and diss. from Shibendra *v.* Kinoo, 12 C. 605 (1886). The judgment refers to a case at p. 603, but this appears to be a mistake, and the case at p. 605 is meant.

they did not appear on the following day any application for a further adjournment must be supported by proper materials. He was present on the following day, but without the two witnesses, and his application for a further adjournment was refused on the ground that no proper reasons for it had been made out. On this he withdrew; and the case was then decided on its merits. When he afterwards applied to have the decree set aside as *ex parte*, it was submitted that at the adjourned hearing he had not appeared, but had only applied for a further adjournment,(1) and that therefore sect. 157 of the last Code (now represented by O. XVII. r. 2) became applicable.(2) It was held that the Court had no power to make an order under sect. 108 of the last Code (now represented by O. IX. r. 13) combined with sect. 157 of the last Code, and that his remedy was an appeal against the refusal of his application for further adjournment.(3)

Lastly, there is the case in which the party being absent, the recognized agent is present. If the latter accompanies a pleader, who applies for an adjournment but who is otherwise uninstructed, then it is a question of fact whether the agent is able to answer all material questions, in which case the party must be deemed to appear by the pleader. In such a case, the requirements of the summons as to appearance are as fully satisfied as if the party had appeared in person and applied for an adjournment; and equally, in such a case, the purpose of the appearance or the action taken on appearance is immaterial. If, however, the party being absent, neither the pleader applying for adjournment nor any person accompanying him, whether a recognized agent or not, is able to answer, then, apart from O. III. r. 1, there is no appearance within this rule, and the only remaining question is whether the party appears by his recognized agent under the former rule. That is a question of fact. The mere presence of the agent is not necessarily an appearance of the party. It must be determined whether he intended to appear, and did in fact appear, for the party, in the exercise of his power under O. III. r. 1, *ante*.(4) Where a defendant did not appear, and it was alleged that he was insane, and the Judge struck off the case, it was held that he should not have done so, but ought to have made the inquiry contemplated in Act XXXV. of 1858.(5)

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

2. *Where* on the day so fixed it *is* found that the summons has not been served upon *the defendant* in consequence of the failure of the plaintiff to pay the court-fee *or postal charges* (*if any*) *chargeable* for such service, the Court may *make an* order that the suit be dismissed: [s. 97.]

Provided that no such order shall be *made* although the

(1) Satish Chandra Mukerjee *v.* Aliara Prosad Mukerjee, 34 C. 403 (F. B.) (1907); and see Venkatarama *v.* Nataraja, 24 M. L. J. 235 (1912).

(2) Mariannissa *v.* Ram Kalpa Gorain, 34 C. 235 (1907); Cooke *v.* Equitable Coal Co., 8 C. W. 621 (1904).

(3) Kader Khan *v.* Juggeswar, 35 C. 1023 (1908), distinguished in Enatulla Basunia *v.* Jibon Mohan Roy, 19 C. L. J. 535 (1914).

(4) Soonderlal *v.* Goorprasad, 23 B. 414 (1898).

(5) Musst. Moorut *v.* Baboo Dhurm, 2 W. R. Misc. 7 (1865).

summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

"**May make an order that the suit be dismissed.**"—If the plaintiff has omitted to pay the court-fee by accident or the like, the Court may, on his application, direct the issue of a fresh summons. If it does not, there is no other course open but to dismiss the suit; or the Court may dismiss the suit at once, leaving the plaintiff to apply under r. 4, *post*. The rule applies not merely where there is a single defendant, but also where one of several defendants has not been served, for the suit is incomplete, and cannot be heard without notice to all the defendants. Where, however, in the latter case no objection was previously taken, the Court declined to entertain it on special appeal.(1) The suit may be dismissed whether the summons was that originally issued, or that re-issued, on account of non-service of the original one.(2) But in no case should the case be disposed of before the day fixed for hearing.(3) In the under-mentioned case the Court was disposed to think, though the case was dealt with on the merits, that an order under the corresponding former section was not appealable.(4) If the court-fee for serving the summons on a defendant newly added by the Court is not paid, the suit, according to the Bombay High Court, should be dismissed altogether, even as against the original defendant; but if it is proceeded with and decreed against him, and he does not take that objection on appeal, he cannot raise it for the first time on special appeal.(5) The Allahabad High Court appears to have taken a different view,(6) holding that in such a case the suit should be dismissed against those defendants only on whom the summons could not be served, but that if the suit is by mistake dismissed as against the original defendants also, to avoid injustice the dismissal against them should be held to have been ordered under this rule.

Proviso.—The rule contemplates a defendant appearing before service of the summons. In the under-mentioned case (7) the Court stated that it was not necessary to decide whether, if a plaintiff were merely to lodge a plaint and take no proceedings upon it against a defendant, the latter in such a case would have a right to appear; but that where, as in that case, a plaintiff, by legal process of arrest, brought the defendant before the Court, then he had a right to appear at the hearing of the case, although no summons had been served upon him.

3. *Where* neither party appears *when the suit is called on for hearing*, the *Court may make an order that* the suit be dismissed.

***Where* neither party appears, suit to be dismissed.**

(1) Shek Abas *v.* Ibrahimji Hasanji, 5 B. H. C. R. 118 (1868).

(2) Chhaganlal *v.* Vinayakrao, 1898, Bom. P. J. 249.

(3) Gulab Dai *v.* Jiwan Ram, 2 A. 318 (1879).

(4) Lucky Churn *v.* Budurrunnissa, 9 C. 627 (1883).

(5) Shek Abas *v.* Ibrahimji Hasanji, 5 B. H. C. R. 118 (1868).

(6) Gulab Dai *v.* Jiwan Ram, 2 A. 318 (1879).

(7) Syed Ali *v.* Adib, 15 B. 160 (1890).

"**Called on for hearing.**"—The parties are bound to attend from the time the Court opens, and must be in attendance when the case is called on for hearing, and, if absent at that time, they will be treated as not appearing.(1) The Court is not bound to wait for any party until it is about to close for the day, or even till the pleader for the party can find it convenient to attend on account of his engagement in another Court; as, if this were done, Courts would find it difficult to get through their work.(2) The subsequent day referred to in sect. 98 of the last Code was that to which the first hearing is adjourned; (3) but the day fixed for hearing after a remand on appeal was held to be within the meaning of those words.(4) The reference to adjournment has now been omitted because this matter is sufficiently covered by the terms of O. XVII. r. 2.

"**Neither party appears.**"—It does not apply when a party is present, but has omitted to serve notice. Failure to take measures to serve a person with a notice as ordered by the Court is not a non-appearance.(5)

Shall be dismissed.—In cases where the Court does not otherwise direct, dismissal is the only consequence, and the proviso relates to the postponing of the case, and not to the making of any final order in it.(6) Where neither party appears on the day fixed for the hearing of a suit, an order striking the case off the file is illegal; the only order that can be passed in the circumstances being that of dismissal.(7) The rejection of an application of the respondent, asking that security for costs may be taken from the appellant on the non-appearance of both the parties, has been considered, by virtue of the provisions of sect. 647 (now 141), a dismissal under the section which this rule replaces.(8)

Plaintiff may bring fresh suit or Court may restore suit to file.

4. *Where* a suit is dismissed under *rule 2* or *rule 3*, the plaintiff may (subject to the law of limitation) bring a fresh suit, or *he may apply for an order to set the dismissal aside, and* if he satisfies the Court that there was sufficient *cause* for his not paying the court-fee *and postal charges* (*if any*) required within the time *fixed before the issue* of the summons, or for his non-appearance, as the case may be, the Court shall *make* an order *setting* aside the dismissal and *shall* appoint a day for proceeding with the suit. [s. 99.]

(1) Kuttiyali *v.* Pari Makri, 7 M. 356 (1884).

(2) Raj Narain *v.* Akroor Chunder, 24 W. R. 141 (1875) [as to absence of counsel, see Lakhmi *v.* Gatto Bai, 7 A. 542 (1885)].

(3) Comalammal *v.* Rungasamy, 4 M. H. C. R. 56 (1868).

(4) Rughoonath Singh *v.* Ram Coomar, 14 W. R. 81 (1870). See next note.

(5) Haradhun *v.* Protap Narain, 14 W. R. 401 (1870).

(6) Raj Narain *v.* Ananga Mohon, 26 C. 598, 601 (1899).

(7) Alwar *v.* Sheshammal, 10 M. 270 (1887); and see ib. p. 290 as to appeal.

(8) Lakhmi Chand *v.* Gatto Bai, 7 A. 542 (1885).

"**The plaintiff.**"—These words will include the plaintiff's legal representative; but though the latter may thus apply to have the order of dismissal set aside, the order will be set aside only if he proves a sufficient excuse, such as the plaintiff himself would have been required to prove before the order could be set aside.(1) See sect. 146.

"**Fresh suit.**"—Applying the principle embodied in this rule, if a suit is dismissed by an order purporting to be made under this section before the day fixed for hearing on failure to deposit *talabana*, this irregularity on the part of the Court does not deprive the plaintiff of his right to bring a new suit under this section.(2)

"**Satisfies the Court.**"—Each question of this kind must be dealt with, not according to any hard-and-fast general rule, but according to its own particular circumstances.(3)

"**Set aside dismissal.**"—When a suit has been dismissed for default, and the plaintiff has neglected to make an application within thirty days, there can be no review of judgment under sect. 114, *post*.(4) A Judge, when restoring a suit, has no jurisdiction to pass at that time any order as to the general costs of the suit.(5) There is no appeal from an order setting aside the dismissal and appointing a day for proceeding with the suit.(6) But where such an order has been set aside on appeal, and the last order has been reversed by the High Court, the proceedings of the first Court and the decree passed by it are not invalidated on the ground that as an effect of the reversal of the order restoring the suit, there were no proceedings in Court at the time of the passing of the decree in which such decree could be passed.(7)

Dismissal of suit where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons.

5. (*1*) *Where*, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from *the date of the* return *made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers*, to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may *make an order that* the suit *be* dismissed as against such defendant.

(1) Couvin *v.* Bensley, 43 C. 253 (Amer.), cited in Hukm Chand, C. P. C. 707.

(2) Gulab Dai *v.* Jiwan Ram, 2 A. 318 (1879).

(3) Lakhmi Chand *v.* Gatto Bai, 7 A. 542 (1885); in Dhunsook Doss *v.* Hurry Baboo, Bourke, O. C. 115 (1865), the evidence offered was considered insufficient.

(4) Koilash Mondol *v.* Nabadwip Chandra, 2 C. W. N. 318 (1896); dist. in Raj Narain *v.* Ananga Mohan, 26 C. 598 (1899).

(5) Krishna Vithal *v.* Ganesh Bhaskar, 26 B. 201 (1901); s. c., 3 B. L. R. 734.

(6) Alwar *v.* Seshammal, 10 M. 270 (1887); Wahid-un-nissa *v.* Kundan Lal, 35 A. 427 (1913) (plaintiff can apply for revision).

(7) Alwar *v.* Seshammal, 10 M. 270 (1887), p. 290.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Object and effect of rule.—This rule recognizes the practice of issuing fresh summons on the return of the original unserved, but was enacted to put an end to the reprehensible practice of instituting a suit, and then holding proceedings *in terrorem* over the defendant for a long period without taking any steps to bring it to a hearing.(1) Time runs from the date of the return by the Nazir.(2) An addition has, therefore, been made interpreting "return" as that not of the Bailiff but of the Nazir. A plaintiff cannot, however, by merely applying to the Court within a year of the return, for a fresh summons, avoid dismissal of the suit. He must also satisfy the Court that he used diligence in the meanwhile. If he fails to establish either of the two points, his suit must be dismissed.(3) It is to be observed that the exercise of the power conferred is discretional only. The refusal to take a fresh summons on a defendant, though sufficient to justify the dismissal of the suit against him, does not operate to release him from liability.(4) As regards the right to bring a fresh suit,(5) see the case cited, in which the section was recently applied.

[s. 100.]

Procedure *when* only plaintiff appears.

6. (1) *Where* the plaintiff appears and the defendant does not appear *when the suit is called on for hearing, then*—

When summons duly served.

(*a*) if it is proved that the summons was duly served, the Court may proceed *ex parte;*

When summons not duly served.

(*b*) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

When summons served, but not in due time.

(*c*) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) *Where* it is owing to the plaintiff's default that the

(1) See Gourchand Soor *v.* Peary Lall, 15 B. L. R. App. 12 (1875); Ramkissen Doss *v.* Luckeynarain, 3 C. 312 (1878); Gerender Coomar *v.* Juggadamba Dabee, 5 C. 126 (1879), which last case deals with the rules of the H. C. on the subject; Urquhart *v.* Gilbert, 1 Ind. Jur., N. S. 224 (1862). As to the Court's discretion to issue a second summons, see these cases *passim*.

(2) Parsotam Vithal *v.* Abdul Rehmanbhai, 13 B. 500 (1889).

(3) Byaharimal *v.* Satya, 3 Bom. L. R. 402 (1901).

(4) Shaik Alli *v.* Mahomed, 14 B. 267 (1889).

(5) Sita Ram Singh *v.* Pokhpal Singh, 28 A. 749 (1906).

summons was not *duly served or was not* served in sufficient time, the Court shall order *the plaintiff* to pay the costs occasioned by *the* postponement.

"**Appears.**"—See notes to r. 1, *ante*. This rule is not limited in its application to defendants residing within British India.(1) By sect. 74 of the Dekkhan Ryots Act, the Code is only to be applied so far as it is consistent with the Act.(2)

"**When the suit is called on.**"—These words appear to have been inserted so as to limit the rule to the first day of hearing and mark the distinction between these provisions and those of O. XVII. r. 2.

Clause (*a*).—No legal decree can be passed *ex parte* without there being proof of the due service of the summons.(3) Where the summons has been served through another Court, see sect. 28, *ante*. To justify an *ex-parte* decree against all defendants, all must have been served, and if the defendant's liability is joint, and if a decree can only go against all, it has been held that without notice to all the defendants no judgment could be passed.(4) It was held with reference to sect. 56 of the Code of 1859, that "*duly served*" refers to the mode of service and not to the agency by which it is effected.(5) Where a summons is sent by post to a defendant residing out of British India, it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summons was sent, sufficient proof of service to show that the summons was posted, but there must be some evidence of its having been received by the defendant.(6) The Court may proceed, *ex parte*, whether the defendant has been summoned only to appear and answer the claim, or, in addition, to attend and give evidence. In the latter case, it is not necessary, before proceeding *ex parte*, that all the processes prescribed by law for compelling the attendance of the defendant as a witness should be exhausted, it being sufficient that the service of the summons for his attendance has been effected.(7) When a defendant appears, the failure to put in a defence in writing or verbally does not authorize the trial of the suit or make the decree passed in it *ex parte*,(8) not even if the defendant should have been ordered to file a written statement.(9) And if the defendant appears at the first hearing and files a written statement, the fact of his non-appearance at the final hearing does not operate to make the decision passed in the case *ex parte*.(10) In England a plaintiff is by Statute allowed in certain cases to sign judgment for default;

(1) Fakhr-ud-din *v.* Ghafur-ud-din, 23 A. 99 (1900).

(2) Dulichand *v.* Dhondi, 5 B. 184 (1880).

(3) Ib., at p. 100; Ram Lochan *v.* Nitya Kalee, 12 W. R. 211 (1869).

(4) Penfold *v.* Slyfield, 68 N. W. Rep. (Amer.) 226; cited Hukm Chand, C. P. C. 710.

(5) Mackintosh *v.* Kalu Doss, 19 W. R. 234 (1873).

(6) Fakhr-ud-din *v.* Ghafur-ud-din, *supra*.

(7) Taruck Nath *v.* Jeamat Nosya, 5 C. 353 (1879).

(8) Jankee Ram *v.* Chundrabully, 7 W. R. 295 (1867).

(9) Shivarajadhani *v.* Kuppagantulu, 2 M. H. C. R. 311 (1865).

(10) Anantharama *v.* Madhava, 3 M. 264 (1881).

but in this country it has been held that, in all cases where the Court proceeds *ex parte*, the plaintiff must produce *primâ facie* proof of his case,(1) and must prove the claim to the satisfaction of the Court, before he can obtain a decree, except in the case of summary proceedings on negotiable instruments. It is, however, to be noted now that under O. VIII. r. 5 every fact not denied is taken to be admitted; though under that rule such admission is not necessarily equivalent to a proof.(2)

The remedies open to a defendant against whom an *ex-parte* decree has been passed, and who contends that the Court should not have so proceeded, are either to apply under O. IX. r. 13 (formerly sect. 108), *post*, or, to appeal from the *ex parte* decree, under sect. 96. Under O. IX. r. 13, by which a summary remedy is given, the complainant must satisfy the Court not merely that the *proof* required by this rule was not given, but that *in fact* the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing. Where a defendant appeals from an *ex parte* decree, it is sufficient, in the first instance, to establish that in the Court which passed that decree the necessary *proof* of service of summons was not given. It is not incumbent on the appellant to show that the summons was in fact not duly served.(3)

Clause (*b*).—In the under-mentioned case it was held that the Court is bound in every case to issue a fresh summons, though it may order the plaintiff to pay the costs of the postponement, and cannot dismiss the suit or reject an application governed by this rule.(4)

Clause (*c*).—Where, if the defendant had not appeared, the Court would have been bound to postpone the hearing on the ground that sufficient time had not been given to him to appear and answer to the suit, his appearing ought not to put him in a worse position, and an adjournment should be granted.(5)

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

7. *Where* the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. [s. 101.]

Appearance at adjourned hearing only.—Sect. 111, Act VIII. of 1859. What the Legislature intended was that the defendant might be admitted to defend the suit merely upon a petition and without any evidence being gone into to prove the truth of the fact stated in that petition. In fact,

(1) Amrithnath *v.* Dhunput Singh, 8 B. L. R. 44; s. c., 15 W. R. 503 (1871).

(2) Satyes Chandra *v.* Monmohini, 19 C. L. J. 519 (1914).

(3) Fakhr-ud din *v.* Ghafur ud din, 23 A. 99 (1900).

(4) Lallubhai Vajeram *v.* Bai Magangavri, 18 B. 59 (1893). It does not appear, however, why these proceedings, which were in a suit, were treated as miscellaneous.

(5) Shaikh Awlad *v.* Shaikh Abdool, 18 W. R. 141 (1872).

the section contains no provision for and does not appear to contemplate taking such evidence.(1) If the Court admits the defendant to defend, the suit will proceed in the ordinary course as a defended suit. If the Court refuses this, then no appeal lies from the order of refusal; (2) the suit proceeds as an *ex parte* suit, and the defendant may then apply to set aside the decree under O. IX. r. 13, *post*,(3) and if that application be refused he may then appeal under O. XLIII. r. 1 (*c*); or he may appeal against the *ex parte* decree without resorting to the procedure laid down in O. IX. r. 13, *post*.(4) But where though the Court refuses to receive a written statement, it frames issues in the presence of the defendant's pleader, who is permitted to cross-examine, the decree is not an *ex parte* one.(5)

Procedure where defendant only appears.

8. *Where* the defendant appears and the plaintiff does not appear *when the suit is called on for hearing*, the Court shall *make an order that* the suit *be* dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Application of rule.—This rule corresponds with sect. 114 of the Code of 1859. In construing an order alleged by one side and denied by the other to be an order under this rule, the order will be considered as one under it if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance or non-appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the plaintiff appears and the defendant does not appear.(6) It was formerly considered (7) that the Chapter in which the section corresponding to the rule appeared, applied to execution proceedings, but this was subsequently held not to be so, having regard to the change made in 1892 in sect. 647, corresponding with sect. 141, *post*.(8) The rule is applicable to adjourned hearings of cases; (9) and to proceedings before

(1) Ashruffunnissa *v.* Lehareaux, 8 C. 272, 273 (1882).

(2) S. 104, *post*. See Syed Mahomed *v.* Shaik Muntozul, 18 W. R. 400 (1872).

(3) Sankaralinga Mudali *v.* Ratnasabhapati, 21 M. 324 (1897); Ashruffunnissa *v.* Lehareaux, 8 C. 272, 274 (1882).

(4) Ashruffunnissa *v.* Lehareaux, *supra*.

(5) Raghapa bin Hanmapa *v.* Parapa bin Shivapa, 1 B. 217 (1876).

(6) Lalta Prasad *v.* Nand Kishore, 22 A. 66 (1899).

(7) See cases cited *ante*, and Kalee Kristo *v.* Mahomed Kader, 12 W. R. 428 (1869); Raja *v.* Srinivasa, 11 M. 319 (1888); Biswa Sonan *v.* Binanda Chunder, 10 C. 416 (1884); Seetul Pershad *v.* Mahomed Kureem, 5 All. H. C. R. 164 (1873); Sheo Prasad *v.* Kastura Kuar, 10 A. 119 (1887).

(8) See notes *ante*, and Jang Bahadur *v.* Mahadeo Proshad, 8 C. W. N. 160 (1903), where the lower Court held that s. 103 of the last Code did not apply by operation of s. 647 of that Code, and the High Court held that no appeal lay from such decision; s. c., 31 C. 207.

(9) Mariannissa *v.* Ramkalpa Gorain, 34 C. 235, 237 (1907).

the Court to which a reference is made under the Land Acquisition Act.(1) It has been recently held by the Privy Council that this rule does not apply where the main issue of the case has been decided on its merits and there is a subsequent default in appearance.(2) In this case the plaintiff had sued to recover the sum paid by him to release property from a wrongful attachment, and also for damages for it, the District Court had dismissed the first claim on its merits, the plaintiff had then abandoned the second claim and had failed to appear in subsequent proceedings, and the District Judge had thereupon dismissed the whole suit under sect. 102 of the last Code, now represented by this rule.

Non-appearance.—An order can only be made for non-appearance (3) of the plaintiff. A plaintiff fails to appear within the meaning of this rule when his pleader declines to proceed with the suit, and it makes no difference that the party himself was present in Court.(4) It was held under the Code of 1859 that where a commission has issued for local inquiry and the Commissioner requires the attendance of the parties, should the defendant appear and the plaintiff make default in appearing on the day appointed, the proper course is for the Commissioner to dismiss the suit under this rule.(5) A suit can only be dismissed under this rule for default of a nature therein described, and therefore not for non-attendance of witnesses.(6) The Court should neither receive evidence on behalf of a defendant nor examine the merits of the case.(7) If a suit is dismissed for want of evidence, the decision is one on the merits and not under this rule.(8) Non-appearance caused by the death of the plaintiff should not be confounded with default.(9)

Judgment.—The suit should either be dismissed or decreed. "Struck off" is not a proper mode of disposing of the case;(10) though in a case in which such an order was passed, it was held that though the correct expression had not been used, practically the case had to be regarded as having been decided *ex parte*.(11)

(1) Bhandi Sing *v.* Ramadhin Roy, 10 C. W. N. 991 (1905).

(2) Kanhaya Lal *v.* National Bank of India, 37 I. A. 80 (1910); 37 C. 426.

(3) As to the meaning of "appearance" in this connection, see Lalta Prasad *v.* Nand Kishore, 22 A. 66 (1899); Rampertab Mull *v.* Jakeeram Agurwallah, 23 C. 991 (1896); Hinga Bibee *v.* Manna Bibee, 8 C. W. N. 97 (1903); s. c., 1 C. 150. In Kanji *v.* Habib, 2 Bom. L. R. 206 (1900), it was held that there was no default on A's part, as there was nothing to show that B, by whom the suit was admittedly instituted, acted with authority.

(4) Gopala Row *v.* Maria Susaya Pillai, 30 M. 274 (1906); 17 M. L. J. 225; but see Esmail *v.* Haji Jan Mahamed, 33 B. 465 (1908).

(5) Eshan Chunder *v.* Soorjo Lall, Marsh. 139 (1864), *sed qu.*, as the parties were present in the Judges' Court through their vakils; though where the failure was to pay the Commissioner's fees, the order was not considered as passed under this section: Shaik Sahib *v.* Mahomed, 13 M. 570, 571 (1890).

(6) Mahomed Azeem-ool-lah *v.* Ali Buksh, 5 All. H. C. R. 74 (1873).

(7) Parbati *v.* Tulsi Koeri, 18 C. L. J. 128 (1913), p. 130; Kesri Chand *v.* National Jute Mills Co., 16 C. W. N. 968 (1912).

(8) Kartick Chandra Pal *v.* Sirdar Mandal, 12 C. 563, 566 (1885).

(9) Debi Baksh Singh *v.* Habib Shah, P. C., 35 A. 331 (1913); 40 I. A. 151.

(10) Khoob Lall *v.* Toolsie Singh, 17 W. R. 219 (1872); and cf. Alwar *v.* Seshammal, 10 M. 270, 271 (1887); Biswa Sonan *v.* Binanda Chunder, 10 C. 416 (1884).

(11) Beejoy Gobind *v.* Radha Benode, 10 W. R. 348 (1868).

Plaintiff's remedy upon dismissal.—Where the suit is dismissed the plaintiff may apply for a review without any previous application under the next rule; (1) or he may apply under that rule. It is not necessary to draw up a formal decree; and the fact that such a decree has been drawn up cannot alter the nature of an order of dismissal under this rule, which is not a decree within the meaning of sect. 2, and is not liable to be challenged by way of appeal. The present Code has in this respect altered the pre-existing law.(2) An order dismissing a suit at an adjourned hearing for non-appearance of the plaintiff and his pleader was held to be an order under sect. 157 (now O. XVII. r. 2), and its consequential section (the present rule), and not sect. 158 (now O. XVII. r. 3).(3)

Decree against plaintiff by default bars fresh suit.

9. (1) *Where* a suit is wholly or partly dismissed under *rule 8*, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if *he satisfies the Court that there was* sufficient cause *for his non-appearance* when the suit was called on for hearing, the Court shall *make an order setting* aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this *rule* unless notice of *the* application has *been* served *on* the *opposite party*.

Application of rule.—This rule corresponds with sect. 119 of Act VIII. of 1859. The rule applies to original cases and not to cases in appeal,(4) a special procedure in hearing appeals being provided; nor does it apply to execution proceedings.(5) It bars a subsequent suit only when the plaintiff in the latter had been either the plaintiff in the former suit or represented by him.(6) It does not bar a suit the plaintiff in which had been a contesting defendant in a former suit.(7) When an executor presents an application for probate he cannot be regarded as a plaintiff suing in respect of some cause of action, and therefore this rule will not apply.(8) It makes it compulsory on a Court to set aside a dismissal order under r. 8 of this Order where the plaintiff satisfies the Court that there was sufficient cause for his non-appearance; but

(1) Raj Narain Purkait *v.* Ananga Mohan Bhandari, 26 C. 598 (1899).

(2) Rukminimayi Dasi *v.* Paran Chandra Bhera, 39 C. 341; 15 C. L. J. 334 (1910); Parbati *v.* Tulsi Koeri, 18 C. L. J. 128 (1913), p. 130. And see Gilkinson *v.* Subramania Ayyan, 22 M. 221 (1898).

(3) Shrimant Sagajirao *v.* Smith, 20 B. 736 (1895).

(4) Ram Lall Chowdhry *v.* Surdaree Jah (1864), W. R. Misc. 21; Anonymous, 1 Ind. Jur. O. S. 68 (1869); Kali Kishore *v.* Dhunnunjoy Roy, 3 C. 228 (1877).

(5) Madon Mohon Mondul *v.* Baikanta Nath Mondul, 10 C. W. N. 839 (1906). See notes to r. 8, *ante*; Asim *v.* Raj Mohan, 13 C. L. J. 532 (1910).

(6) Ottapurakkal *v.* Cherichil, 33 M. 31 (1909).

(7) Ottapurakkal *v.* Cherichil, 33 M. 31 (1909).

(8) Ramani *v.* Kumud, 14 C. W. N. 924 (1910).

it does not take away the Court's power to restore the case for any other valid reason.(1) It was held to apply to rent cases under Act VIII. of 1869, B. C.,(2) and to proceedings under sect. 9 of the Specific Relief Act.(3) As to default of appearance before Commissioner, see notes to r. 8, *ante*. By O. XVII. r. 2, *post*, the present procedure applies to any day to which the hearing of the trial may be adjourned, but not to the case of a person obtaining time to do some act and making default. That falls under r. 3 of the latter Order.(4) This rule does not apply to suits dismissed for any other reason than non-appearance, and includes suits dealt with under O. XVII. r. 2, *post*, but not those disposed of under r. 3 of that Order.(5) Where a suit was dismissed "in default of prosecution" on the ground that the plaintiff failed to deposit *talabana*, the order was held not to be one under the section corresponding with this rule,(6) as was also the case where a suit was dismissed because neither plaintiff nor his pleader appeared on the day fixed for hearing the argument.(7) At an adjourned hearing of a suit, witnesses on behalf of the plaintiff not being in attendance, the plaintiff applied for issue of a warrant against one of them. The Court refused the application, and the pleader for the plaintiff thereupon intimated that he had no further instructions to appear; and the suit was dismissed. Subsequently an application was made under sect. 103 (this rule) to set aside the order of dismissal. On objection by the defendant that inasmuch as the dismissal was under sect. 158 (O. XVII. r. 3) the remedy of the plaintiff was by way of an application for review,—Held, that the suit was dismissed under sect. 102 (last rule) read with sect. 157 (O. XVII. r. 2) and that the application was maintainable under sect. 103, the present rule.(8) And generally, if time is given to do an act and it is not performed, O. XVII. r. 3 applies, otherwise r. 2 of the latter Order. See notes to these two rules, *post*. Sect. 38 of Act XV. of 1882 did not preclude a plaintiff, whose suit had been dismissed for default, from applying under this rule to have the order of dismissal set aside. He had two separate remedies under different enactments. If he applied for a new trial under sect. 38, he had to do so in eight days; if he applied under this rule, he had to do so in thirty days.(9) The rule applies to proceedings before the Court to which a reference is made under the Land Acquisition Act.(10)

(1) Lalta Prosad *v.* Ram Karan, 34 A. 426 (1912).

(2) Oodwunt Mahtoon *v.* Bidhee Chund, 18 W. R. 207 (1872).

(3) Anthony *v.* Dupont, 4 M. 217 (1881).

(4) Sriraja Venkataramaya *v.* Anumukonda Rangayya, 7 M. 11 (1883).

(5) Comalammal *v.* Rungasawmy Iyengar, 4 Mad. H. C. R. 56 (1868); Franks *v.* Nunch Mal, 7 All. H. C. R. 79 (1875); Mahomed Azeem-ool-lah *v.* Ali Buksh, 5 All. H. C. R. 74 (1873). See as to these cases, Mariannissa *v.* Ramkalpa Gorain, 34 C. 235, 239 (1907).

(6) Ram Sundar *v.* Ram Bandhan, 7 All. H. C. R. 126 (1875), in which it was also held that application might be made for a review of judgment.

(7) Rai Chand *v.* Mathura Prasad, 3 A. 292 (1880).

(8) Mariannissa *v.* Ramkalpa Gorain, 34 C. 235 (1907); followed in Enatulla Basunia *v.* Jibon Mohan, 19 C. L. J. 535 (1914). And see Kader Khan *v.* Juggeswar, 35 C. 1023 (1908).

(9) Soonderlal *v.* Goorprasad, 23 B. 414 (1898). As to limitation under this section, see Hinga Bibee *v.* Manna Bibee, 8 C. W. N. 97 (1903); Debi Baksh *v.* Habib Shah, 17 C. W. N. 829 (1913); 40 I. A. 151; 35 A. 331.

(10) Bhandi Singh *v.* Ramadhin Roy, 10 C. W. N. 991 (1905); Behary Lal Sur *v.* Nanda Lal Goswami, 11 C. W. N. 430 (1907).

"**Fresh suit.**"—A plaintiff is only precluded from instituting a fresh suit where the previous suit was rightly dismissed under r. 8, for it is only to such a case that r. 9 applies.(1) Nextly, assuming that the case was one to which the provisions of r. 8 properly apply, the statutory bar raised by this rule only applies where the cause of action in the two suits is the same. This is a matter to be determined on the facts of each particular case.(2) It has been held that while dismissal of a suit under sect. 102 of the last Code (now represented by r. 8 of this Order) is not intended to operate in favour of the defendant as *res judicata*, yet when read with sect. 103 of that Code (now represented by this rule) it precludes a fresh suit in respect of the same cause of action, referring to the grounds on which the plaintiff asked the Court to decide in his favour.(3)

"**Reasonable cause.**"—This must be determined according to the facts of each particular case. See notes to r. 13, *post*.(4) Where when his suit is dismissed for default of appearance under r. 8, the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained at all under this rule by showing that at the time of the dismissal there was an appearance by the plaintiff; but as an answer to the application on the merits, the defendant can raise the contention that the plaintiff was not prevented from appearing, because, in fact, he did appear.(5)

Appeal.—If the plaintiff successfully applies under this rule, no appeal lies from the order directing the suit to be readmitted; (6) though under the last Code an appeal was held to lie against an order rejecting an application under sect. 588, clause (8) of that Code; and an appeal is given by O. XLIII. r. 1 (c). But it is not every order dismissing an application which is open to appeal, but only an order rejecting an application to have the dismissal of a suit set aside.(7)

An appellate or revisional authority should not lightly interfere with an order of restoration of a case dismissed for default, but should do so only upon very strong grounds.(8)

The effect of these rules (8 and 9) was recently considered in a Privy Council

(1) Kanji *v.* Habib, 2 Bom. L. R. 206 (1900).

(2) The causes of action were held to be different in Chand Kour *v.* Partab Singh, 16 C. 98 (1888); s. c., 15 I. A. 156; Gobind Chunder Addya *v.* Afzul Rabbani, 9 C. 426 (1882); Ramchandra Jivaji Tilve *v.* Khatal Mahomed Gori, 10 B. 28 (1885); and the same in Shankar Baksh *v.* Daya Shankar, 15 C. 422 (1887); s. c., 15 I. A. 66. Upon the question of the finality of a decision under s. 102, see Rungrav Ravji *v.* Sidhi Mahomed, 6 B. 482 (1882), at p. 486; and as to suit for partition dismissed for default, Bisheshar Das *v.* Ram Prasad, 28 A. 627 (1906); Madon Mohon Mondul *v.* Baikanta Nath Mondul, 10 C. W. N. 839 (1906).

(3) Sankar *v.* Madan, 14 C. W. N. 298 (1909).

(4) And see Manilal Dhunji *v.* Gulam Husein Vazeer, 13 B. 12 (1888); Rampertab Moll *v.* Jakeeram Agurwallah, 23 C. 991, at p. 995 (1896); Sm. Toolsy Money Dassee *v.* Sm. Prosad Money Dassee, 2 C. W. N. 490, 491 (1898).

(5) Lalta Prasad *v.* Nand Kishore, 22 A. 66 (1899).

(6) Hirdhamun Jha *v.* Jinghoor Jha, 5 C. 711 (1880).

(7) Ghasiti Bibi *v.* Abdul Samad, 29 A. 596 (1907) [order refusing to restore application under s. 310 of last Code].

(8) Gopala Row *v.* Maria Susaya Pillai, 17 M. L. J. 225 (1907); s. c., 30 M. 274.

decision.(1) In this case a suit was dismissed for default under r. 8 on non-appearance by a plaintiff whose death was not known to the Court. His son applied under r. 9; and an order was made setting aside the dismissal. The respondent applied for revision under sect. 115; and the Court of the Judicial Commissioner reversed that order and on review confirmed the reversal on the ground that the order dismissing the suit was proper under r. 8 and that the application by the appellant (the son of the deceased plaintiff) had not been within time, and that O. 22, r. 3 only applied to a pending suit. The Privy Council held that the rulings of the Court of the Judicial Commissioner were vitiated by applying to a dead man rules which referred only to a defaulter, and that the order setting aside the dismissal was correct, and that "an abuse of the process of the Court" within the meaning of sect. 151 had occurred and that (apart from any section) any Court might rightly have considered itself possessed of inherent power to rectify the mistake made in inadvertently dismissing the suit.

Procedure in case of non-attendance of one or more of several plaintiffs.

10. *Where* there *are* more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, *or make* such order as it thinks fit. [s. 105.

Procedure in case of non-attendance of one or more of several defendants.

11. *Where* there *are* more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed, and the Court shall, at the time of *pronouncing* judgment, make such order as it thinks fit with respect to the defendants who do not appear. [s. 106.]

Non-attendance of one or more of several plaintiffs or defendants.—These rules correspond with sect. 116 of the Code of 1859. There is nothing in the latter section which conflicts with or limits the operation of sect. 108 (now r. 13), and the application of sect. 108 is not limited to the case of a sole defendant who has not appeared, or where there are more defendants than one, and none of them has appeared.(2)

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

12. *Where* a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing [s. 107.]

(1) Debi Baksh Singh *v.* Habib Shah, P. C., 35 A. 331 (1913); 17 C. W. N. 829; 40 I. A. 151.

(2) Cooke *v.* Equitable Coal Co., 8 C. W. N. 621 (1904). As regards the case of Doorga *v.* Shamanund, 12 W. R. 376 (1869), cited in the course of argument, it is to be observed that if the judgment of Markby, J., is sound (as to which *quære*), the interest was the same between those who appeared and those who did not. The question, however, whether the decree was *ex parte* against the absent defendants was, according to the judgment of Hobhouse, J., not necessary for the decision.

rules applicable to plaintiffs and defendants, respectively, who do not appear.

Non-appearance in person when ordered.—This rule corresponds to sect. 117 of the Code of 1859. A person failing to appear in person in obedience to an order to that effect may, in the case of a plaintiff, have his suit dismissed, or, in the case of a defendant, have the suit decided *ex parte* against him, notwithstanding that his pleader is present.(1) An appeal, it was held, would lie from an *ex parte* decree passed under the corresponding section.(2)

Setting aside Decrees ex parte.

Setting aside decree *ex parte* against defendant.

13. In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was *passed* for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall *make* an order *setting* aside the decree *as against him* upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

Object of rule.—The first object and purpose for which Courts sit is, of course, that the parties shall be heard; and therefore the object of this rule is to ensure, within reasonable limits as to public convenience, that every defendant shall have a hearing.(3) Similar provisions exist in the procedure of the English (4) and United States (5) Courts, the general rule being that, apart from cases where the defendant has not been properly notified of the hearing, that every decree may be set aside for unavoidable casualty or misfortune preventing the party from defending or prosecuting, or for fraud practised by the successful party in obtaining the judgment, or for mistake, inadvertence, surprise, or excusable neglect.(6) Applications of this character should therefore always be disposed of as substantial justice may require, and even where there is a doubt the benefit should be given to the applicant and the

(1) See Moona Lal *v.* Gopal Singh, S. D. N. W. (1863), p. 37 (cited O'Kinealy, C. P. C.); Kistodhone Dutt *v.* Nilmoney Singh, Coryton 3 (1864–5).

(2) S 96, *post*. The case of Krishna Ram *v.* Gobind Prasad, 8 A. 20 (1885), was decided before the amendment of s. 540 by Act VII. of 1888.

(3) Chintamony Dassi *v.* Raghoonath Sahoo, 22 C. 981 (1895), at pp. 983, 984, *per* Pigot, J.

(4) See Ord. 13, r. 10; Ord. 36, r. 33; and s. 91, County Court Act, 1888, 51 & 52 Vict. c. 43.

(5) See Hukm Chand, C. P. C. 718.

(6) Ib.

decree set aside.(1) Further, the Court has an inherent power to deal with an application to set aside an order made *ex parte*, and to set it aside upon a proper cause being substantiated.(2)

Setting aside of decrees.—The Code provides several ways in which decrees can be set aside. Firstly, by proceedings under this and similar provisions where the order has been passed in the absence of the parties or either of them.(3) An application to set aside an *ex parte* order is not, strictly speaking, an application for a rehearing, although it may result in it.(4) Other modes are by application for review before the Court passing the decree, or by appeal to a superior Court.(5) These are proceedings in the suit. Except in case of fraud, a separate suit does not lie to set aside a decree.(6) A suit will lie to set aside an *ex parte* fraudulent decree, although no endeavour has been made to get the decree set aside and the suit revived under this rule ; (7) or after such endeavour has been made and the application has been dismissed,(8) the reason being that this rule limits the attention of the tribunal to specific matters, and, instead of subjecting to inquiry the radical question involved, they assume the existence of a real suit. A Court has no power to restore an *ex parte* decree once set aside.(9)

"**In any case.**"—These words are very wide, and the section, under this and the last Code, is so worded as to exclude the doubt which was entertained under the Codes of 1859 and 1877, whether sect. 119 of the former Code and sect. 108 of the latter applied only to cases where the defendant had never appeared, or whether they applied also to cases where a defendant had been present on a first, but had been absent on an adjourned, hearing.(10) Where, however, it was contended that a decree was

(1) Ib. ; citing Watson *v.* Railroad Co. 41 Cal. 520 (Amer.) ; Cameron *v.* Carroll, 67 Cal. 500 (Amer.) ; Lodeman *v.* Schluter, 71 Cal. 94 (Amer.).

(2) Tyeb Beg Mahomed *v.* Allibhai, 31 B. 45, 49 (1906) [Small Cause Court].

(3) Sadho Misser *v.* Golab Singh, 3 C. W. N. at p. 377 (1897).

(4) Parvatishankar *v.* Ishvardas, 19 B. 208, at p. 210 (1894).

(5) Sadho Misser *v.* Golab Singh, 3 C. W. N. 375, at p. 377 (1897).

(6) Ib. See as to remedies, Mena Lall *v.* Bhujhun Jha, 2 W. R. 213 (1874) ; Narsingh *v.* Rafikan, 37 C. 97 (1909) ; 14 C. W. N. 507.

(7) Abdul Mazumder *v.* Mahomed Gazi Chowdhry, 21 C. 605 (1894).

(8) Pran Nath Roy *v.* Mohesh Chandra Moitra, 24 C. 546 (1897), where an application under this section was rejected and no appeal was laid against such rejection ; Dwarka Prasad *v.* Lachhoman Das, 21 A. 289 (1899) ; Radha Raman Shaha *v.* Pran Nath Roy, 28 C. 475 (1901) ; s. c., 5 C. W. N. 757 ; Kagendra Nath Mahatu *v.* Pran Nath Roy, 29 C. 395 (1902) ; s. c., 6 C. W. N. 473 ; 4 Bom. L. R. 363 ; dist. in Puran Chand *v.* Sheodat Rai, 29 A. 212 (1906), where the only fraud alleged was connected with the non-service of summons ; followed in Narsingh *v.* Rafikan, 37 C. 197 (1909) ; 14 C. W. N. 507 ; and see Golap *v.* Indra, 13 C. W. N. 493 (1909) ; Balkisen *v.* Tapesur, 17 C. W. N. 219 (1911).

(9) Raman Chettiar *v.* Mohideen Sahib, 17 M. L. J. 81 (1906).

(10) It was held under the Code of 1859 that the section referred to the first hearing : Comalammal *v.* Rungasawmy Iyengar, 4 M. H. C. R. 56 (1868) ; Gorachand *v.* Roghu, 3 B. L. R. App. 121 (1869) ; Zain-ul-abdin *v.* Ahmed Raza, 2 A. 67 (1878) [*contra*, Kalee Churn *v.* Modhoo Soodun, 6 W. R. 86 (1866) ; Paroye *v.* Chinta Monee, 18 W. R 457 (1872) ; and see Doyal Mistree *v.* Kupoor Chund, 4 C. 318 (1878) ; Ryall *v.* Sherman, 1 M. 287 (1877) ; Shanka Das *v.* Crohan, 1879, P. R.

not *ex parte* if the defendant has once appeared, it was held that there was no ground for so limiting the meaning of the words of the last Code, and that a decree is *ex parte* if it was made at an adjourned hearing in the absence of the defendant, whether the defendant has or has not appeared at an earlier stage of the case. The present rule therefore applies to every case in which a decree is passed *ex parte*, either by reason of his non-appearance at the first or at an adjourned hearing.(1) The former section was held to apply to proceedings under Ch. VII. of the Presidency Small Cause Courts Act,(2) and to execution proceedings where the order amounts to a decree under sect. 47, *ante*.(3)

The rule, moreover, is not limited to the case of a sole defendant, or, where there are several defendants, to cases where none of them have appeared.(4) The fact that an order under r. 7 has been made against a defendant and has not been appealed against, is no objection to an application being made by him under this rule.(5) And it has been held that the fact that an appeal from an *ex parte* decree is pending will not preclude the defendant (against whom the decree was passed) from applying under this rule for an order to set it aside.(6) Sect. 37 of the Presidency Small Cause Courts Act (XV. of 1882) does not apply to an *ex parte* decree. An application to set aside such a decree passed by a P. S. C. C. falls within this rule.(7) Satisfaction of an *ex parte* decree does not disentitle a judgment-debtor from applying to a Court to set it aside.(8) Neither this rule nor any other portion of the Chapter of the last Code in which this rule appeared applied to execution proceedings.(9) Nor does the rule apply where the case has been dismissed, not for default by non-appearance, but for something else, such as cases falling under O. XVII. r. 3, *post*.(10)

No. 26]; similarly under the Code of 1877, the words of which were "in any case in which a decree is passed *ex parte* against a defendant *under* s. 100:" Sheo Churn *v.* Heera Lall, 11 C. L. R. 537 (1882). As to the difference between the Codes of 1859, 1877, and 1882, see Luckmidas Vithaldas *v.* Ebrahim Oosman, 2 B. at p. 648 (1878); Jonardan Dobey *v.* Ramdhone Singh, 23 C. at p. 742 (1896).

(1) Jonardan Dobey *v.* Ramdhone Singh, 23 C. 738 (1896); F. B. overruling Sital Hari Banerjee *v.* Hira Lall Chatterjee, 21 C. 269. The question in issue in the first case was as to non-appearance on the day to which the first hearing had been adjourned, but the Court expressed its opinion upon the case of non-appearance on any adjourned hearing. See also Rule 2032 of 1906, Cal. H. C.; Hildreth *v.* Sayaji Piraji, 20 B. 380 (1895); Hira Dai *v.* Hira Lal, 7 A. 538 (1885); Bhagwan Dai *v.* Hira, 19 A. 355 (1897); Shanka Dat Dube *v.* Radha Krishna, 20 A. 195 (1897); Baldeo Shai *v.* Manohar Lal, 1895, P. R. No. 82; Ramnath *v.* Mamraj, 1884, P. R. No. 139; and see Kader Khan *v.* Juggeswar, 35 C. 1023 (1908); and Muniappan Chetty *v.* Balayan Chetti, 31 M. 505 (1908); Enatulla Basunia *v.* Jibon Mohan Roy, 19 C. L. J. 535 (1914), p. 538, following Jonardan Dobey *v.* Ramdhone Singh, *supra*.

(2) Tyeb Beg Mahomed *v.* Allibhai Mangalji, 31 B. 45 (1906).

(3) Krishna Chandra Pal *v.* Protap Chandra Pal, 3 C. L. J. 276 (1906).

(4) Cooke *v.* Equitable Coal Co., 8 C. W. N. 621 (1904).

(5) Sankaralinga Mudali *v.* Ratha Sabhapati Mudali, 21 M. 324 (1897).

(6) Damodar *v.* Sarat, 13 C. W. N. 846 (1909).

(7) Roshan Lal *v.* Lachmi Narayan, 17 B. 507 (1892), and the limitation is thirty days

(8) Zendoo Lal Nandlal *v.* Kishorilal Mehtabrai, 1 Bom. L. R. 213 (1899).

(9) See notes to r. 8, *ante*; Hari Charan Ghose *v.* Manmatha Nath Sen, 41 C. 1 (1913).

(10) See notes to O. XVII. r. 3.

decree set aside.(1) Further, the Court has an inherent power to deal with an application to set aside an order made *ex parte*, and to set it aside upon a proper cause being substantiated.(2)

Setting aside of decrees.—The Code provides several ways in which decrees can be set aside. Firstly, by proceedings under this and similar provisions where the order has been passed in the absence of the parties or either of them.(3) An application to set aside an *ex parte* order is not, strictly speaking, an application for a rehearing, although it may result in it.(4) Other modes are by application for review before the Court passing the decree, or by appeal to a superior Court.(5) These are proceedings in the suit. Except in case of fraud, a separate suit does not lie to set aside a decree.(6) A suit will lie to set aside an *ex parte* fraudulent decree, although no endeavour has been made to get the decree set aside and the suit revived under this rule ; (7) or after such endeavour has been made and the application has been dismissed,(8) the reason being that this rule limits the attention of the tribunal to specific matters, and, instead of subjecting to inquiry the radical question involved, they assume the existence of a real suit. A Court has no power to restore an *ex parte* decree once set aside.(9)

"**In any case.**"—These words are very wide, and the section, under this and the last Code, is so worded as to exclude the doubt which was entertained under the Codes of 1859 and 1877, whether sect. 119 of the former Code and sect. 108 of the latter applied only to cases where the defendant had never appeared, or whether they applied also to cases where a defendant had been present on a first, but had been absent on an adjourned, hearing.(10) Where, however, it was contended that a decree was

(1) Ib. ; citing Watson *v.* Railroad Co. 41 Cal. 520 (Amer.) ; Cameron *v.* Carroll, 67 Cal. 500 (Amer.) ; Lodeman *v.* Schluter, 71 Cal. 94 (Amer.).

(2) Tyeb Beg Mahomed *v.* Allibhai, 31 B. 45, 49 (1906) [Small Cause Court].

(3) Sadho Misser *v.* Golab Singh, 3 C. W. N. at p. 377 (1897).

(4) Parvatishankar *v.* Ishvardas, 19 B. 208, at p. 210 (1894).

(5) Sadho Misser *v.* Golab Singh, 3 C. W. N. 375, at p. 377 (1897).

(6) Ib. See as to remedies, Mena Lall *v.* Bhujhun Jha, 2 W. R. 213 (1874) ; Narsingh *v.* Rafikan, 37 C. 97 (1909) ; 14 C. W. N. 507.

(7) Abdul Mazumder *v.* Mahomed Gazi Chowdhry, 21 C. 605 (1894).

(8) Pran Nath Roy *v.* Mohesh Chandra Moitra, 24 C. 546 (1897), where an application under this section was rejected and no appeal was laid against such rejection ; Dwarka Prasad *v.* Lachhoman Das, 21 A. 289 (1899) ; Radha Raman Shaha *v.* Pran Nath Roy, 28 C. 475 (1901) ; s. c., 5 C. W. N. 757 ; Kagendra Nath Mahatu *v.* Pran Nath Roy, 29 C. 395 (1902) ; s. c., 6 C. W. N. 473 ; 4 Bom. L. R. 363 ; dist. in Puran Chand *v.* Sheodat Rai, 29 A. 212 (1906), where the only fraud alleged was connected with the non-service of summons ; followed in Narsingh *v.* Rafikan, 37 C. 197 (1909) ; 14 C. W. N. 507 ; and see Golap *v.* Indra, 13 C. W. N. 493 (1909) ; Balkisen *v.* Tapesur, 17 C. W. N. 219 (1911).

(9) Raman Chettiar *v.* Mohideen Sahib, 17 M. L. J. 81 (1906).

(10) It was held under the Code of 1859 that the section referred to the first hearing : Comalammal *v.* Rungasawmy Iyengar, 4 M. H. C. R. 56 (1868) ; Gorachand *v.* Roghu, 3 B. L. R. App. 121 (1869) ; Zain-ul-abdin *v.* Ahmed Raza, 2 A. 67 (1878) [*contra*, Kalee Churn *v.* Modhoo Soodun, 6 W. R. 86 (1866) ; Paroye *v.* Chinta Monee, 18 W. R 457 (1872) ; and see Doyal Mistree *v.* Kupoor Chund, 4 C. 318 (1878) ; Ryall *v.* Sherman, 1 M. 287 (1877) ; Shanka Das *v.* Crohan, 1879, P. R.

in the presence of the first party and subject to cross-examination by him.(1) Proof in support of the application may be given either by the oral testimony of the petitioner or by petition supported by an affidavit.(2) And if the requirements of the rule are carried out the application cannot be refused on other grounds.(3) A failure to make an application under this rule will not affect any other remedies which the party may possess.(4)

"**Duly served.**"—See as to this O. V., *ante*, and notes thereto,(5) also as to substituted service case cited.(6) When the rule speaks of the summons not being duly served, it refers, it was held, to service on that defendant only who complains, and does not refer to service on his co-defendants.(7) Even if the summons be properly served, the Court may restore the suit if it was not served in sufficient time to enable the defendants to appear and answer.(8) On similar principles an order was set aside as irregular, it having been made in the absence of one of the parties to whom no intimation had been given of the day when the case would be heard.(9) It is the duty of the Court to serve the summons of the registration of the suit. Where, before the admission of a suit, one of the proposed defendants had appeared by a pleader on an application for his appointment as guardian *ad litem* to a minor defendant, it was held that this did not absolve the Court from serving him with a copy of the plaint and notice of the date fixed for hearing, after the plaint had been admitted.(10) The burden is upon the petitioner to satisfy the Court that the summons was not duly served on him.(11)

"**Sufficient cause.**"—The affirmative provisions in rr. 9, 13, and O. XLI. r. 19, that a plaintiff or appellant (as the case may be) may prove that he was "*prevented by sufficient cause*" from appearing or attending when his suit or appeal was called on and dismissed, do not imply the negative, namely, that an application for restoration cannot be granted unless sufficient cause is shown. The effect of the enactments is that, if sufficient cause is shown, restoration is made obligatory on the Courts, there being no discretion in the

(1) Musst. Jhutoo *v.* Lulita Kooer, 22 W. R. 423 (1874).

(2) See Hardatrai Shukisandas *v.* Finance and Bullion Association, 3 B. H. C. R., O. C. 60 (1866); Damoodur Doss *v.* Choonee, 2 Hyde, 226 (1864); Anund Moyee *v.* Anund Soondur, 13 W. R. 237 (1870); but the Court has refused to receive an affidavit in an appeal from an order of rejection: Leslie *v.* Allender, 17 W. R. 390 (1872).

(3) Gopal Pershad *v.* Rama Woogra Sing, 5 W. R. Misc. 11 (1866).

(4) Abdul Mozumdar *v.* Mahomed Gazi Chowdhry, 21 C. 605 (1894); Prannath Roy *v.* Mohesh Chandra Moitra, 24 C. 546 (1897); Bibi Mutto *v.* Kali Begum, 6 A. 65 (1883); *vide ante*, "Setting aside of decrees;" *vide post*, 'Appeal," etc.

(5) And Anund Moyee *v.* Anund Soondur, 13 W. R. 237 (1870), where there was no service. If there is service it must be a proper one: Chanbasappa *v.* Mainaba, 7 Bom. H. C. R., A. C. 138 (1870); Shiboo Roy *v.* Kashee Roy, 25 W. R. 394 (1876).

(6) Mirza Ally Bebance *v.* Syed Hyder Hossein, 2 B. 449 (1878).

(7) Ewing & Co. *v.* Gosaidas Ghose, 3 B. L. R. App. 7 (1869), at p. 8, *per* Phear, J.

(8) Chanbasappa *v.* Mainaba, 7 Bom. H. C. R., A. C. 138 (1870); see Shaikh Awlad *v.* Shaikh Abdool, 18 W. R. 141 (1872); Haradhun Chuckerbutty *v.* Protap Narain Chowdhry, 14 W. R. 401 (1870).

(9) *Ex parte* Maneshankar Hargovan, 2 B. H. C. R., A. C. 381 (1866).

(10) Gulab Chand *v.* Shankar Lal, 35 A. 163 (1913).

(11) Kumud *v.* Jotindra, 38 C. 394 (1911); 13 C. L. J. 221; Hedlot *v.* Karan, 15 C. L. J. 241 (1911); Indu Meah *v.* Dar Baksh, 14 C. L. J. 42 (1911).

matter; whereas in other cases the merits of the applicant's case will form an important element for consideration when the Court is asked to exercise its discretion.(1) The Court has to determine the sufficiency of the cause, and this is a question not of law but of fact dependent upon the circumstances of each particular case.(2) No case can therefore be an authority in another, though previous decisions may sometimes help as a guide to Courts in determining what is sufficient cause.(3) The rule should in this respect receive a liberal construction (4) so as to promote the ends of justice, it being the spirit and policy of the law to give every party an opportunity of being heard, except in cases of inexcusable fault and neglect, when the Court has, as already pointed out, a discretion to restore, even though the case be not such as render restoration obligatory upon it. It is, however, a general principle that the default will not be opened for reasons affecting a co-defendant only who does not join in the application.(5)

"**Court.**"—The Court remains the same though the presiding officer may be different, and a Judge can therefore revive a suit tried by his predecessor.(6) But a Judge can only set aside a decree of his own, but not that of a superior Court.(7) If the *ex parte* decree is made by a Court on appeal, the Court which passed the original decree appealed against cannot be asked to set it aside.(8) After appeal filed the power to set aside the original decree becomes vested in the Appellate Court.(9)

"**Decree.**"—There was a difference of opinion under the last Code as to the meaning of this term. It was held both that the words "*decree*" and "*suit*" in this section must be taken to mean the whole decree against all defendants (where there are several) and the entire suit; (10) as also that the

(1) Somayya *v.* Subamma, 26 M. 599 (1903).

(2) Shankar Das *v.* Crohan, 1879, P. R. No. 26; Venkatarama *v.* Nataraja, 24 M. L. J. 235 (1912).

(3) See Hukm Chand, C. P. C. 724–739, and Hurdut Rai *v.* Bullion Association, 3 B. H. C. R. 60 (1866) [it is enough to show a *bonâ fide* mistake, which is not unreasonable]; Damodur Dass *v.* Choonee, 2 Hyde, 216 (1864) [understanding between parties for adjournment]. It is sufficient for an infant to show that his guardian was negligent, Kesho Pershad *v.* Hirday Narain, 6 C. L. R. 69 (1876), and the Court has restored a case even upon the supposition of the attorney's negligence, Oriental Finance Corporation *v.* Mercantile Credit Corporation, 2 B. H. C. R. 267, 269 (1866), though the Court, in Raj Narain Burdhun *v.* Akroor Chunder Roy, 24 W. R. 141 (1875), refused to interfere where the pleader was absent; but see Bulwant Rao *v.* Secretary of State (1897), Bom. P. J. 357. Though negligence of a party or his agent may justify a Court in refusing restoration, the latter may always consider whether (in cases where there is no prejudice to the plaintiff) the imposition of terms and the payment of costs is not, under the circumstances, a sufficient penalty for the defendant's neglect.

(4) Oriental Finance Corporation *v.* Mercantile Credit Corporation, 2 Bom. H. C. R. 267, 269 (1866).

(5) Chapman *v.* Lemon, 11 How Pr. 235 (Amer.); see Ewing & Co. *v.* Gosaidas Ghose, 3 B. L. R. App. 7 (1869), *ante*.

(6) Rughoo Mohinee *v.* Kasheenath Roy, 10 W. R. 156 (1868); see Kutab-ud-din *v.* Rupa, 1890, P. R. No 158.

(7) Monmohini Chowdhurani *v.* Nara Narayan Roy, 4 C. W. N. 456 (1899).

(8) Zimutunnissa *v.* Muddun Mohun, 22 W. R. 537 (1874).

(9) Sankara Bhatta *v.* Subraya Bhatta, 30 M. 535 (1907); s. c., 17 M. L. J. 436.

(10) Mahomed Hamidulla *v.* Tohurennissa Bibi, 25 C. 155 (1897), *per* Maclean, C.J., and Banerjee, J.; s. c., 1 C. W. N. 652; foll.

word "*decree*" referred to is the decree described in the first sentence of the section, viz. the decree passed *ex parte* against the defendant who has not appeared; and that the words "*shall appoint a day for proceeding with the suit*" meant that a day is to be appointed for proceeding with the suit so far as the defendant, who has applied to the Court under the provisions of this section, is concerned.(1) No difficulty arose where there was only one defendant, or where, if there were several defendants, an application was successfully made by all of them. In such cases the whole decree against the defendant, or all the defendants, was set aside. The question arose where there were several defendants, and one or more of several (but not all) applied successfully, whether the whole decree was or should be set aside against all the defendants, or only the decree so far as it affected the defendant or defendants who applied. In this connection two sets of circumstances required consideration; (*a*) where an application was made by one or more defendants to set aside a decree which had been made *ex parte* against all defendants, none having appeared; (*b*) where a similar application was made in a case where some of the defendants had appeared and contested the suit and some had not appeared, and a decree was passed against all the defendants. Any interpretation of the section which led to the conclusion that a Court must in all cases set aside the decree against all defendants, or could not in any case do so, led to difficulties. Some of the defendants might not object, and in fact might have no ground for objecting to the decree, and the Court would not be justified in such case in reopening the whole suit.(2) On the other hand, if the Court's power was strictly limited to setting aside the decree as against the defendant who applied, difficulties equally arose.(3) For instance, the relief given might be joint and indivisible.

It was therefore held that though "*decree*" meant "*whole decree*," and

Doyamasi Dasi *v.* Sarat Chunder Mojumdar, 25 C. 175 (1897); s. c., 1 C. W. N. 656; Ajodhya Pershad *v.* Sheo Pershad, 5 C. W. N. 58 (1900); dist. Jadubansa Narain *v.* Mohunt Hari Charan, 6 C. L. J. 226 (1907); Bhura Mal *v.* Har Kishan Das, 24 A. 383 (1902), *per* Stanley, C.J. [ref. to Gauri Sahai *v.* Ashfak Husain, 29 A. 623, 625 (1907)].

(1) Huro Krishno Doss *v.* Motee Chand Baboo, 8 W. R. 260 (1867) [and see Brojonath Surmah *v.* Anund Moyee, 7 W. R. 237 (1867), a case under s. 58, Act X. of 1859; Doorga Persaud Ghose *v.* Greeschunder Bose, 1 W. R. 222 (1864); Koroona Moyee Debia *v.* Nubo Kishen, 11 W. R. 18 (1869), ref. to in Bholai Naskar *v.* Alach Naskar, 3 C. L. J. 158 (1897); Kesho Pershad *v.* Hirday Narain, 6 C. L. R. 69 (1880)]; Manaku *v.* Sitaram, 18 B. 142 (1893); Bhura Mal *v.* Har Kishan Das, 24 A. 383 (1902), *per* Aikman, J., at pp. 396, 399. As regards the citation of cases under the Code of 1859, Dwarkanath Mitter, J., in the first-mentioned case, pointed out that the language of s. 58, Act X. of 1859, and of s. 119 of the Code of 1859 were very nearly similar; and except that the word "judgment" is used instead of "decree" in the Code of 1859, the provisions of s. 119 of that Code are similar to those of the present section. Therefore, in accordance with the observation of Aikman, J., Bhura Mal *v.* Har Kishan Das, *supra*, at pp. 395, 396, the earlier decisions were of use.

(2) Huro Krishno Doss *v.* Motee Chand Baboo, 8 W. R. 260, 261 (1867). Some of the defendants may not object, and, in fact, may have no ground for objecting, to the decree: Dookhee Khan *v.* Rajessuree Ranee, 15 W. R. 371 (1871); and see Bhura Mal *v.* Har Kishan Das, 24 A., at pp. 390–391 (1902).

(3) See Mahomed Hamidulla *v.* Tohurennissa Bibi, 25 C. 155 (1897), at pp. 157, 159; and see, for instance, Shaida Husain *v.* Hub Husain, 25 A. 42 (1902).

thus the Court had *power* to set aside the whole decree against all defendants, the Court was not bound in every case to set aside the decree against all the defendants.(1) It would do so where the decree was really one decree, proceeding upon a common ground (2) and was indivisible; (3) but it might refuse to do so where the decree, though nominally one, really consisted of several decrees against several parties.(4) Where the question involved in a case was whether the liability of the defendants was joint or several, and in such case the *ex parte* decree was set aside, on the application of some of several defendants the entire decree was set aside.(5) Similar conclusions were arrived at by Aikman, J., in whose opinion "*decree*" meant the *ex parte* decree referred to in the opening words of the section, and who held that when the decree was one and indivisible it must be set aside as a whole or not at all; and that the Court must be assumed to have the power to set aside the whole decree, if either the decree was from its nature one and indivisible, or if in order to give to the defendants against whom an *ex parte* decree has to be pronounced the relief to which they are entitled, it must be set aside as a whole.(6) The Calcutta High Court held that the Court might set aside the whole decree even where one or more of the defendants had appeared and contested the suit, while in the case of the remaining defendant or defendants the decree had been passed *ex parte*.(7) A contrary view was taken in the Bombay High Court; (8) and Stanley, J., and Burkitt, J., in the Allahabad High Court (9) reserved their opinions on the point.

The proper rule is that now enacted by the proviso, viz. that relief is ordinarily to be given only to the party who is entitled to and applies for it. If, however, in order to give such relief or for other purpose it is necessary to set aside the decree as against others also, this will be done as in cases where

(1) Jadubansa Narain *v.* Mohunt Hari Charan, 6 C. L. J. 226 (1907); Kunjo Behari Ghose *v.* Durgamoni Dassi, 3 C. L. J. 160 (1906); Monmohini Chowdhurani *v.* Nara Narayan Roy Chaudhri, 4 C. W. N. 456 (1899), at p. 459; but see the words of the section, "shall pass," and if decree meant whole decree, then the whole decree must have been set aside; and see Gopala Chetti *v.* Subbier, 26 M. 604 (1903), at p. 606; Valia Panga Achan *v.* Marutha Veera Karundan, 31 M. 454 (190[illegible]

(2) See Dookhee Khan *v.* Rajessuree Ranee, 15 W. R. 371 (1871); see Gopala Chetti *v.* Subbier, 26 M. 604 (1903); see Manaku *v.* Sitaram, 18 B. 142 (1893), it was held that the whole case was not reopened, even though there was a common cause of action. It is however, to be noted that in that case some of the defendants appeared.

(3) Mahomed Hamidulla *v.* Tohurennissa Bibi, 25 C. 155 (1897) at p. 160; Monmohini Chowdhurani *v.* Nara Narayan Roy Chaudhri, *supra*, at p. 458; Bhura Mal *v.* Har Kishan Das, 24 A. 383 (1902), *per* Stanley, C.J; Mohini Chandra Gutra *v.* Annada Charan Dutt, 6 C. W. N. 109 (1901); Gopala Chetti *v.* Subbier, 26 M. 604 (1903), where the defence of the second defendant was peculiar to him; Brijlall *v.* Mahadeo Prosad, 17 C. W. N 133 (1911).

(4) Ib. This case, it may be contended, is not really an exception, as there are in effect several decrees, and the whole decree is as against the particular defendant set aside.

(5) *In re* Hari Das Karmakar, 5 C. L. J. 202 (1905).

(6) Bhura Mal *v.* Har Kishan Das, 24 A. 383 (1902), at p. 400.

(7) Mahomed Hamidulla *v.* Tohurennissa Bibi, *supra*.

(8) Manaku *v.* Sitaram, 18 B. 142 (1893).

(9) Bhura Mal *v.* Har Kishan Das, *supra*, at pp. 390, 391.

it is not possible to sever the decree into parts as separately affecting the parties respectively.

"**Terms.**"—The Court may set aside the decree upon such terms as it thinks fit.(1) The Court has a full discretion in the matter. If the defendant is not at all in fault, and has a sufficient defence, there does not appear to be any reason why he should be put on terms. In other cases terms may be imposed. The Court may direct payment of all previous costs in the action as a condition precedent to setting aside the decree; it may order a party to give security for those likely thereafter to be incurred; it may direct him to pay the decretal amount into Court; (2) or it may make such other order as it thinks fit. So a decree may be set aside on condition that the defendant should find a surety who would be responsible for any amount that might be found due from the defendant by any decree which might subsequently be made.(3)

When a judgment is ordered to be set aside upon terms, the conditions must be complied with within the time fixed or the judgment will remain in force as if the order setting it aside had not been made. Where a decree was set aside upon terms of a certain payment by a given date, it was held on appeal that the Court had jurisdiction to extend the time for payment or pass a fresh conditional order setting aside the decree upon terms.(4)

Effect of setting aside decree.— If the decree is set aside, this necessarily carries with it a reversal of any order previously made under r. 7 refusing to allow the party to appear and defend the suit.(5) The position is the same as when the suit was first instituted. As regards proceedings subsequent to the decree set aside, it is well settled that where in execution the decree-holder is himself the auction-purchaser the sale cannot stand if the decree be subsequently set aside.(6) There is, however, a distinction between this case and that where a third party is the auction-purchaser.(7) A sale having duly taken place in execution of a decree in force at the time cannot afterwards be set aside as against a *bonâ fide* purchaser not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court.(8) And the same principle applies where the decree is set aside by

(1) Under the Code of 1859 it was held that terms could not be imposed: Administrator General *v.* Lala Dyaram, 6 B. L. R. 688 (1871).

(2) If the decree is finally maintained, money so paid into Court becomes the property of the decree-holder, and an application to get out the money will not be governed by the provisions relating to the execution of decrees: Mayal Ali *v.* Lachman Singh, 1898, P. R. No. 8.

(3) Sonatun Shaha *v.* Dinonath Shaha, 26 C. 222 (1898); s. c., 3 C. W. N. 228.

(4) Jagarnath Sahi *v.* Kanta Prasad Upadhya, 36 A. 77 (1913), distinguishing Sura ijan Singh *v.* Ram Bahal Lal, 35 A. 582 (1913).

(5) Sankaralinga Mudali *v.* Rathasabhapati Mudali, 21 M. 324, 325 (1897).

(6) Sett Umedmal *v.* Srinath Roy, 27 C. 810 (1900); s. c., 4 C. W. N. 692, and cases there cited [and see Lala Jagat Narayan *v.* Tulsiram, 1 B. L. R., A. C. 71 (1868)]; Hazari Mull *v.* Janaki Prosad, 6 C. L. J. 92 (1907) [order setting aside *ex parte* decree reversed].

(7) Ib.

(8) Zain-ul-Abdin Khan *v.* Muhammad Asghar Ali, 10 A. 166 (1887); s. c., 15 I. A. 12, where, however, at p. 172, the Privy Council point out that the party may be restored to the money for which the property was sold. Any claim which the judgment-debtor might have for the balance would only lie against the decree-holder.

the Court of first instance under this rule. When a decree has been set aside under this rule it cannot be taken to be revived in any subsequent proceeding and the principle of sect. 144 cannot be extended to it.(1) As to whether the order setting aside the decree at the instance of one defendant reopens the case against all the others, see notes to "Decree."

"Proceeding with the suit."—The case begins again in the ordinary way, as if no decree had been passed. The burden and mode of proof is just the same as it would have been if the decree had not been passed.(2) The evidence should be recorded *de novo*, as that taken in the defendant's absence at an *ex parte* hearing cannot be used against him at the rehearing.(3)

Appeal. Revision. Review.—When an application under this rule is rejected, an appeal lies by the defendant against the order of rejection.(4) But the order passed on appeal is final,(5) and therefore no second appeal lies.(6) And if the defendant applies unsuccessfully under this rule and does not appeal against the order, he cannot, on appeal against the original *ex parte* decree, obtain the relief which he might have got on an appeal from the order of rejection under this rule, but for which he did not apply.(7) The defendant, however, may appeal under sect. 96 against the *ex parte* decree without previously taking any steps to have it set aside under this rule.(8) Where, however, an application under this rule is made and refused, the party may appeal from the order under O. XLIII. r. 1 (*c*), and the order made on such appeal is final. But if there is no appeal from the order refusing to interfere under this rule, and the party prefers an appeal against the original *ex parte* decree, the Appellate Court cannot remand the case on the ground that the party had not a proper opportunity of being heard. All that it can do is to deal with the case on the merits, on the materials in the record.(9) A Full Bench of the same High Court has, however, more recently held that when a suit is decided *ex parte*, an Appellate Court, to which an appeal from the decree is preferred under sect. 540 (now sect. 96), has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the suit *ex parte* and remand the suit for rehearing.(10) It is not, however, open to the plaintiff to prefer an immediate appeal from an order setting aside his decree.(11) And though there is some authority to the contrary,(12) the better and more recent opinion is that such an order (ordinarily

(1) Raghu Nandan *v.* Jagdis, 14 C. W. N. 182 (1909).

(2) See Hukm Chand, C. P. C. 746.

(3) Ram Baksh *v.* Kishori Mohan, 12 W. R. 130 (1869), though it was said to be doubtful if all the expenses of obtaining and serving fresh summonses on the witnesses should be thrown on the plaintiff: Bishen Perkash *v.* Ruttan Geer, 20 W. R. 3 (1872).

(4) O. XLIII. r. 1 (*c*).

(5) S. 104.

(6) Aubinash Chunder Mookerjee *v.* Martin, 3 C. 832 (1882).

(7) Caussanel *v.* Soures, 23 M. 260 (1899).

(8) Ashruffununnissa *v.* Lehareaux, 8 C. 272 (1882); Karuppan *v.* Ayyathorai, 9 M. 445 (1886).

(9) Caussanel *v.* Soures, *supra*.

(10) Sadhu Krishna Ayyar *v.* Kuppan Ayyangar, 30 M. 54 (1906), F. B.

(11) Shama Dass *v.* Hurbuns Narain Singh, 16 C. 426 (1889).

(12) See Rung Lall Misser *v.* Tokhun Misser, 25 W. R. 304 (1876); Bimola Soonduree *v.* Kalee Kishen, 22 W. R. 5 (1874); Luckheemonee Dossee *v.* Bhoobun Mohun Bose, 23 W. R. 147 (1874).

at least) is not one affecting the decision of the case under sect. 99, and cannot be contested on appeal from the final decree.(1) It is subject to attack under sect. 115 if the conditions of that section are fulfilled.(2) An *ex parte* decree is liable to review.(3)

No decree to be set aside without notice to opposite party.

14. No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

Notice.—In an application under r. 13, the only parties entitled to notice are those that come under the description of "opposite party" in this rule. An auction-purchaser does not come under that description, and is not entitled to notice.(4)

(1) Krishna Chandra Goldar *v.* Mohesh Chandra Saha, 9 C. W. N. 584 (1905); Chintamony Dassi *v.* Raghoonath Sahoo, 22 C. 981 (1895); and a similar view was taken by Jackson, J., in an early case: Boro Khasia *v.* Jata Sirdar, 15 W. R. 315 (1871); s. c., 8 B. L. R. 78; the order, however, was successfully contested in appeal in Gopala Chetti *v.* Subbier, 26 M. 604 (1903), at p. 605; Nand Ram *v.* Bhopal Singh, 34 A. 592 (1912).

(2) See judgment of Bannerjee, J., in Mahomed Hamidulla *v.* Tohurennissa Bibi, 25 C. 155, at p. 158 (1897).

(3) Harihur Pershad Narain *v.* Buddu Pershad, 13 C. L. R. 254 (1883); Bibi Mutto *v.* Ilahi Begam, 6 A. 65 (1883).

(4) Jotendra Mohun Poddar *v.* Raja Srinath Roy, 3 C. W. N. 261 (1898), s. c., 26 C. 267.

ORDER X.

Examination of Parties by the Court.

1. At the first hearing of the suit the Court shall ascertain from *each party* or his pleader whether he admits or denies *such* allegations of fact *as are* made in the plaint *or* written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials. [s. 117.]

Ascertainment whether allegations in *pleadings are* admitted or denied.

2. At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party. [s. 118.]

Oral examination of party, or companion of *party.*

3. The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record. [s. 119.]

Substance of examination to be written.

4. (1) *Where* the pleader of any party who appears by a pleader *or any such person accompanying a pleader as is referred to in rule 2*, refuses or is unable to answer any material question relating to the suit, which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day. [s. 120.]

Consequence of refusal or inability of pleader to answer.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may *pronounce judgment* against him or make such order in relation to the suit as it thinks fit.

Examination of parties.—Rules 2 and 3 correspond, with some alterations, with s. 125 of the Code of 1859. As to these, *vide post*. After the Court has ascertained what is admitted and denied under r. 1, it may proceed to an oral examination under the next rule. This rule contemplates the case of a suit at the first or subsequent hearing in which a party has appeared at the proper time, not a case where a party has not so appeared.(1) Where, however, a defendant appears by pleader or in person, the fact that he is not

(1) Joy Prokash Singh *v.* Meghraj Singh, 21 W. R. 207 (1869).

prepared to put in a written statement does not warrant the trial of a suit *ex parte*. The Judge should in that case ascertain what are the matters in issue by an examination of the defendant under this rule.(1) The object of this examination is not to take evidence or to ascertain what is to be the evidence in the case, but to see whether a cause of action exists, what are the matters in dispute, and, if necessary, to allow an amendment of the pleadings.(2) Under the Code of 1859, provision was made for the examination of three persons, viz. the party, pleader, or companion of either. R. 2 now excludes the pleader, though r. 4 contemplates his examination. Under the Code of 1859, the examination was (unless the pleader was the person examined) to be on oath or affirmation. But as this provision has been omitted, the examination may now take place without oath or affirmation.

R. 4 provides for the appearance of a party, not to give evidence in the ordinary way, but to put the Court in possession of information necessary to the framing of issues or other points in the conduct of the case. The power given is discretionary, the intention of the section being to enable the Court not only to get obscure points cleared up by obtaining information from either of the parties,(3) but also, if possible, to get admissions so as to narrow down the issues.(4) If the party does not appear, the Court may pass a decree (5) against the defaulting party, but this can only be done if the pleader has previously thereto refused or been unable to answer a material (6) question.(7) If the plaintiff is in default the Court may dismiss his suit. If it be the defendant, the question arises whether the Court can or should decree the plaintiff's suit without any evidence in support of his claim.(8) Apparently the Court has power to do so.(9) The Court, however, is not bound to pass a decree; it may pass any order it thinks fit. The amended section substitutes "pronounce judgment" for "pass a decree." Apparently, however, the two phrases are meant to intend the same thing. R. 4 is of a penal character, and it is therefore incumbent on the Court which professes to act under it to take care that the contingency contemplated by it has in fact occurred.(10)

(1) Sivaraj Shani Nilakantham *v.* Kuppajantulu Ramiah. 2 M. H. C. R. 311 (1865).

(2) Gunga Narain Gupta *v.* Tiluckram Chowdhry, 15 C. 533, 537 (1888); s. c., 15 I. A. 119 [examination of pleader]; as to the manner in which verbal admissions of the pleader should be treated, see Natha Singh *v.* Jodha Singh, 6 A. 406 (1884).

(3) Discretion is given to the Court to decide which of the parties ought to answer the question: Bhimarao Gopal *v.* Venkatrao Narsingrao, 5 Bom.L. R. 687 (1903).

(4) Ib.

(5) See Nilmonee Singh Deo *v.* Ram Huree, 2 W. R. 161 (1865); Satu *v.* Hanmantrao, 23 B. 318 (1898); Bhimarao Gopal *v.* Venkatrao Narsingrao. 5 Bom. L. R. 687 (1903).

(6) See Bhimarao Gopal *v.* Venkatrao Narsingrao, *supra*.

(7) Satu *v.* Hanmantrao, 23 B. 318 (1898).

(8) Under s. 170 of the Code of 1859 (which has not been re-enacted) some evidence was required to be given by a plaintiff, Damoodur Bhoorsun *v.* Rughornath Panja, 12 W. R. 242 (1869); Ishan Chunder *v.* Hurish Chunder, 12 W. R. 369 (1869); Thakoor Lall *v.* Brohmo Moyee, 15 W. R. 253 (1871), cases in which a party was summoned to give evidence by the opposite party.

(9) Raj Chookun Duswandi *v.* Busjeet Tewaree, 20 W. R. 165 (1873), where Phear, J., said that apparently the Legislature had thought fit to empower the Court upon the occurrence of certain contumacy on the part of a party to give a verdict against him irrespective of the merits of the case, and without reference to the merits apparent on evidence which might have been (in a case coming under s. 170 of the Code of 1859) previously taken between the parties. (10) Ib.

ORDER XI.

Discovery and Inspection.

[s. 121.]

Discovery by interrogatories.

1. *In any suit the plaintiff or defendant* by leave of the Court may deliver interrogatories in writing for the examination of the opposite par*ties* or any one or more of such parties, *and such interrogatories when delivered shall have* a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same *party* without *an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.*

Discovery.—The provisions as to discovery have been remodelled in conformity with the present English Rules, and the English decisions will be more closely applicable. This is O. 31, r. 1. It does not apply to rent-suits in Bengal [sect. 148, clause (*a*), Act VII. of 1885]. The words "through the Court" have been omitted. Other amendments are noted, *post*. According to the former English practice, actions were instituted to obtain discovery. Under the present practice these can be rarely necessary.(1) Order 31 of the Judicature Act Rules, following the extended principles of the Court of Chancery, now gives power to the Court in all suits to order discovery in aid of the action.(2) This part of the Code closely follows the English Rules. The main object of administering interrogatories is to save expense by obtaining admissions from the opposite party.(3) A plaintiff may interrogate with a view to obtain information or admissions *in support of his own case*, and this right extends with proper qualifications not only to his original case, but also to any answer which he has to make to the defendant's case.

(1) See generally as to Bills for discovery, Bray on Discovery, 609–619; Ann. Pr., notes to O. 31; see Orr *v.* Draper, 4 C. D. 92; Remer *v.* Salisbury, 2 C. D. 378.

(2) See Ann. Pr. *loc. cit.* ed. (1905), p. 384.

(3) Waghji Thackersey *v.* Khatro Rowji, 10 B. 167, at p. 171 (1886).

But the right is always subject to the qualification that the interrogatories must be directed to a case on which the plaintiff has already determined and to which he has committed himself. He cannot be allowed to put fishing questions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it.(1) Discovery is not limited to giving the party a knowledge of that which he does not already know, but includes the getting an admission of anything which he has to prove on an issue between himself and his opponent; (2) to facilitate proof or save expense; (3) and to diminish the burden of proof.(4) So one party may be asked as to any admissions he may have made tending to support his opponent's cause of action.(5) And discovery may be had of the names of persons to make them parties, and the names and securities of prior incumbrances.(6) The interrogatory must be as to facts, and must not ask for conclusions of law, inference of facts, or construction of a document.(7) In short, a party is entitled to discovery of every fact which makes out his own case or shows that he is in the right, and this includes specific allegations in the nature of a replication to an anticipated defence. He is not, however, entitled to discovery of matters which support his opponent's case or show that his opponent is right. It has been held that he cannot ask the opposite party by what evidence he intends to support his case.(8) But in a suit for the recovery of the amount on a *hundi* alleged to have been drawn and accepted by the defendant in consideration of a loan, it has been recently held in the Calcutta High Court that a party is entitled to interrogate on facts directly in issue in the pleadings and that therefore the defendant was entitled to discovery of all necessary details, including the names and addresses of the persons by whom it was presented.(9) In this country it was formerly held that interrogatories viewed as machinery for eliciting facts bearing upon issues arising in suits were intended only to have

(1) Ali Kader *v.* Gobind Dass, 17 C. 840, 848 (1890); and in Bemolamoney Dassee *v.* Hulodhur Bullubh, 1 Boln, 618.

(2) Att.-Gen. *v.* Gaskill, 20 Ch. D. 528; Kennedy *v.* Dodson (1895), 1 Ch 334, 341.

(3) Grumbrecht *v.* Parry, 32 W. R. (Eng.) 204; Hall *v.* L. & N. W. Ry. Co., 35 L. T. 850. So it is admissible to interrogate to facts which will inform the party as to evidence to be obtained: Att.-Gen. *v.* Gaskill, *supra*, the names of persons who may give evidence in his favour; Hall *v.* Liardet, W. N. 83 (1875), the names of persons present at an alleged slander and so forth.

(4) Att.-Gen. *v.* Gaskill, *supra*, 527, 528.

(5) Hodsoll *v.* Taylor, L. R. 9 Q. B. 79; and see Brid *v.* Malzy, 1 C. B. N. S. 308; but see as to admissions, ss. 22 and 23 of the Evidence Act.

(6) Union Bank of London *v.* Manby, 13 C. D. 239 [incumbrances in mortgage suits]; Hancocks *v.* Lablache, 3 C. P. D. 202 [defendant's husband]; West of England Bank *v.* Nicholls, 6 C. D. 613 [prior securities]; Eyre *v.* Rodgers, 40 W. R. (Eng.) 137 [names of defendants: tenants in ejectment-actions].

(7) Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. 117, 123 (1895) [where it was sought to obtain the opponent's views as to the construction of a will].

(8) Ali Kader *v.* Gobind Dass, 17 C. 840, 847 (1890); Neckram Dobay *v.* Bank of Bengal, 14 C. 703, at p. 706 (1887) ["this is a matter relating exclusively to the plaintiff's case"].

(9) Baijnath Kedia *v.* Raghunath Prasad, 41 C. 6 (1913); distinguishing Ali Kadir *v.* Gobind Dass, 17 C. 340 (1890), on the ground that the facts were different and that in the last Code the provisions were not the same as the English O. XXXI.

a limited operation.(1) So though English authorities establish that a plaintiff may interrogate the defendant in order that he may know what case he has to meet—not the evidence but what the defence is—such interrogatories are really framed to anticipate or supply defects of pleading. But the system of procedure in this country, it was held, was different. Two modes were held to be specially provided for meeting the difficulty in question. If the pleading was too vague the Court might require a further and fuller written statement under the section corresponding with O. VIII. r. 9. The other method referred to was that provided by the Code in the settlement of issues. Interrogatories should not in such a case, it was held, be resorted to in this country.(2) So again it was held that sect. 134 of the last Code indicated that in a case falling within it a party should proceed, not by way of interrogatories, but according to the procedure laid down in that section, and that the Code did not contemplate that a party should be compelled to give discovery of documents by means of interrogatories or otherwise the relevancy of which was denied.(3) Further particulars may now be demanded under O. VI. r. 5, but there can be no doubt that the framers of the present Code intended to approximate the two systems as far as possible.

Time for delivery of interrogatories.—The former Code contained the words "*at any time*," which have now been omitted. In England a plaintiff is hardly ever allowed discovery before statement of claim, for from the earliest times the Court has set its face against allowing discovery for the purpose of fishing out a case,(4) and this must always be so under the Code where a suit is not instituted until after the presentation of a plaint.(5) In Common Law actions the proper time for discovery was not until after defence, for until then it was not usually possible to say what was really material. But a plaintiff has been allowed to interrogate before defence, and in the Chancery Division it is common practice to allow a plaintiff discovery before defence.(6) And the Court has a discretion to allow this under this rule. The same principles which prohibit discovery before the plaintiff has stated his case apply to a defendant. As a rule, therefore, in England a defendant will not be allowed general discovery before putting in his defence,(7) and this was laid down as an absolute rule in all cases by the second paragraph of the former section. This portion of the former proviso has been omitted and the English

(1) Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. 117, at p. 124 (1895), where it was held that s. 134, now r. 17, indicated one direction in which the scope of interrogatories was intended to be limited, just as Ali Kader *v.* Gobind Dass, 17 C. 840 (1890), which it followed, explained another direction limiting the scope of operation.

(2) Ali Kader *v.* Gobind Dass, 17 C. 840 (1890); it may, however, be considered questionable whether such differences as exist in the procedure are sufficient to deprive a party, of the right to use all his remedies; O'Kinealy, C. P. C., Notes to s. 125. The circumstances of litigation in this country have undoubtedly cast upon the Courts, in regard to pleadings, some responsibilities which do not find a counterpart in English practice; but that is no reason for excluding the very material assistance which the parties can render in giving precision to the points in issue.

(3) Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. 117, at pp. 124, 125 (1895).

(4) Ann. Pr. 1905, p. 383, notes to O. 31, r. 1.

(5) *Vide* s. 26, *ante*.

(6) Ann. Pr. 1905, p. 383, notes to O. 31, r. 1.

(7) Ann. Pr. 1905, p. 384, notes to O. 31, r. 1.

practice will be followed. The same procedure may be adopted in miscellaneous proceedings after decree. Interrogatories as to accounts pending or to make the judgment available, or to find out how the property in cases of mesne profits has been managed, have been allowed, and no doubt will be admitted under the Code.(1)

Leave.—Application should be made on petition in Chambers, the order being that the plaintiff be allowed to interrogate.(2). It was held to be the duty of the Court to determine whether the applicant should be allowed to interrogate, but not to determine at that stage what questions the opposite party should be compelled to answer.(3) But see now next rule. In giving leave the Court, as a rule, decides nothing as to the specific interrogatories, but only that there is a case for interrogating the party, that the interrogatories may possibly be relevant, that their genuine character is not improper, and that their administration is not sought for the mere purpose of annoyance. Where the party on being served refuses to answer them the Court enters upon a considered adjudication under r. 11, *post*, and the resulting order may be enforced under r. 21. The grant of leave to one party to deliver interrogatories to another does not amount to an order requiring the other party to answer them; for that party may perhaps have good ground for refusing to answer them or some of them (r. 6). Leave granted is, therefore, not an order to answer within the meaning of r. 21 entailing a dismissal or striking out a defence.(4)

"**Interrogatories.**"—For form of interrogatories, see Schedule IV. 123 of last Code and case cited,(5) and r. 4, *post*. Interrogatories are only affidavits obtained in a particular way, and the party wishing to use them must put them in as his evidence.(6) See as to their use, r. 22, *post*.

"**Opposite parties.**"—Primarily this is a party on the other side of the record to the applicants.(7) A party not on the other side of the record is an opposite party within the meaning of the rule if between him and the applicant there is some right to be adjusted in the action, which in Chancery might often be the case between two plaintiffs or two defendants.(8) But defendants were

(1) See Ann. Pr., O. 31, r. 1, "discovery after and for working out judgment or order," Bray, 567–569.

(2) Sham Kishore Mundle *v.* Shoshi Bhoosun Biswas, 5 C. 707 (1880); and as to service, see ib.

(3) Sham Kishore Mundle *v.* Shoshi Bhoosun Biswas (1880), 5 C., at p. 709.

(4) Prem Sukh Chunder *v.* Indro Nath Banerjee, 18 C. 420 (1891) F. B., overruling Lalla Dabee Pershad *v.* Santo Pershad, 10 C. 505 (1884); see notes to r. 21, *post*.

(5) Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. 117, at pp. 118–120 (1895), and Chitty F. 267–272; D. C. F. 957, Ann. Pr. form 6, Appx. B.

(6) Waghji Thackersey *v.* Khatao Rowji, 10 B. 167, at p. 171 (1886); Gosto Bihary Pal *v.* Johur Lall Pal, 4 C. 836 (1879).

(7) In Spokes *v.* Grosvenor (1897), 2 Q. B. 124, the Court held that such a party might be ordered to give discovery of documents of a necessary party though there might be no issue between him and the applicant.

(8) Shaw *v.* Smith, 18 Q. B. D. 193; Molloy *v.* Kirby, 15 C. D. 162; Alcoy, etc., Co. *v.* Greenhill, 74 L. T. 345, where discovery of documents between co-defendants to counter-claim was ordered; and in Eden *v.* Weardale, 35 Ch. D. 287, it was said at pp. 295, 296, to mean that a plaintiff might interrogate a defendant, and a defendant a plaintiff, and that the words were so wide as to include all persons who litigate one against the other in any proceeding, any question which the Court may properly decide.

refused leave to interrogate co-defendants who had put in no defence, there being no issue between them.(1)

In England formerly the decisions established that an infant, by reason of incapacity, could not be interrogated,(2) nor could he be made to give discovery of documents,(3) nor could such orders be made against a next friend (4) or guardian *ad litem* (5) as such, neither having the status of a party as that term is understood in the rules dealing with the subject. Now, however, r. 23 makes the order applicable to infant plaintiffs and defendants, and to the next friends and guardians *ad litem* of persons under disability.(6)

The Bombay High Court (7) has, however, in the case cited, applying the present English rule, held that an affidavit of documents may be required from a minor defendant, though the Judge stated that he did not decide that a next friend or guardian of an infant could be directly ordered to make an affidavit of documents. It has, however, been pointed out (8) that the order as made was invalid (the guardian *ad litem* being willing to make an affidavit) and that the affidavit was in reality to be made by the guardian, and the Calcutta High Court has in the case cited held that a minor cannot be compelled to give discovery under sect. 129 of the former Code, nor on the same principle (viz., his incapacity) could he be interrogated under the section corresponding to this rule; nor could his next friend or guardian be considered an "opposite party" upon whom such interrogatories can be served within the meaning of that section. It has, however, been said that a guardian *ad litem* may under circumstances be made a party for the purpose of obtaining discovery from him.(9) But even in this case, which was an exceptional one, it was held that where the guardian had been made a party defendant for purposes of discovery, the discovery was not intended to include the right to administer interrogatories

(1) Marshall *v.* Langley, W. N. (89) 222.

(2) Ann. Pr., notes to this rule which was introduced in 1893, in consequence of the decisions cited. As to lunatics, see Bray, Discovery, 63-67, and Ann. Pr. vol. ii. Part IV. "Lunatics."

(3) Mayor *v.* Collins, 24 Q. B. D. 361, commented on in Redfern *v.* Redfern (1891), P. 139, where it was doubted whether in the P. D. the old Chancery practice of refusing to make an infant give discovery obtained. See cases cited in Waghji Thackersey *v.* Khatao Rowji, 10 B. 167 (1886); Nathmull Narsingdass *v.* Malharrao Holkar, 19 B. 350 (1894); Duncan *v.* Bhoyro Prosad, 22 C. 891 (1895).

(4) Curtis *v.* Mundy, 2 Q. B. 178 (1892). See Indian cases in last note.

(5) Lawton *v.* Elwes, 48 L. T. 425; Scott *v.* Consolidated Bank, W. N. (93) 56; Dyke *v.* Stephens, 30 Ch. D. 189. See Indian cases in last note but one.

(6) Ingram *v.* Little, 11 Q. B. D. 257. See Indian cases in last note but two.

(7) Nathmull Narsingdass *v.* Malharrao Holkar, 19 B. 350 (1894), *per* Farran, J.

(8) Duncan *v.* Bhoyro Prosad, 22 C. 891 (1895).

(9) Ib., at p. 895, citing Waghji Thackersey *v.* Khatao Rowji, 10 B. 167 (1886); but see now Berry *v.* Keen, 26 Sol. Jo. 312; Burchard *v.* Macfarlane, 2 Q. B. 247 (1891); Symonds *v.* City Bank, 79 L. T. J. 175; Burstall *v.* Beyfus, 26 Ch. D. 40-42, disapproving the old practice; establishing that a person should not be made a party, solely for the purpose of discovery. Ann. Pr. 1905, p. 414, notes to O. 31, r. 12. In Rahimbhoy *v.* Turner, 17 B. 341, 348 (1892), a defendant having been irregularly made a party but only for the purpose of discovery to a prior suit brought by the plaintiff, was held not a party to that suit, so as to make applicable to him the provisions of ss. 13 or 43, corresponding with s. 11 and O. II. r. 2 of the present Code.

to him.(1) Now, however, r. 23 makes the preceding rules of the Order applicable to minors and lunatics, their next friends and guardians.

Particular interrogatories to be submitted.

2. *On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.*

Submission of interrogatories. - This rule, which is new, is taken from O. 31, r. 2. Under this rule the Judge has not, it has been said,(2) to settle the interrogatories, but to decide what should be administered. Allowing an interrogatory does not preclude any objection being taken in the answer under r. 6, *post*.(3) Where some have been allowed and some refused, application may be made for leave to deliver further interrogatories (4) In the undermentioned cases, defendant undertaking to make admissions, leave was refused (5) and admissions having been refused, leave was given.(6)

Costs of **interrogatories.**

3. In adjusting the costs of the suit *inquiry* shall at the instance of any party be made into the propriety of *exhibiting* such interrogatories, and if it *is the opinion of the taxing officer or of the Court, either with or without an application for inquiry* that such interrogatories have been *exhibited* unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be *paid in any event* by the party in fault.

Costs.—This is taken from O. 31, r. 3, and does not apply to rent-suits in Bengal (*vide* r. 1, *ante*).

Form of interrogatories.

4. *Interrogatories shall be in the Form No. 2 in Appendix C, with such variations as circumstances may require.*

Corporations.

5. *Where* any party to a suit *is* a corporation *or a* body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person,

(1) Waghji Thackersey *v.* Khatao Rowji, 10 B. 167 (1886).

(2) *Per* Chitty, J, in Tye *v.* Willoughby, 38 Sol. J. 338.

(3) Peck *v.* Ray (1894), 3 Ch. 282.

(4) Boake *v.* Stevenson (1895), 1 Ch. 361.

(5) Jubb *v.* Bibbs, W. N. (83) 208; and see Kekewich, J., in Clarke *v.* Clarke, 43 Sol. J. 719.

(6) Hellier *v.* Ellis, W. N. (84) 9.

any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

Corporations and Companies.—English O. 31, r. 5. Does not apply to rent-suits in Bengal (*vide ante*, r. 1). The English rule is practically the same except that instead of the word "*suit*," it uses the words "*cause or matter*," which also appear in O. 31, r. 1 of the English rules, and is identical with that under the C. L. P. Act except that "*member*" is added. The old practice in Chancery was to make him a party for the purpose of discovery, but this can no longer be done.(1) As to body corporate, or other body; Crown; (2) foreign sovereigns; (3) liquidator; (4) see cases cited.(5) The secretary of a corporation or company is, as a rule, the proper person to answer, and it was the practice of Jessel, M.R., not to direct a member to answer unless there was no officer who had a competent knowledge of the facts.(6) The officer or member is the representative or *alter ego* of the body for the purposes of answering the interrogatories.(7) It is not his answer but the answer of the body, and, therefore, there is no obligation either to disclose his knowledge, or to obtain and disclose the knowledge of other servants or agents of the body acquired by him or them otherwise than in the course of his or their employment.(8) As regards discovery and production of documents, this is obtained by an order against the body for an affidavit of documents in its possession, to be made by the secretary, clerk, or other proper officer on its behalf.(9) It should, if possible, be made by some person who has personal knowledge as to documents in the possession of the body.(10)

6. *Any objection* to answer*ing* any interrogatory on the ground that it is *scandalous or* irrelevant or not *exhibited bonâ fide* for the purpose of the suit, or that the matters inquired *into are* not sufficiently material at that stage, or on any other ground, *may be taken in the affidavit in answer.* [s. 125]

Objections *to interrogatories* **by** *answer.*

"**Any objection.**"—This rule is taken from O. 31, r. 6. It does not apply to rent suits in Bengal (see r. 1, *ante*). Where interrogatories are scandalous

(1) Wilson *v.* Church, 9 C. D. 552.

(2) Att.-Gen. *v.* Newcastle (1897), 2 Q. B. 384; discussing, generally, the Crown's position in matters of discovery.

(3) S. A. Rep. *v.* La Coup Franco Belge (1898), 1 Ch. 190 [if a foreign sovereign bring an action here he must give discovery]; Prulean *v.* U.S.A., L. R. 2 Eq. 663, 664 [on his own oath]; *aliter* foreign republics, Rep. Costa Rica *v.* Estange, 1 C. D. 171, see *post.*

(4) Who is under an obligation to give discovery: *Re* Contract Corp., 7 Ch. 207; *Re* Burned's Banking Co., 2 Ch. 350; but not an affidavit of document as of course: *Re* Mutual Society, 22 Ch. 720, 721. The liquidator has a reciprocal right of discovery: *Re* Alexandra Co., 16 Ch. D. 58.

(5) Bray's Digest on Discovery, Art. 3, and Ann. Pr., notes to O. 31, r. 6.

(6) Berkeley *v.* Standard Discount Co., 13 Ch. D. 99.

(7) Ib., at p. 101

(8) Welsbach Co. *v.* New Sunlight Co. (1900). 2 Ch. 1.

(9) Ann. Pr., note to O. 31, r. 5; see forms in Chitty, F., 247-249, s. 54.

(10) See Bray's Digest, Art. 24; Rep. of Liberia *v.* Roye, 1 App. Cas. 139.

or in any way an abuse of the process of the Court, the latter may interfere at any stage. Where an *ex parte* order is made giving leave to interrogate, the party ordered to answer has a right to come into Court to have the order set aside if the case is one in which interrogatories should not have been allowed. When an order for administration of interrogatories is properly made, a party objecting to them may at his peril omit to answer the interrogatories to which he objects, but the more prudent course is to file his affidavit in answer stating in it his objections to answer such questions as he objects to.(1) Then the interrogating party can apply under r. 11, and the Court will make an order under that section enforceable under r. 21, *post*.

"**Irrelevant.**"—There is a distinction between discovery and cross-examination.(2) Interrogatories which do not relate to any matters in question in the suit are irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness. The discovery must be directly relevant to the matters in issue.(3) Questions going to the credit of a party as a witness are inadmissible,(4) but the right to interrogate is not confined to the facts directly in issue, but extends to any facts, the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue.(5) Under the old Chancery practice, the discovery was material if it might be useful in obtaining any relief which the plaintiff might obtain. For the purpose of testing the relevancy to a particular issue, the case of the party making the discovery upon that issue may have to be assumed to be true.(6)

"**Not exhibited bonâ fide.**"—Even if the interrogatories are relevant they may be objected to on the ground that they have not been put *bonâ fide* for the purposes of the suit. All questions put *malâ fide* with an ulterior object beyond that of helping the case of the party setting them should be disallowed.

"**Not sufficiently material at that stage.**"—Material means more than relevant. A fact may be relevant but not material at a particular stage. The term means material as to the case made, and the relief prayed for at the stage of the case when discovery is sought. What is material at one stage of a case may not be material at another. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing. Thus, where a person sued as an agent denied agency, an interrogatory as to the names of the persons to whom he had sold was refused. For the question to be decided was agency or no agency and the right to an account would only arise if the agency were proved.(7) Again, discovery relating to the quantum of damage is clearly relevant, although it may be postponed until the question of liability has been deter-

(1) Sham Kishore Mundle *v.* Shoshibhoosun Biswas, 5 C. 707 (1880).

(2) Att.-Gen. *v.* Gaskill, 20 Ch. D. 530.

(3) *Re* Howel Morgan, 39 C. D. 316; and see Kennedy *v.* Dodson (1895), 1 Ch. 334.

(4) Allhusen *v.* Labouchere, 3 Q. B. D. 659.

(5) Marriott *v.* Chamberlain, 17 Q. B. D. 163.

(6) Ann. Pr. 1905, p. 406, notes to O. 31, r. 7; Bray, 18.

(7) Moore *v.* Craven, L. R. 7 Ch. App. 95; and see other cases in Ann. Pr, notes to O. 31, r. 7.

nined. Where, therefore, the parties were at issue as to the plaintiff being ntitled to recover any damages at all, an interrogatory as to damages was eld to be premature, as the question whether there had been any wrongful ct committed and whether the plaintiff was entitled to any damages had first o be determined.(1) Generally, the Court is unwilling before the right to elief is established to make an order for discovery which may be injurious to he defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief.(2) In considering whether discovery ought to be given the Court must first consider whether it will help the plaintiff at the trial. If it will not, but will only be of use if the plaintiff obtains a decree, then the Court will postpone discovery as being not sufficiently material at the stage at which it is sought.(3)

"**Any other like ground.**"—Documents which of themselves evidence exclusively the party's own case are clearly (4) protected. He must swear that (to the best of his belief and after proper examination) they form or support or evidence or relate exclusively to his own case or title, and that they contain nothing impeaching his own case or title.(5) Then there is the question of privilege. The Evidence Act excludes certain questions, and what a party or a witness may not be asked in the witness-box he cannot be interrogated upon.(6) Interrogatories should therefore be disallowed regarding the conduct of a Judge or Magistrate in Court, or anything which came to his knowledge in Court as such, except by the order of a Superior Court; (7) communications made during marriage, except in suits between married persons; (8) affairs of State and official communications; (9) information given concerning the commission of an offence; (10) professional communications; (11) confidential communications with legal advisers.(12) Sects. 126–129 of the Evidence Act refer to communications between clients and their legal advisers alone. There are certain cases, however, for which the Act does not make specific provisions, and in which the question of privilege generally arises in applications for discovery before trial in which communications made for the purpose of litigation between third persons and the adviser, or third persons and the client for the

(1) Neckram Dobay *v.* Bank of Bengal, 14 C. 703 (1887); dist. case where the question was simply one as to amount of damages, the defendant wishing to satisfy the demand.

(2) Fennessy *v.* Clark, 37 Ch. D. 187.

(3) Parker *v.* Wells, 18 C. D. 483. See Sutherland *v.* Sreehee Churn Dutt, 10 C. 808 (1884), where the objection that the documents were then not sufficiently material was overruled; and Secretary of State *v.* Jehangir, 4 Bom. L. R. 342, 347 (1902).

(4) Ann. Pr., notes to O. 31, r. 1, p. 399. Budden *v.* Wilkinson (1893), 2 Q. B. 432, dissented from Maclean *v.* Jones, 66 L. T. 653, limiting it to documents of title to land; and see Frankenstern *v.* Gavin's Co. (1897), 2 Q. B. 62, and second part of r. 15, *post*.

(5) Ib.; Bray, Dig., Art. 23. The last assertion as to impeaching it need not be made by a defendant in ejectment, for his having no title will not entitle the plaintiff.

(6) See Ryrie *v.* Shivshankar, 15 B. 7, at p. 10 (1890).

(7) Indian Evidence Act, s. 121. On this and the following section, see the Authors' Commentary on the Act, 6th Ed.

(8) Ib. s. 122.

(9) Ib. ss. 123, 124 (and see Ann. Pr., notes to O. 31, r. 1, citing cases where discovery has been refused if injurious to public interests).

(10) Ib. s. 125.

(11) Ib. ss. 126–128.

(12) Ib. s. 129.

purpose of submission to the adviser, are protected.(1) On the same principle as a witness cannot be examined so he cannot be interrogated as to questions of law.(2) Nor is he bound to discover the evidence of his case, for this would enable his unscrupulous opponent to tamper with the witnesses and to manufacture evidence in contradiction, and so shape the case as to defeat justice.(3) But according to the English authorities a party must discover the nature of his case, or the facts on which he relies in support of his case, as distinguished from the evidence of his case or the way in which he is going to make out his case.(4) According to the English rule a party is not compelled to give discovery which will tend to criminate him or expose him to the risk of any kind of punishment.(5) But in this country a witness is not excused from answering on the ground that an answer will criminate.(6) Though, therefore, a party may and should for his protection (7) claim privilege on this ground, it would appear that he may be compelled to answer an incriminating interrogatory. Objectionable or oppressive interrogatories should be disallowed.(8) The mere fact that questions would be admissible in cross-examination will not make them good as interrogatories (9)

Setting aside and striking out interrogatories

7. *Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.*

Setting aside of interrogatories.—See notes to last rule. The present rule is taken from O. 31, r. 7

Affidavit in answer, filing

8. Interrogatories shall be answered by affidavit to be filed within ten days, or within such *other* time as the *Court* may allow.

Time for answer.—Order 31, r. 8. If defendant is out of the jurisdiction or there be other sufficient cause for allowing a greater length of time, a reasonable time will be given. If ten days have been originally fixed the Court may, upon an application supported by affidavit, extend the time for filing the affidavit

(1) See the matter fully dealt with in Authors' Evidence Act, 6th Ed., notes to s. 126–129, "Information obtained from third parties for the purpose of litigation;" and Vishnu Yeshawant *v.* New York Life Assurance Co., 7 Bom. L. R. 709 (1905).

(2) *Vide ante.*

(3) Ann. Pr., notes to O. 31, r. 1; Bray, 15; see Benbow *v.* Low, 16 C. D. 95; *Re* Strachan, 1 Ch. 415, 417, 448 (1895).

(4) Ann. Pr., O. 31, r. 1, p. 397 (1905) but see Ali Kader *v.* Govind Dass, 17 C. 340 (1890), *ante;* which case has recently been distinguished in Baijnath Kedia *v.* Raghunath Prasad, 41 C. 6 (1913), in which it was held that a party may interrogate on all facts directly in issue in the pleadings].

(5) Ib., at p. 386.

(6) Indian Evidence Act, s. 132.

(7) See R. *v.* Gopal Doss 3 M. 271, and other cases cited in Authors' Evidence Act, notes to s. 132.

(8) Winters *v.* Dabbs, W. N. 21 (1876). See Lockett *v.* Lockett, 4 Ch. App. 336.

(9) Bhagwandas Parashram *v.* Burjorji Ruttonji, 37 B. 347 (1912)

in answer. As to objections and mode of stating them, and as to answering sufficiently, see notes to rr. 6, 11, respectively. The rule does not apply to rent-suits in Bengal (see r. 1, *ante*).

Form of affidavit in answer.

9. *An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.*

No exception to be taken

10. *No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.*

[s 1 27]

Order to answer or answer further

11. *Where* any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the *Court* may direct.

"**Insufficiently.**" O. 31, r. 11. It does not apply to rent-suits in Bengal (see r. 1, *ante*). The same necessity for clear specific answers and absence of all evasion is required as in the case of pleading, as to which see O. VIII. r. 4. If the answer is evasive the usual practice is to require a further answer. Moreover, matter of supererogation should not be introduced. It is, of course, legitimate to explain or qualify an answer. But when an answer is couched in a form which makes it embarrassing, that is to say, which prevents the person who asks it from using it without having thrust upon him irrelevant matter as part of it, it is insufficient.(1) A party must answer, to the best of his knowledge, information and belief.(2) He is bound therefore to state all the information he already possesses, though he is not bound to obtain it of any one except his agents and servants. Of these he must inquire, using his best efforts *bonâ fide* to get the information. He must also examine documents in his possession or power if necessary.(3) The question in all cases is whether the answer is insufficient. The Court has not to go into the question of its truthfulness. If the Court is clearly satisfied (from certain sources, as to which see r. 6, *ante*) that the oath of the party by which he claims his protection cannot be really available for the purpose for which he puts it forward, a further answer may be ordered. But the oath should not be disregarded on mere suspicion. A substantial answer is sufficient under the present practice, the substance and not the form being that at which the Court looks. If looking at all the answers together the Court thinks that every question material to the issue has been fairly and substantially

(1) See Lyell *v.* Kennedy, 27 C. D. 28; 33 W. R. 44; Richards *v.* Crawshay, 8 Times R. 446; Ann. Pr., notes to O. 31, r. 11.

(2) Bray, Dig., Arts. 16-19; Ann. Pr. *loc. cit.*

(3) Ib.

answered, though some questions have not been answered accurately, it will not require a further answer.(1) The Court may direct a *viva voce* examination instead of a further affidavit. A roving cross-examination is not legitimate, but the party should only be required to make such an answer as would have been sufficient if originally given in writing.(2) See notes to r. 6, *ante*.

Application for **discovery of documents.**

12. Any party may, *without filing any affidavit*, apply to the Court for an order *directing any other party to any suit to make discovery on oath* of the documents which are or have been in his possession or power, relating to any matter in question *therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.*

Affidavit *of docu ments.*

13. *The* affidavit *to be* made *by a party against whom such order as is mentioned in the last preceding rule has been made*, shall specify which (if any) of the documents therein mentioned *he* objects to produce, *and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.*

Discovery affecting documents.—Up to r. 11 the Code has dealt with the first branch of discovery, that of interrogatories. It then proceeds to deal with discovery as it affects documents. This latter discovery embraces two heads: first, discovery simply—that is, the power of compelling the opponent to disclose the documents he has in his possession; secondly, the power of compelling their production and inspection.(3) The subject of discovery simply is dealt with by this rule, which is taken from the English Order 31, r. 12. Subsequent rules deal with production and inspection. The proper mode of ascertaining what documents the adversary has is by an affidavit of documents, and not by interrogating him. An interrogatory, therefore, asking generally as to documents is not permissible. Though, according to English practice, an interrogatory asking as to specific documents is not necessarily open to objection.(4) The practice in the Calcutta High Court is that the party applies without any affidavit in support of his application; that the opposite

(1) Ann. Pr., notes to O. 31, r. 11.

(2) Litchfield *v.* Jones, 51 L. T. 572.

(3) Ann. Pr. 1905, p. 409. But according to Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. 117 (1895), it would seem that the procedure to be followed is not by interrogating but by an application for inspection under r. 17.

(4) Dhapi *v.* Ram Pershad, 14 C. 768, at p. 774 (1887).

party may be directed to make an affidavit in terms of this rule.(1) Such an application is generally granted as a matter of course, but where there is contest before a party can obtain discovery he must show that he has a good cause of action, and that the documents are relevant to the case.(2) The proviso to r. 12 has been added so as to give the Court a discretion similar to that imported in 1893 into O. 31, r. 12, of the English rules. The former section spoke of "*all*" the documents, and as appeared from the use of that word in the first paragraph, and from the terms of the second paragraph, the party against whom the order issued had to describe all his documents in the affidavit, even though he asserted on grounds stated by him that he could not be compelled to produce them. The words are now omitted, as the nature and extent of the discovery required depends upon the Court's order. An order for discovery can be made in a case under the Land Acquisition Act under this rule.(3)

"Party." When there are several plaintiffs all of them must ordinarily join in the affidavit, though it is possible that upon a proper case being made out the order may be limited to a particular party.(4) As to minors, lunatics, next friends, and guardians, see notes to r. 1, *ante*, and r. 23, *post*; and as to liquidators, companies, and corporations, notes to r. 5. Discovery of documents and inspection may be allowed to a plaintiff from a co-plaintiff, or to a defendant from a co-defendant if there are rights which have to be adjusted between them in the suit.(5) Where one of several parties alone makes an affidavit of documents a summons may be taken out calling upon the other parties to show cause why they should not also make an affidavit.(6)

Affidavit.—Ordinarily the affidavit should be made by the party himself.(7) The affidavit should be in the following form (see Appendix C, No. 5), with such variations as circumstances may require :—

In the Court of at A. B. *v.* C. D.

I, the above-named defendant C. D., make oath, and say as follows :—

1. I have in my power or possession the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object (8) to produce the documents set forth in the second part of the first schedule hereto

3. That (*here state upon what grounds the objection is made, and verify the facts as far as may be, for the party must make the discovery though he asserts that he cannot be compelled to produce*).

4. I have had, but have not now,(9) in my possession or power the

(1) Nittoomoy Dassee *v.* Soobul Chunder Law, 23 C. 117, at p. 125 (1895).

(2) Amarendra Nath Chatterjee *v.* Kally Kissen Tagore, 2 C. W. N. 17, at p. 18 (1897)

(3) British India Steam Navigation Co. *v.* Secretary of State for India, 38 C. 230 (1910).

(4) Ryrie *v.* Shivshankar, 15 B. 7 (1890).

(5) Shaw *v.* Smith, 18 Q. B. D. 193 ; app. Brown *v.* Watkins, 16 Q. B. D. 125.

(6) Ryrie *v.* Shivshankar, 15 B. 7 (1890)

(7) Wilson, J., H. C. Cal. Feb. 17, 1879 ; and see Kahan Bibi *v.* Safdar Husain, 8 A. 265 (1886).

(8) See Oriental Bank Corporation *v.* Brown, 12 C. 265, 266 (1885); Ryrie *v.* Shivshankar, 15 B. 7, 8 (1890); Secretary of State *v.* Jehangir, 4 Bom. L. R. 342, 347 (1902).

(9) See Kahan Bibi *v.* Safdar Husain, 8 A. 265, at p. 267 (1886).

documents relating to the matter in question in this suit set forth in the second schedule hereto

5. The last-mentioned documents were last in my possession or power on (*state when*).

6. That (*here state when and what has become of the last-mentioned documents, and in whose possession they are now*).

7. According to the best of my knowledge, information, and belief, I have not now, and never had, in my possession, custody, or power, or in the possession, custody, or power of my solicitors, pleaders, or agents, solicitor, pleader, or agent, or in the possession, custody, or power, of any other person or persons on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of, or extract from any such document, or any other document whatsoever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the first and second schedules hereto

The Advocate-General is not called upon to make discovery on oath.(1)

"**Possession or power.**" These words do not here bear the limited meaning which they bear for the purpose of an order for production. No order for production can be made against a party unless he has directly or indirectly admitted it to be in his possession or power. Possession or power for the purpose of justifying an order for production has a narrower meaning than for the purpose of inclusion in an affidavit of documents. For the purpose of an order for production it means sole legal possession, a right and power to deal with them; (2) the sole property in them; (3) joint possession with other persons being insufficient.(4) Where the document is not in the party's sole legal possession it is sufficient for him to state the fact; it is not necessary to allege or show the refusal of the co-owners; (5) but he must state their names and the nature of their ownership.(6) But possession of the agent is possession of the principal.(7) and one partner of a firm represents the other partners for the purposes of production of documents (8) But under the present rule all documents must be included in which the party has any possession or property jointly with others, or even in which he has no property at all if they are in his corporeal possession.(9) Careful search must be made for all relevant documents in his own physical possession, and proper inquiries and efforts made as to those which are not; for instance, documents abroad,(10) and the affidavit must state not only the documents which are but those which have been in the party's possession.(11)

(1) Advocate General Bombay *v.* Adamji, 30 B. 474 (1905).

(2) Kearsley *v.* Philipps, 10 Q. B. D. 36, 40 Cot; C. A. ib. 465.

(3) Murray *v.* Walter, Cr. & Ph. 114.

(4) Ib.; and see cases cited in Haji Jakaria *v.* Haji Casim, 1 B. 496 (1876).

(5) Kearsley *v.* Philipps, *supra*.

(6) Bovill *v.* Cowan, C. R. 5 Ch. 195. See Ann. Pr., notes to O. 31, r. 14.

(7) Bray's Digest, 195; where solicitor claims lien, see Lewis *v.* Powell (1897), 1 Ch 678; *Re* Hawkes (1898), 2 Ch. 7; and as to privilege, s. 131, Evidence Act.

(8) Haji Jakaria *v.* Haji Casim, 1 B. 496 (1876).

(9) See Ann. Pr., notes to O. 31, r. 12, and cases there cited. (10) Ib.

(11) See Kalian Bibi *v.* Safdar Husain, 8 A. 265, at p. 267 (1886).

"**Relating to any matter in question therein.**"—The following interpretations have been given of these words:—Documents containing information which may either directly or indirectly enable the party seeking discovery either to advance his own case, or damage that of his adversary, or which may fairly lead him to a train of inquiry which may have either of these two consequences.(1) They are not confined to such as would be admissible in evidence.(2) Every document which will throw any light on the case.(3)

Objection to production. As to what documents are privileged from production, see notes to r. 6, *ante*. The affidavit should set out the grounds on which privilege is claimed. But a party is not confined to the affidavit in which the claim is first set up. He is entitled to put in and use a further affidavit in support of his claim of privilege.(4)

Sealing up.—According to the Equity practice followed in the High Courts, a party may seal up such portions of otherwise material documents as he swears are privileged. A party must, however, specify what parts of the documents referred to he claims to seal up, and the grounds upon which the claim is based.(5) If he does not, though the Court has allowed an application to consider the sufficiency of the affidavit,(6) yet technically the right way of raising the question is by taking out a summons for production and inspection.(7) When the right of a party producing documents to seal certain portions of them is contested, the Court appoints an officer to whom the plaintiff states in confidence why he wants to inspect any portion of the documents sealed, and the officer, after looking at the documents, reports whether and in what way the part noted or desired to be noted is material to the case of the other party.(8)

Objection to affidavit.—When an affidavit is technically insufficient, that is, in its terms, and fails to comply with the requirements of the Code, a summons may be taken out to consider its sufficiency,(9) and the party will be ordered to amend his affidavit or file a further affidavit; (10) as where the description of documents is imperfect (11) or improperly verified; (12) or where the affidavit does not specify what the plaintiff claims to seal up, and is not in the prescribed form.(13) The only occasion where a party can be compelled to file a further

(1) Compagnie Financiere *v.* Peruvian Guano Co., 11 Q. B. D. 63

(2) Ib., 62; Jessel, M.R., in Bustros *v.* White, 1 Q. B. D. 425; Hutchinson *v.* Glover, 1 Q. B. D. 141.

(3) Ib., 144.

(4) Ambika Charan *v.* Bengal Spinning Co., Ltd., 22 C. 105 (1894).

(5) Jadub Loll Shaw *v.* Kanai Loll Shaw, 20 C. 587, 589 (1893).

(6) Ib.

(7) Ib.; Horendra Nath Mukerjee *v.* Girendra Kumar Dutt, 3 C. W. N. 495 (1897).

(8) Heera Lall Rukhit *v.* Ram Suran Loll, 4 C. 835 (1879); Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. 117, at p. 126 (1895).

(9) See Oriental Bank Corporation *v.* Brown, 12 C. 265 (1885); Kenelly *v.* Wyman, 1 C. 178 (1876); Jadub Loll Shaw *v.* Kanai Loll Shaw, 20 C. 587 (1893).

(10) Amarendra Nath Chatterjee *v.* Kally Kissen Tagore, 2 C. W. N. 17 (1897).

(11) Oriental Bank Corporation *v.* Brown, *supra*.

(12) Kalian Bibi *v.* Safdar Husain, 8 A. 265 (1886).

(13) Jadub Loll Shaw *v.* Kanai Loll Shaw, 20 C. 587 (1893); but see Horendra Nath Mukerjee *v.* Girendra Kumar Dutt, 3 C. W. N. 495 (1899).

affidavit of documents, is when the original affidavit is insufficient, that is, in its terms, and fails to comply with the requirements of the Code. If it is not alleged that the affidavit is defective in that respect, but that the affidavit contains statements which are untrue in fact, the party so alleging should specify the documents which he requires to see, and which have been omitted from the affidavit, and apply for an order of inspection under r. 18, *post*.(1) He must (as appears from that rule), in addition to the matters mentioned, show that the documents of which he claims inspection are relevant to the matters in question in the suit.(2) If he is then met by an affidavit of the other party denying possession, that is a risk which the party seeking inspection must take. For just as for the purposes of discovery an affidavit of documents denying possession is conclusive, so for the purposes of production and inspection an affidavit denying possession of such documents would be equally conclusive.(3) The Court, however, in this decision distinguishing cases on the question of privilege which stand on a different footing, was not prepared to assent to the broad proposition that, as the oath of the party is conclusive on the question of possession, so also in an application under r. 18, the affidavit of the opposite party is conclusive on the issue of relevancy.(4) An effective remedy may, however, be obtained at the hearing where possession is denied. For if on cross-examination or otherwise it appears that the party has failed to disclose or refused inspection of relevant documents in his possession, the Court will then direct immediate inspection to be given, adjourning the hearing at the cost of the person who has so evaded giving discovery.(5) If the Court is clearly satisfied on a perusal of the affidavit, the documents therein referred to, and the pleadings, that the affidavit cannot be accepted, the Court may, according to the English practice, order a further affidavit of documents. But these are the only sources to which the Court may look for this purpose.(6) It is not clear upon the Indian cases what course should be taken in such a case. The case cited below (7) seems to suggest that a further affidavit will only be ordered where the affidavit is technically insufficient in its strictest sense; and where a defendant in his written statement referred to documents not set out in his affidavit, the Court discharged a summons to consider its sufficiency, holding that as the omitted documents were sufficiently described in the written statement, an application could be forthwith made for inspection if inspection were needed.(8)

Conclusiveness of affidavit.—Where, however, a proper affidavit has been filed, either originally or as the result of an order for a further affidavit, the oath of the party swearing the affidavit is conclusive upon the questions

(1) Amarendra Nath Chatterjee *v.* Kally Kissen Tagore, 2 C. W. N. 17 (1897); and see Basanta *v.* Kumudini, 16 C. W. N. 81 (1911).

(2) Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. 117, at p. 125 (1895).

(3) Ib., at p. 127.

(4) Ib., at p. 126.

(5) Amarendra Nath Chatterjee *v.* Kally Kissen Tagore, *supra*.

(6) Ann. Pr. 1905, pp. 385, 386, notes to O. 31, r. 1; Jones *v.* Montevideo Co., 5 Q. B. D. 558; Compagnie Financière *v.* Peruvian Guano Co, 11 Q. B. D. 63; Hall *v.* Truman, 29 C. D. 319.

(7) Amarendra Nath Chatterjee *v.* Kally Kissen Tagore, 2 C. W. N. 17 (1897).

(8) Kenelly *v.* Wyman, 1 C. 178 (1875).

of possession,(1) privilege,(2) and, according to English practice, relevancy.(3) The Court cannot regard the opponent's oath; the general rule in all questions of discovery being that where you have the oath of the party claiming discovery challenging the oath of the party giving discovery, the oath of the latter is for this purpose conclusive. The party seeking discovery must rest upon the affidavit, and he cannot even examine upon it, nor adduce evidence to contradict it, nor can he do this in another form by administering general interrogatories.

14. *It shall be lawful for* the Court, at any time during the pendency of any suit, *to* order the production by any party thereto, *upon oath*, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court *shall* think right; and the Court may deal with such documents, when produced, in such manner as *shall* appear just. [s. 130.]

Production of documents.

"**It shall be lawful.**"—This rule is taken from O. 31, r. 14. See, as to the discretion, note "Order the production." The rule enables any party who has obtained privately, by interrogatories or by affidavit of documents, knowledge of a document in the hands of his adversary, to compel production. But no order for production can be made against a party unless he has directly or indirectly admitted it to be in his possession or power. See notes to r. 13, *ante*.

"**At any time.**"—Therefore, even as late as in appeal. As regards the earliest point at which the order may be made, the Court will act upon the general principles governing the time or stage for discovery. *Vide ante*, notes to r. 1. An order under this rule may be made even before the issues have been framed.(4)

"**Order the production.**"—Under the Evidence Act in regard to certain documents where they are absolutely privileged, the Court has no power whatever to order production. But under this rule the Court does possess the discretion, and this discretion is to be exercised according to the practice of the Court.(5) In the case cited the Court held that though a document might not be such as passed directly between the legal adviser and the client, yet if it was of such a nature as to make it quite clear that it was obtained confidentially

(1) Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. 117, 125, 127 (1895); Ann. Pr. p. 385

(2) Ib., at p. 12; Vinayakrao Dhunderaj *v.* Narotam Anandji 17 B. 581 (1893) [claim that documents privileged as relating solely to defendant's title and did not tend to prove or support plaintiff's title; *held*, that Court could not go behind defendant's affidavit]; Ann. Pr. 1905, p. 415. As to what is privileged, see notes to r. 6.

(3) Ann. Pr., 385, 415; whether, however, the affidavit is conclusive on this point under r. 18, see Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. at p. 125 (1895); and in O'Kinealy, C. P. C., notes to s. 130, it is said that it is not possible to say how far this rule (conclusiveness of statement as to relevancy) will apply in other cases, it being suggested that the Court should follow the rule laid down in s. 162 of the Evidence Act.

(4) Gobind *v.* Kunja, 10 C. L. J. 407 (1909).

(5) Vishnu Yeshawant *v.* New York Life Insurance Co., 7 Bom. L. R. 709 (1905).

for the purpose of being used in litigation, and with a view to being submitted to legal advisers, then the Court will not compel the production of such a document.(1) In an earlier case in the same Court it was held that a Judge has no discretion to refuse to allow inspection of documents relating to matters in question in a suit, provided that they are not privileged.(2) This decision was based on Bustros *v.* White,(3) at which time it was held that there was no discretionary power under this rule. But in England the Court has since been given a discretion by the amendment of O. 31, r. 18 (2). And this is so here also under the second clause of r. 18, *post*. A party is entitled to production or inspection only when the books or papers are material and necessary to establish his cause of action. The exercise of the power under this rule cannot be delegated to a commissioner.(4) Upon an application for inspection of documents, which is objected to on the ground of immateriality, the Court will, if necessary, order them to be produced for its own inspection in order to judge of their materiality.(5) The power of refusing inspection should be exercised with great caution; and the opposite party should be allowed to inspect and take copies of the documents when they relate to matters in issue, unless they are privileged in law, relate exclusively to the case of the party producing them, and contain nothing supporting or tending to support the other side.(6)

Party.– Therefore, the order should not issue against any other person, not even the party's solicitor.(7)

"Possession or power."—See *ante*, and notes to r. 13, *ante*.

"Relating to," etc.—As to the interpretation to be given to these words, see notes to r. 13, *ante*.

Revision.—An order under this section is not open to revision, and can only be impeached in appeal from the final decree.(8)

Inspection of documents referred to in *pleadings or affidavits*

15. *Every* party to a suit *shall be entitled* at any time *to* give notice to any other party, *in whose pleadings or affidavits reference is made to any document*, to produce *such* document for the inspection of the party giving such notice, or of his pleader, and to permit *him or them* to take copies thereof; *and any* party *not* complying with such notice shall *not* afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he *shall* satisfy the Court that such document relates only to his own title, *he being a defendant to the suit*, or that he had some

(1) Vishnu Yeshawant *v.* New York Life Insurance Co., 7 Bom. L. R. 709 (1905).

(2) Wallace *v.* Jefferson, 2 B. 453 (1878).

(3) 1 Q. B. D. 426.

(4) Gobind *v.* Kunja, 10 C. L. J. 407 (1909); 4 C. W. N. 147.

(5) Gurnuk Roy *v.* Tularam, 28 C. 424 (1901).

(6) Balamoney *v.* Ramasami Chettiar, 30 M. 230 (1906); s. c., 17 M. L. J. 79; and notes may be taken during inspection: Gobind *v.* Kunja, 10 C. L. J. 407 (1909); 14 C. W. N. 147.

(7) See Cashin *v.* Craddock, 2 C. D. 140.

(8) *In re* Nizam of Hyderabad, 9 M. 256 (1886); Balamoney *v.* Ramasami Chettiar, 30 M. 230 (1906).

other cause *or excuse which the Court shall deem* sufficient for not complying with such notice, *in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.*

Notice to produce for inspection.—This is r. 15 of the English O. 31. There is a distinction between an application for general discovery of documents and an application for production of a specified document, that is, a document referred to in the pleadings or affidavits. The order for production may be made at any early stage of the case, and, unlike the case of general discovery, a defendant is entitled to inspection although he has not filed his written statement.(1) As to form of application, see No. 124, Schedule IV. of last Code and r. 17. A Judge has no power under this rule, or r. 18, to direct inspection to be given of documents unless there be as an essential preliminary to the right of inspection either the specification of a document by the party seeking the inspection, or its disclosure by the other side in the pleadings or otherwise.(2)

"Other party."—A defendant may obtain discovery or inspection, as against a co-defendant, if the latter can be regarded as an opposite party.(3) If the party on whom the notice is served should answer in the manner prescribed in the next rule, he should object to produce such documents as he considers he ought not to be compelled to produce, leaving his adversary to get an order for inspection under r. 18, *post*.

"And any party not complying."—The concluding words of this rule give an express power to the Judge to allow the document to be used in evidence, a power which the Judge was originally held to have by implication. As to documents referring to party's own title and "sufficient cause," see notes to rr. 1, 6, *ante*.(4)

Notice to produce.

16. *Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.*

[s. 132.]

Time for inspection when notice given.

17. The party to whom such notice is given shall, within ten days from the receipt *of such notice*, deliver to the party giving the same a notice stating a time within three days from *the* delivery *thereof* at which the documents, or such of them as he does not object to produce, may be inspected at *the* office *of* his pleader, or *in the case of bankers' books or other books of account or books in constant*

(1) Quilter *v.* Heatley, 23 Ch. D. 42, 49, 50; followed in Ram Dyal Saligram *v.* Nurhurry Balkrishna, 18 B. 368 (1893).

(2) Secretary of State *v.* Jehangir, 4 Bom. L. R. 342 (1902).

(3) Anandrao Vithal *v.* Budha Malla, 17 B. 384 (1892).

(4) And Webster *v.* Whewall, 15 C. D. 120; Quilter *v.* Heatley, *supra*; Dhapi *v.* Ram Pershad, 11 C. 768, 777 (1887); Venayakrao Dhundiraj *v.* Narotam Anandji, 17 B. 581, 584 (1893).

use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. *Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.*

Notice for inspection.—This rule is taken from O. 31, r. 17. If a party does not wish to produce documents for inspection he should refrain from delivering the notice under this rule, and wait for the plaintiff to apply for an order under r. 18, supported by an affidavit under that rule.(1) In the under-mentioned case (2) inspection was ordered to be given where the defendant kept his books, a matter now specially dealt with by the rule.

Order for inspection.

18. (*1*) *Where the* party served with notice under *rule 15* omits to give *such* notice of *a* time for inspection or objects to give inspection, or *offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the* party desiring it, *make* an order *for* inspection *in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.*

(*2*) *Any* application *to inspect* documents, except *such as are* referred to in the *pleadings, particulars* or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the *other* party. *The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.*

Application for order of inspection.—This rule is taken from O. 31, r. 18. No order will be granted unless notice has been served under r. 15.(3) The filing of an affidavit by one party under r. 13 of this Order does not preclude the other party from applying for further discovery and inspection under this rule.(4)

Affidavit in support of application.—The rule applies to every case in which the party desiring inspection is able to state of his own knowledge that the other party is in possession of documents and that they are relevant.(5)

(1) Dhapi *v.* Ram Pershad, 14 C. 768, 777 (1887); and as to when time begins to run, see ib.

(2) Kevaldas *v.* Pestonji, 5 B. 467 (1881).

(3) Mohendro Nauth *v.* Ishan Chunder, 10 C. 56 (1883); and see Dhapi *v.* Ram Pershad, 14 C. 768 (1887).

(4) Basanta *v.* Kumudini, 38 C. 428 (1911).

(5) Nittomoyee Dassee *v.* Soobul Chunder Law, 23 C. 117, 127 (1895).

The applicant must show *inter alia* that the documents of which he claims inspection are relevant to the matters in question in the suit. That appears under r. 14, because it is that rule only which gives the Court power to order production of documents relating to any matter in question in the suit, and the Court has no power to order the production of any other document.(1) The second sub-rule, which corresponds with s. 134 of the last Code,(2) is taken from O. 31, r. 18. The last sentence, which is also new, is taken from the same English rule. It is open to the other party to file an affidavit denying possession, or relevancy or claiming protection, and it seems from the English decision on the rule cited that the statements in such affidavit as to possession must be accepted by the Court as no less conclusive than if they were contained in an affidavit of documents.(3) The Court, however, in the case last cited distinguishing questions of privilege, was not prepared to accept the broad proposition, that in an application under this rule the affidavit of the opposite party would also be conclusive on the question of relevancy.(4)

19. (*1*) *Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.*

Verified copies.

(*2*) *Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.*

(*3*) *The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or*

(1) Nittomoye Dassee *v.* Soobul Chunder Law, 23 C., at p. 125 (1895).

(2) See Secretary of State *v.* Jehangir, 4 Bom. L. R. 342, 350 (1902).

(3) Annual Practice, 1905, p. 425; Wiedeman *v.* Walpole, L. R. 24 Q. B. D. 537, *per* Williams, J., at p. 542; s. c., in appeal at p. 626; see Nittomoye Dassee *v.* Soobul Chunder Law, 23 C. 117, at p. 127 (1896).

(4) Nittomoye Dassee *v.* Soobul Chunder Law, *supra*, at pp. 125, 126.

power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

"**Verified copies.**"—This rule is new, and is taken from O. 31, r. 19A.

"**Privilege.**"—This word in the second sub-clause includes any objection to inspection, for instance irrelevancy,(1) and the word "document" includes a sealed-up portion of a document.(2)

Power to call for affidavit.—The documents referred to in the third sub-clause are documents which can be named and specified.(3) The statements are, it is conceived, as conclusive as if they were in an affidavit of documents.(4)

Premature discovery.

20. *Where* the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to *the* discovery or inspection *sought* depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question *in dispute in the suit* should be determined before deciding upon the right to the discovery or inspection, order that *such* issue or question be determined first, and reserve the question as to the discovery or inspection.

Premature discovery.—This rule, which is taken from O. 31, r. 20, deals with the case where discovery or inspection is premature. The intention is to give the Court the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence which is to be used at the trial, and therefore from the nature of the case before the hearing of the cause.(5) The provisions of this rule are not intended to come into operation until after an application has been made under r. 18, *ante*.(6) The practice is to take out a summons calling on the other party to show cause why an issue should not be framed.(7) Where an order is made under this rule by the Judge in Chambers, the suit should be set down for the trial of the particular issue as well as of the cause itself when it comes to a hearing before the same Judge.(8) An order under this section is not a "judgment" and no appeal lies from it.(9)

Non-compliance with order for discovery.

21. *Where* any party fails to comply with any order to answer interrogatories, or for discovery or inspection *of documents*, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution,

(1) Ehrmann *v.* Ehrmann (1896), 2 Ch. 826.

(2) Ib.; Ainsworth *v.* Wilding (1900), 2 Ch. 315.

(3) White *v.* Spafford (1901), 2 K. B. 241; and see Graves *v.* Heinemann, 18 Times R. 115, following that case.

(4) Ann. Pr., notes to O. 31, r. 19A.

(5) Ahmedbhoy *v.* Nullcebhoy, 6 B. 572 (1882). See Amarendra Nath Chatterjee *v.* Kally Kissen Tajore, 2 C. W. N. 17, at p. 18 (1897); Sutherland *v.* Singhee Churn Dutt, 10 C. 808, at p. 811 (1884).

(6) Dhapi *v.* Ram Pershad, 14 C. 768, at p. 776 (1887).

(7) Ib., at p. 705.

(8) Ib., at p. 572.

(9) Secretary of State *v.* Jehangir, 4 Bom. L. R. 342 (1902).

and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not *defended*, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and *an order* may *be made* accordingly.

Default.—This rule, which is taken from English O. 31, r. 21, is a highly penal provision.(1) It is not imperative.(2) The party is only *liable* to, etc. There must, in the first place, be an order which has been disobeyed, and, therefore, as regards interrogatories, no action can be taken under this section until an order has been passed under r. 11, *ante*.(3) A case will not be dismissed, or a defence struck out, except in extreme cases, and as a last resort.(4) An order will not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid a fair discovery.(5) If the parties concerned are *pardanashin* ladies this should be taken into account.(6) But the rule has been framed to prevent not merely contumacy but procrastination,(7) and the Court will not go on staying proceedings for ever; it may expel them altogether from the Court.(8) The Court may dismiss the suit or strike out the defence. And in the High Court the party in default is also liable to commitment for contempt.(9) Where a defence is struck out and a decree is made, as in an undefended cause, the decree is not *ex parte* within the meaning of O. IX. r. 13, so as to allow of an application to set it aside under that rule,(10) or in respect of the remedy of appeal.(11) It has, however, been held that a party, against whom an order has been made striking out his defence, may come in and seek to set it aside on showing good grounds.(12) This is because such an order is an interlocutory one, as regards which the Court has a wide discretion. It is, however, a different matter when such interlocutory order not having been set aside, a final decree is passed.(13) An order dismissing a suit under this rule is a decree, and is appealable,(14) and an order purporting to be made under this rule has been revised.(15) While there may be an appeal against an order dismissing a suit or a decree passed

(1) Twycross *v.* Grant, W. N. (75) 201, at p. 229.

(2) Hartley *v.* Owen, 34 L. T. 752; Kennedy *v.* Lyell, W. N. (82) 137.

(3) Prem Sukh *v.* Indro Nath Bannerjee, 18 C. 420, 421 (1891): *vide ante*, p. 787.

(4) See Shoma Kissor Mundlee *v.* Shoshe Bhoosun Biswas, C. 707 (1880); Khaja Assenoola Joo *v.* Khaja Abdool Aziz, 9 C. 923 (1883).

(5) Danvilliers *v.* Myers, W. N. (83) 58; Wilson *v.* Raffalovitch, 7 Q. B. D. 553.

(6) Kalian Bibi *v* Safdar Husain, 8 A. 265 (1886).

(7) Twycross *v.* Grant, W. N. 1875, 229.

(8) Rep. Liberia *v.* Roye, 1 App. Cas. 143.

(9) Hassonbhoy *v.* Cowasji Jehangir, 7 B. 1 (1881); see also Navivahoo *v.* Narotamdas, 7 B. 5 (1882).

(10) Kesharia Accomar *v.* Potooah Sett, 2 C. W. N. 676 (1898); Chunni Lal *v.* Chamman Lal, *post*.

(11) Chunni Lal *v.* Chamman Lal, 7 A. 159 (1884); decided before the amendment of s. 540 of the last Code, which gave an appeal from an *ex parte* decree. As to appeal, *vide post*.

(12) Khajah Assenoola *v.* Khajah Abdool Aziz, 9 C. 923 (1883); dist. in next case.

(13) Kesharia Accomar *v.* Potooah Sett, 2 C. W. N. 676, at p. 679 (1898).

(14) Maharajadhiraj Mansingji *v.* Mehta Hariharram, 19 B. 307 (1894); and in Chunni Lal v. Chamman Lal, 7 A. 159, 160 (1884).

(15) Dhapi *v.* Ram Pershad, 14 C. 768, at p. 777 (1887).

after striking out a defence, if on such appeal it be held that the order was justified, it is not open to the appellant in the latter case to enter into his defence on appeal, for otherwise he would be placed in a better position in the appeal than in the first Court.(1) The result of the defence being struck out, and the order striking it out affirmed, is that the party is placed in the same position as if he had not defended or (to use the words of the last Code) appeared and answered. This rule is the only provision under which a defence can be struck out. The Court has no power to strike out a defence for failure of the defendant to appear in time (in pursuance of an undertaking given by him to the Court) for further examination as a witness for the opposite side.(2)

22. *Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.*

Using answers to interrogatories at trial.

Method of using answers.—As regards this Cotton, L.J., said: (3) "Under the new rules the plaintiff can read one passage without referring to the whole even of the same paragraph, and I think no Judge would allow a defendant where he had made an admission to read with it a passage which was not connected in sense or substance with that admission, even if he had put in a statement submitting that he was entitled to do so and claiming to do so. Of course, when an admission is read everything ought to be read which is fairly connected with that admission: but I think it would be wrong for the defendant, and he would not be allowed, to try to bring in matter which was not in any way connected with the matter admitted."

23. *This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.*

Order to apply to minors.

Persons under disability.—See notes to r. 1, "Opposite parties," and cases there cited.

(1) Sm. Giribala Debi *v.* Upendro Nath Sen, Reg. App. Cal. H. C. 44 of 1902, 1 June, 1904.

(2) Vasudevad *v.* Sankaran, 22 M. L. J. 60 (1911).

(3) In Lyell *v.* Kennedy, 27 C. D. 15; and see Bowen, L.J., ibid. 29.

and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not *defended*, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and *an order* may *be made* accordingly.

Default.—This rule, which is taken from English O. 31, r. 21, is a highly penal provision.(1) It is not imperative.(2) The party is only *liable* to, etc. There must, in the first place, be an order which has been disobeyed, and, therefore, as regards interrogatories, no action can be taken under this section until an order has been passed under r. 11, *ante*.(3) A case will not be dismissed, or a defence struck out, except in extreme cases, and as a last resort.(4) An order will not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid a fair discovery.(5) If the parties concerned are *pardanashin* ladies this should be taken into account.(6) But the rule has been framed to prevent not merely contumacy but procrastination,(7) and the Court will not go on staying proceedings for ever; it may expel them altogether from the Court.(8) The Court may dismiss the suit or strike out the defence. And in the High Court the party in default is also liable to commitment for contempt.(9) Where a defence is struck out and a decree is made, as in an undefended cause, the decree is not *ex parte* within the meaning of O. IX. r. 13, so as to allow of an application to set it aside under that rule,(10) or in respect of the remedy of appeal.(11) It has, however, been held that a party, against whom an order has been made striking out his defence, may come in and seek to set it aside on showing good grounds.(12) This is because such an order is an interlocutory one, as regards which the Court has a wide discretion. It is, however, a different matter when such interlocutory order not having been set aside, a final decree is passed.(13) An order dismissing a suit under this rule is a decree, and is appealable,(14) and an order purporting to be made under this rule has been revised.(15) While there may be an appeal against an order dismissing a suit or a decree passed

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(3) Prem Sukh *v.* Indro Nath Bannerjee, 18 C. 420, 421 (1891): *vide ante*, p. 787.

(4) See Shoma Kissor Mundlee *v.* Shoshe Bhoosun Biswas, C. 707 (1880); Khaja Assenoola Joo *v.* Khaja Abdool Aziz, 9 C. 923 (1883).

(5) Danvilliers *v.* Myers, W. N. (83) 58; Wilson *v.* Raffalovitch, 7 Q. B. D. 553.

(6) Kalian Bibi *v* Safdar Husain, 8 A. 265 (1886).

(7) Twycross *v.* Grant, W. N. 1875, 229.

(8) Rep. Liberia *v.* Roye, 1 App. Cas. 143.

(9) Hassonbhoy *v.* Cowasji Jehangir, 7 B. 1 (1881); see also Navivahoo *v.* Narotamdas, 7 B. 5 (1882).

(10) Kesharia Accomar *v.* Potooah Sett, 2 C. W. N. 676 (1898); Chunni Lal *v.* Chamman Lal, *post*.

(11) Chunni Lal *v.* Chamman Lal, 7 A. 159 (1884); decided before the amendment of s. 540 of the last Code, which gave an appeal from an *ex parte* decree. As to appeal, *vide post*.

(12) Khajah Assenoola *v.* Khajah Abdool Aziz, 9 C. 923 (1883); dist. in next case.

(13) Kesharia Accomar *v.* Potooah Sett, 2 C. W. N. 676, at p. 679 (1898).

(14) Maharajadhiraj Mansingji *v.* Mehta Hariharram, 19 B. 307 (1894); and in Chunni Lal v. Chamman Lal, 7 A. 159, 160 (1884).

(15) Dhapi *v.* Ram Pershad, 14 C. 768, at p. 777 (1887).

by the party *so neglecting or* refusing, whatever the result of the suit may be, *unless the Court otherwise directs;* and no costs of proving *any* document shall be allowed *unless* such notice *is* given, *except where the omission to give the notice is, in the opinion of the Court, a saving of expense.*

Notice to admit documents.—This rule, which has been considerably remodelled, and is, with some slight alterations, the same as the English rule, is taken from O. 32, r. 2. For form of notice, see No. 127 in Schedule I. Part II. of the former Code and the next rule. A fuller form is given in the Annual Practice, Vol. II. Appendix B. No. 11. The rule is enacted for the facility of proof and saving of costs. The rule has been held to extend to all documents which a party proposes to adduce in evidence, and whether in possession or otherwise, and even though the opposite party has stated that he would not admit them (1) According to the English practice, if a party does not save all just exceptions he is precluded from objecting to the admissibility in evidence of the documents admitted.(2) Though that may sometimes be the case here, it would be necessary to consider in certain instances, *e.g.* a question of stamp, and possibly in others, whether the admission of the party could render that admissible which the law says should not be admitted. Further, an admission with the "saving" that a document is a copy merely dispenses with proof that it is a copy. It does not, however, dispense with proof of circumstances permitting secondary evidence being given. Admissions of documents between co-defendants to which the plaintiff is not a party cannot be entered as evidence against him.(3) If the party having notice fails to prove the documents, the party refusing to admit will not be made liable for the costs of the unsuccessful attempt.(4) This also appears from the words of the rule, which imply successful proof.

Notice to admit facts.—This section is limited to documents. Under the English practice,(5) however, and that of the Calcutta High Court,(6) notice may be given to admit specific facts, and in case of refusal to admit, the party so refusing pays the costs of proving such facts unless the Judge certifies that the refusal was reasonable. The form of notice and answer are given in the Annual Practice, Nos. 12 and 13 in Appendix B., and in forms 269 E. (1) (2) of the Calcutta High Court Rules. See as to admissions for purpose of trial Authors' Evidence Act, 4th ed. p. 349. The Code now provides in r. 4, *post*, for admission as to facts.

Form of notice.

3. *A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.*

(1) Rutter *v.* Chapman, 8 M. & W. 388; Spencer *v.* Borough, 9 M. & W. 425; as to giving notice to admit proof of photographer, see East Stonehouse Lorne Board *v.* Victoria Brewery Co. (1895), 2 Ch. 574.

(2) Vane *v.* Whittington, 2 Dowl. N. S. 757; Chaplin *v.* Levy, 9 Ex. 531, in which a party was held not to be precluded from objecting to the insufficiency of the stamp; and see Taylor, Ev., § 724 A. 9th ed.

(3) Dodds *v.* Tuke, 25 C. D. 617.

(4) Stracey *v.* Blake, 7 C. & P. 404; Doe *v.* Peters, 1 C. & K. 279; Freeman *v.* Rosher, 6 D. & L. 517.

(5) O. 32, r. 4.

(6) Cal. H. C. rules, O. S. 269 D.

Notice to admit facts.

4. *Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.*

"**Not later than nine days before.**"—English O. 32, r. 4. This expression of time is unusual, and might be construed to be identical with "clear days," *i.e.*, exclusively of both the day of service of the notice and the day named for hearing. The day of service is in England excluded, and the word "before" appears to exclude the day of hearing.(1) A notice to admit facts should, where practicable, supersede interrogatories.(2) This notice may be delivered with the statement of claim, and the Court cannot set it aside as improper. The defendant's only course is to refuse to answer it, which he would do at his peril as to costs.(3) Where plaintiff disregarded a notice under this rule given by the defendant, the latter was allowed to administer interrogatories.(4)

"**Any other party.**"—*Semble* these words mean any opposite party, as in O. XI. r. 11, *ante*.(5)

Form of admissions

5. *A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.*

Judgment on admissions.

6. *Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the*

(1) Ann. Pr., note to O. 32, r. 4.
(2) O. 31, r. 2; and see Clarke *v.* C., W. N. (99) 130.
(3) Crawford *v.* Chorley, W. N. (83) 198.
(4) Hellier *v.* Ellis, W. N. (84) 9.
(5) See Brown *v.* Watkins, 16 Q. B. D. 125.

parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

Judgment.—The rule is merely permissive, and the plaintiff by not availing himself of it, and proceeding to trial in the ordinary way, does not thereby waive his right to rely, at the trial, on the admission contained in the pleadings.(1) "This rule (1875) enables the plaintiff or defendant to get rid of so much of the action as to which there is no controversy. That is the meaning of it;" (2) and the same learned Judge frequently decided that the former rule must be read as if the words "if any" were inserted after the word "question." (3) The Court will not, on motion, give judgment on admissions contained in the defence of an infant defendant nor, *semble*, on default of infant in filing a defence.(4) The plaintiff must have a clear case, and the mere admission or non-denial by the defendant of a right asserted by plaintiff, but which in fact has no existence in law, is not sufficient to entitle the plaintiff to a judgment establishing the right.(5) In any case the power of the Court is discretionary, and will not be exercised where the case cannot be conveniently tried on motion.(6)

Affidavit of signature.

7. *An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required.*

Notice to produce documents.

8. *Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.*

Object of rule.—The object of this rule is to enable secondary evidence of documents to be given at the trial if they are not then produced pursuant to the notice.(7) See English O. 32, r. 8.

Costs.

9. *If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.*

(1) Tildesley *v.* Harper, 7 C. D. 403.

(2) *Per* Jessel, M.R., Thorp *v.* Holdsworth, 3 C. D. p. 640.

(3) Clutton *v.* Lee, 24 W. R. 607 (Eng.).

(4) Byrne *v.* B., 5 L. R. Ir. (Ch. D.) 134, and note thereto, p. 136; National Provincial Bank *v.* Evans, 30 W. R. 177; but see *contra* Fitzwalter *v.* Waterhouse, 52 L. J., Ch. 83.

(5) Chilton *v.* Corporation of London, 7 C. D. 735; and see Gilbert *v.* Smith, 2 C. D. 686, judgment of Mellish, L.J.; Rutter *v.* Tregent, 12 C. D. 758; Landergan *v.* Feast, 34 W. R. 691.

(6) Melton *v.* Sidebottom, 5 C. D. 342.

(7) Dwyer *v.* Collins, 7 Ex. 639; Stulz *v.* S., 5 Sim. 460; Day's C. L. P. Acts, p. 141; Taylor's Evid., pp. 440–56.

ORDER XIII.

Production, Impounding and Return of Documents.

Documentary evidence to be *produced* at first hearing.

1. The parties or their pleaders shall *produce*, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced. [s. 188.]

(2) The Court shall receive the documents *so* produced: provided that *they are* accompanied by an accurate list thereof prepared in such form as the High Court directs. [s. 140.]

Documents to be ready.—If a plaintiff sues or relies on a document he must either produce it with his plaint or enter it on the list attached to it (O. VII. r. 14). Any document which has not been produced or entered cannot be received in evidence without leave of the Court (O. VII. r. 18; see notes thereto). And by this rule the parties must bring with them, and have in readiness at the first hearing, all the documentary evidence in their possession or power,(1) and on which they rely, and file it. But they need not file them unless they are called for.(2) The main object of this and the following rule is to prevent parties from manufacturing evidence pending the trial to meet unexpected exigencies; (3) not to shut out true and valuable evidence merely because the party had, without good and assignable cause, abstained from bringing it before the Court at the first hearing; (4) or formal evidence beyond suspicion, such as certified copies of public documents.(5)

(1) See Syed Ikram Hossein *v.* Ram Lochun Dutt, 23 W. R. 29 (1875) [s. 128 of the Code of 1859, though it did not contain them, and was held to be so limited].

(2) Mahbub Hossein *v.* Patasu Kumari, 1 B. L. R. 120 (1868).

(3) Syed Ikram Hossein *v.* Ram Lochun Dutt, 23 W. R. 29 (1874), *per* Phear, J. [s. 128 of Code of 1859]; Ranchhod Hirabai *v.* Secretary of State, 22 B. 173 (1896); Lilabati Misrain *v.* Bishun Chobey, 6 C. L. J. 621 (1907).

(4) Syed Ikram Hossein *v.* Ram Lochun Dutt, *supra*.

(5) Ranchhod Hirabai *v.* Secretary of State, 22 B. 173 (1896); Lilabati Misrain *v.* Bishun Chobey, 6 C. L. J. 621 (1907).

Effect of non-production of documents.

2. No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of *rule 1* shall be received at any subsequent stage of the proceedings unless good cause *is* shown to the satisfaction of the Court for the non-production thereof; and the *Court* receiving any such evidence shall record *the* reasons for so doing.

Effect of non-production.—A party is bound to be prepared at all points with his documentary evidence; (1) but they need not file them unless they are called for.(2) The parties, though not entitled as of right to adduce fresh documentary evidence after the issues on the case are settled, may yet tender such evidence, stating the grounds upon which it was not tendered at an earlier stage; and the Judge may receive or reject such evidence; but the grounds on which he acts should be stated on the record.(3) If in the course of a trial something is brought to light which is entirely new, no doubt the Court framing a fresh issue would give the parties time to produce evidence in respect of that new matter.(4) As to the manner in which these provisions should be applied, see notes to last rule.

Rejection of irrelevant or inadmissible documents.

3. The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

"**Reject.**"—The Court having called on the parties to produce their documentary evidence, must receive and inspect every document tendered, returning such as it considers irrelevant or otherwise inadmissible,(5) either under the Evidence Act or other Acts, such as those relating to stamp and registration. If for want of time, the Judge is then unable to inspect or consider them, he may allow them to be filed and inspect and reject them afterwards.(6) The documents returned by the Court cannot be used in evidence, or put in the record until proved or admitted, *vide post*. No appeal lies from an order rejecting documents, though the rejection may be impugned in the appeal from the final decree.(7)

(1) Gour Huree *v.* Pran Huree, 21 W. R. 42 (1873) (s. 128, Code of 1859).

(2) Mahbub Hossein *v.* Patasu Kumari, 1 B. L. R. 120 (1868).

(3) Watson & Co. *v.* Kunhye Bahadoor, 9 W. R. 294 (1868); as to appellate Court throwing out document received by first Courts, see Bhoom Narain *v.* Kurmoon Ali, W R. 198 (1864).

(4) Gour Huree *v.* Pran Huree, 21 W. R. 42, 43 (1873).

(5) Roshun Jehan *v.* Inayut Hossein, Marsh, 127 (1867).

(6) Soodukhina Chowdhrain *v.* Raj Mohun Bose, 11 W. R. 350 (1869) (s. 129 of Code of 1859).

(7) *In re* Erskine, 18 W. R. 511 (1872)

[s. 141.]

Endorsements on documents admitted in evidence.

4. (1) Subject to the provisions of the next following sub-*rule*, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely :—

(*a*) the number and title of the suit,

(*b*) the name of the person producing the document,

(*c*) the date on which it was produced, and

(*d*) a statement of its having been so admitted ;

and the endorsement shall be signed *or initialled* by the Judge.

(2) *Where* a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following *rule*, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed *or initialled* by the Judge.

Endorsements.—The sections in the last Code corresponding with this and the following rules, 6, 7, and 8, were substituted by sect. 13, Act VII. of 1888, for sects. 141 and 142 of the Code of 1882. As to admission in evidence, see notes to rr. 6 and 7, *post*.

[s. 141A.]

Endorsements on copies of admitted entries in books, accounts and records.

5. (*1*) *Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where* a document admitted in evidence in the suit is an entry in a *letter-book or a* shop-book or other account in current use, the party on whose behalf the *book or* account is produced may furnish a copy of the entry.

(2) *Where* such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(*a*) where the record, book or account is produced on behalf of a party, then by that party, or

(*b*) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) *Where* a copy of an entry is furnished under the foregoing provisions of this *rule*, the Court shall, after causing the copy to be examined, compared and *certified* in manner mentioned in *rule 17 of Order VII*, mark the entry and cause

the book, account or record in which it occurs to be returned to the person producing it.

Stamp.—This section was added to the last Code by sect. 13, Act VII. of 1888. A copy or extract from an entry in an account book filed under the provisions of this section and sect. 142A (now r. 7) requires no stamp.(1)

Endorsements on documents rejected as inadmissible in evidence.

6. *Where* a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (*a*), (*b*) and (*c*) of *rule 4*, sub-*rule* (*1*) *together with* a statement of its having been rejected, and the endorsement shall be signed *or initialled* by the Judge.

Recording of admitted and return of rejected documents.

7. (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under *rule 5*, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the *persons* respectively producing them.

"**Admitted in evidence.**"—The rules as to the admissibility of evidence will be found in the Evidence Act. Primary rules are that documents must be proved by the party relying on them,(2) unless admitted.(3) And it is not sufficient that they have not been denied by the opposite party.(4) Secondary evidence should not be accepted without sufficient reason.(5)

"**Form part of the record.**"—The corresponding section in the last Code was added by Act VII. of 1888, sect. 13. Documents which have not been proved but simply filed in accordance with a usage in the Mofussil should not be put up with the record. It is the duty of the Judge to pass over such

(1) Kastur *v.* Fakiria, 26 B. 522 (1902); s. c., 4 Bom. L. R. 223.

(2) Kirteebash Mayettee *v.* Ramdhun Khoria, B. L. R. F. B. 658 (1867); Reazoonissa *v.* Bookoo Chowdhrain, 12 W. R. 267 (1869).

(3) Burjorji Cursetji *v.* Muncherji Kuverji, 5 B. 143 (1880).

(4) See cases in last note but one.

(5) See Ramalakshmi Ammal *v.* Sivanantha Perumal, 14 M. I. A. 570, 588; 17 W. R. 553; Ram Gopal Roy *v.* Gordon Stuart, 14 M. I. A. 453, 461 (1872); Syud Abbas Ali *v.* Yadeem Ramy, 3 M. I. A. 156 (1843).

documents unproved, but it is also the duty of the pleader of the party against whom they are intended to be used, to insist that they should not remain on the record at all.(1) Where a document tendered in evidence in a Court of first instance, is rejected as inadmissible, but is nevertheless allowed to remain on the record of the case, the mere fact of the document remaining on the record does not make it evidence in the Appellate Court; but it must be tendered in evidence in that Court, and accepted thereby.(2)

8. Notwithstanding anything contained in *rule 5 or rule 7* [s. 143.]
Court may order any document to be impounded. *of this Order or in rule 17 of Order VII*, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

Impounding document.- Act XIV. of 1882, sect. 143 as amended (sect. 14, Act VII. of 1888). A claim was made under sect. 278 of the last Code by one L. G. R. in respect of property attached as that of H. That claim was rejected. The District Judge finding that the document under which L. G. R. claimed executed in his favour by H., was a fraudulent preference, ordered the document to be impounded, and wrote across the document in red ink "declared to be fraudulent, D. J." L. G. R. obtained a rule for the return of the document and the expunging of those words, which was made absolute, the Court ordering that the words should be expunged and the document returned, and holding that this rule does not apply to a case of this kind, where that which is challenged is not the document itself, which was admitted to be genuine, but the transaction evidenced by the document.(3)

9. (1) Any person, whether a party to the suit or not, [s. 144.]
Return of admitted documents. desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under *rule 8*, be entitled to receive back the same,—

(*a*) *where the* suit *is one* in which an appeal is not allowed, when the suit has been disposed of, and

(*b*) *where the* suit *is one* in which an appeal is allowed, when *the Court is satisfied that* the time for preferring an appeal has elapsed *and that no appeal has been*

(1) Kallida Pershad Dutt *v.* Ram Hari Chuckerbutty, 5 C. 317 (1879).

(2) Har Gobind *v.* Noni Bahu, 14 A. 356 (1892).

(3) Rule 820 of 1904, Cal. H. C., 23 May, 1904.

preferred or, if an appeal has been preferred, *when* the appeal has been disposed of:

Provided that a document may be returned at any time *earlier than that prescribed by this rule* if the person applying *therefor* delivers to the proper officer a certified copy to be substituted for the original *and undertakes to produce the original if required to do so:*

Provided also that no document shall be returned which, by force of the decree, has become *wholly* void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the *person* receiving it.

Court may send for papers from its own records or from other Courts.

10. (1) The Court may of its own *motion*, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this *rule* shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this *rule* shall be deemed to enable the Court to use in evidence any document which under the *law of evidence* would be inadmissible in the suit.

"**The Court.**"—This rule, which corresponds with sect. 138 of the Code of 1859, except that the latter section empowered the Court to send for records from public officer also, applies to Appellate Courts as well as those of original jurisdiction.(1) The Judge should pass a distinct order on the application instead of recording the objectionable and meaningless order "*Nutti Shamelpesh.*" (2) But where a party petitioned the Court to send for certain documents, and an order was made that the matter should be decided at the hearing, but no

(1) Juggernath Sahoo *v.* Mahomed Hossein, 15 W. R. 173 (1871).

(2) Romun Kishen Dey *v.* Shaikh Kadir Buksh. 6 W. R. 79 (1866).

further application was made, it was *held* that the applicant was not entitled to appeal on the ground that the record had not been sent for.(1)

"May."—The Court has a discretion, and is not bound to send for the record,(2) though the discretion must be judicially exercised, and, as in other cases where the legislature uses the word "may," where a proper case for the exercise of the power arises, the Court should exercise it.(3) The Court will see that the facts set out in the second paragraph are made out in the affidavit. But if so the Court ought not to refuse the application merely because in its opinion the documents cannot be produced before the termination of the trial.(4) The Court is not bound to send for the whole record, but only such papers as are mentioned in the application.(5)

"Application."—This must show that the record is material; (6) that copies cannot be obtained, or that if obtainable they are insufficient, the original being necessary, as where copies cannot be attested by subscribing witness.(7) It was held that in all cases the party for whose benefit the documents have been used should be required to file copies in the record.(8)

"Other Court."—As already stated, the Court cannot now, as under the Code of 1859, send for records from public offices.(9) The record must be that of a suit or proceeding in another Court. The proper means of obtaining the other records is by summons directed to the proper officer. The Court to which the direction is issued has no discretion to refuse to send records which have been sent for by another Civil Court.(10)

(1) Chundi Churn Sashmul *v.* Doorga Pershad Mirdha, 12 C. L. R. 81 (1882).

(2) Heeramun Roy *v.* Kazee Tahoour, 7 W. R. 109 (1867).

(3) Rughoonath Bose *v.* Oomed Ali, W. R., F. B. 177 (1864), at p. 180, *per* Norman, Off. C.J.; where the Court had not sent for the papers or considered them the case was remanded: Ram Runjun *v.* Gopee Bullub, 18 W. R. 127 (1872).

(4) Krishna Churn Baisack *v.* Protab Chunder Surma, 7 C. 560 (1881) [the same rule applies as regards summons for witnesses, ib.].

(5) Mt. Janokee Bibee *v.* Shah Habeebul, 1864, W. R. 272 (1864).

(6) Mollwo, March and Co. *v.* Pertab Chunder, 1 Ind. Jur. N. S. 283 (1886); Rughoonath Bose *v.* Oomed Ali, W. R., F. B., 177 (1864).

(7) See Louis Coraah *v.* Gooroo Churn Ghose, 18 W. R. 13 (1872), where the Court held that the party should first apply for return of original from the other Court, putting in a copy, and then, if refused, apply under this section.

(8) Narappa *v.* Gapaya, 2 B. H. C. R 341, 342 (1866).

(9) See Juggernath Sahoo v. Mahomed Hossein, 15 W. R. 173 (1871). The Court of Wards was held not to be a Government Office in the ordinary sense of the term: Sobbee Jha *v.* Soshcenath Jha, 15 W. R. 150 (1870); where anything must be done to obtain a document it must be done by the party requiring it. Thus, where the party requires the production of a telegram it is for him and not the Court to obtain the necessary sanction of Government to its disclosure: Lekhraj *v.* Palee Ram, 2 A. H. C. R. 210 (1870).

(10) Golaup Coomary Dossee *v.* Soonder Narain Deo, 4 C. L. R. 36 (1879).

Saving Clause.—This embodies the ruling in the case undermentioned.(1)

Provisions as to documents applied to material objects.

11. The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

(1) Narappa *v.* Gapaya, 2 B. H. C. R. 341 (1866).

ORDER XIV.

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon.

Framing of issues.

1. (*1*) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. [s. 146.]

(*2*) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue *or a defendant must allege in order to constitute his defence.*

(*3*) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(*4*) Issues are of two kinds: (*a*) issues of fact, (*b*) issues of law.

(*5*) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the prties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(*6*) Nothing in this *rule* requires the Court to frame and record issues *where* the defendant at the first hearing of the suit makes no defence.

Issues of law and of fact.

2. *Where* issues both of law and of fact arise in the same suit, and the Court is of opinion that the case *or any part thereof* may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. [s. 146, sixth para.]

Materials from which issues may be framed.

3. The Court may frame the issues from all or any of the following materials:— [s. 147.]

(*a*) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(*b*) allegations made in the *pleadings* or in answers to interrogatories delivered in the suit;

(*c*) the contents of documents produced by either party.

Court may examine witnesses or documents before framing issues.

4. *Where* the Court *is* of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to *any law for the time being in force*) compel the attendance of any person or the production of any document by the person in whose *possession or power* it *is* by summons or other process.

Power to amend, and strike out, issues.

5. (*1*) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the *matters in* controversy between the parties shall be so made or framed.

(*2*) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

Object and effect of issues.—The object of pleading is that each side may be made fully aware of the questions which are about to be argued in order that each may bring forward evidence appropriate to the issues.(1) The pleadings, therefore, are the first stage at which the differences between the parties are made to appear. They may contain an express admission. Pleadings, however, in this country have hitherto not been construed with the same strictness as in England, where legal assistance of a highly expert character is always available. The Courts, therefore, have refused to apply to Indian pleadings the strict rule that averments not traversed must be taken to be admitted.(2) Orders VI. and VIII. now require a stricter practice which is itself justified by the increased professional efficiency. Where, however, issues have been framed, it was held prior to this Code that averments upon which no issue have been framed must be taken to be admitted.(3) For if parties intend

(1) Sayad Muhammad *v.* Fatteh Muhammad, 22 C. 324; 22 I. A. 4 (1894).

(2) Mt Anundmoyee *v.* Sheeb Chunder Roy, 9 M. I. A. 287, at p. 301; 2 W. R. P. C. 19 (1862); Mt. Ahmedee Begum *v.* Dabee Persaud, 18 W. R. 287 (1872) [but see Chundee Churn *v.* Mobaruck Ali, 12 W. R. 469 (1870)]; Madhopersad *v.* Gajudhar, 11 C. 111, 118 (1889).

(3) Mt. Ahmedee Begum *v.* Dabee Persaud, 18 W. R. 287 (1872). And as to admission in pleading, see O. VIII. r. 5.

to raise a question they should request the Court to frame an issue upon it. Where parties in a lower Court allow a suit to be conducted as if a certain fact was admitted, they cannot afterwards in appeal question it, and recede from the tacit admission.(1) It has been said that the duty of raising issues rests under the Code on the Court, and that an admission cannot be inferred from the omission to ask the Court to raise an issue.(2) The Court no doubt frames the issues, but this is done after enquiring from the parties the propositions on which they are *at variance*. It is possibly the duty of a Court, if it perceives that a point which it is necessary to prove may be open to dispute, to draw the parties' attention to it, with a view to ascertain if it is contested or admitted, and if contested to raise an issue on it. If this is done and no issue is raised, then the averment must be taken to be admitted, otherwise these provisions are useless. As regards other cases, something may depend on the circumstances; but if the *dictum* cited was intended to be of general application, it is, with respect, submitted to be unsound.

"One party."—That is ordinarily the plaintiff on one side and the defendant on the other. An issue between co-defendants is generally not allowable.(3) In some cases, however, this may be done, as where the recording and determination of such issue is necessary to giving the appropriate relief to the plaintiff.(4) No issue can be decided between co-defendants if the suit is dismissed.(5)

"Shall." Omission to settle issues.—The Court is directed to do so, and to omit to settle in order that the parties may before the trial know to what points they would have to address themselves, is a great irregularity.(6) At the same time, if it appears that the necessary points have been raised and discussed, the omission to settle issues is not fatal to the trial of the suit.(7) The Code contemplates the settlement of issues whether there is a written statement or not, though it is not obligatory on the Court to frame issues if the defendant makes no defence.(8) And where both parties invoked the decision of the Court upon a question raised by the pleadings and the question was argued,

(1) Mohima Chander *v.* Ram Kishore, 15 B. L. R. 142, 155 (1875); but see Madhopersad *v.* Gajudhar, 11 C. 111, 118 (1884); in this case, however, it is to be noted that it was not suggested that further evidence was obtainable.

(2) Gano Hari Sawant *v.* Shri Dev Sidheshwar, 4 Bom. L. R. 58 (1901).

(3) Degumber Mitter *v.* Khetter Mohun Mitter, 2 W. R. 45 (1865).

(4) See s. 11 as to *res judicata* in such cases, and Madhavi *v.* Kalu, 15 M. 264 (1892); Kalee Kinkur *v.* Kristo Mungul, 11 W. R. 462 (1869).

(5) Bevan *v.* Crawford, 6 C. D. 29.

(6) Muttayan Chettiar *v.* Sangili Vira, 12 C. L. R. 169, at p. 174 (1882); Baboo Rewan Pershad *v.* Jankee Pershad, 11 M. I. A. 25, 27 (1860).

(7) Katchekallyana *v.* Kachivijaya, 12 M. I. A. 495 (1869), especially where the parties well knew what the question between them was; Mt. Mitna *v.* Syad Fuzl Rub, 13 M. I. A. 573 (1870); 15 W. R. P. C. 15; and this procedure has been adopted without objection; Mahomed Basiroollah *v.* Ahmed Ali, 22 W. R. 448 (1874); Sayad Muhammad *v.* Fattch Muhammad, 22 C. 324 (1894), where the questions though not formally stated in the issues had been sufficiently open upon the pleadings.

(8) Rustun Gazi *v.* Tara Prosanna Chowdhuri, 11 C. W. N. 871 (1907).

it was held that the judgment upon it was not *ultra vires* because an issue was not framed embracing the whole question.(1) Where, however, a settlement of issues is considered necessary the case may be remanded on appeal for a new trial after settling and recording the points in dispute,(2) as also where the issue does not sufficiently direct the attention of the parties to the main question to be decided.(3)

On what fixed.—In the first place issues may be framed on the plaint and written statement which are the pleadings in the suit.(4) When the issues come to be stated wider questions may be propounded.(5) The Court is not bound to try the suit in the manner in which the plaint is framed, for its object is merely to bring the matter in dispute between the parties before the Court, but on the settlement of issues the Judge is to ascertain the question.(6) In fact the issues fixed, and not the pleadings, ought to guide the parties as to production of evidence.(7) The real points, however, are often missed or obscured by the infelicitous mode of drawing pleadings which sometimes prevails in the Mofussil. And it is therefore the duty of the judge to ascertain from enquiry of the parties or their pleaders the real points in dispute between them. A Court is not bound down to the language of the pleadings.(8) Issues, it has been said, may be settled even where a plaint discloses no cause of action.(9) though a Court has also in such case a discretion to reject it. A defendant is not precluded from setting up a defence which does not appear in his written statement.(10) But the issues raised should not be inconsistent with the pleadings. Thus, where the plaintiff sued alleging a deed purporting to be executed by himself to be a forgery, the Court should not admit the inconsistent issue whether it was executed under undue influence.(11) The Court may also look to interrogatories and contents of documents produced.

What should be subject of issues.—As a general rule only such averments should be made the subject of issues as are essential to support the cause of

(1) Soorjomonee Dayee *v.* Suddanund Mohapatter, 20 W. R. 377 (1873).

(2) Baboo Rewun Pershad *v.* Jankee Pershad, 11 M. I. A. 25 (1866).

(3) Oolagappa Chetty *v.* Arbuthnot, 1 I. A. 268; 14 B. L. R. 115 (1873); foll. Kuverji *v.* Babal, 19 B. 374, at p. 386 (1890).

(4) Kissen Lall *v.* Lalljeemull, 1 Ind. Jur. N. S. 364 (1866).

(5) See Sm. Kamini Debi *v.* Asutosh Mookerjee, 15 I. A. 159, 162, 163 (1888).

(6) Arbuthnot & Co. *v.* Betts, 14 W. R. 181 (1870).

(7) Huro Soonduree Debia *v.* Ameena Begum, 5 W. R. Act X. 72 (1866).

(8) Apaya *v.* Rama, 3 B. 210, 213 (1879); Moulvie Abdoollah *v.* Shaha Mujeesooddeen, 15 W. R. 286 (1871); Mahomed Mahmood *v.* Safar Ali, 11 C. 407 (1885); Modhe *v.* Dongre, 5 B. 609, 614 (1881); Radha Prasad *v.* Lal Saheb, 13 A. 53, 64 (1890), a procedure resembling the old Common Law pleading "*ore tenus*;" Thakur Rohan *v.* Thakur Surat, 12 I. A., at p. 56 (1884).

(9) Man Gobind Sircar *v.* Umbika Monee, 16 W. R. 218 (1871).

(10) Soonder Narain *v.* Shaikh Naindar, 21 W. R. 407 (1874); Gungapershad Sahu *v.* Maharani Beti, 12 I. A. 47, 50 (1884); Secretary of State *v.* Dipchand, 24 C. 306, at p. 309 (1896), where the objection though not taken in the written statement was raised in argument.

(11) Mahomed Buksh Khan *v.* Hosseini Bibi, 15 I. A. 81 (1888); or failed for want of consideration, Iyyappa *v.* Ramalakshmamma, 13 M. 546 (1890).

action and are denied by the defendant, or as are essential to support a plea and are denied by the plaintiff; and mere pieces of evidence which are to be adduced to enable the Court to infer the truth of a material statement ought not to be made the subject of separate issues.(1) Where a fact is expressly or impliedly admitted no issue, of course, arises, nor is proof of that fact necessary. But where the proof given falls short of legal requirements, the mere default of a party to contest a point which also falls short of an admission will not avail to cure the actual want of evidence.(2) If a plaint and its proof lead to particular issues the Court should raise them and give relief, provided they do not come by surprise on the defendant and are within the scope of and not inconsistent with the pleadings.(3) But a plaintiff will not be allowed to set up one case, and having proved another, ask issues to be raised to suit the proof.(4) See, however, notes on "Amendment of Issues," *post*. If a case not alleged by the plaintiff is disclosed on the evidence the Court can allow it to be set up, provided a specific issue is raised for it, and the defendant is given an opportunity of meeting it.(5)

Some of the cases which have been cited in this connection are as follows :— Suit on lease, genuineness of which disputed; (6) suit for kabulyat; (7) rent; (8) mortgage; (9) account; (10) easement suits; (11) plaintiffs suing as partners; (12) suit against representative of person deceased; (13) misdescription of plaintiff; (14) misjoinder of defendants; (15) suit for damages, issue framed to recover rent; (16) suit for malicious prosecution.(17)

Where the parties accept issues laid down by the Court they are bound

(1) Buch *v.* Furzind Ali, 3 A. H. C. R. 303, 307 (1871).

(2) Bhoobun Chunder Shome *v.* Ram Dyal Shamunto, 14 W. R. 55 (1870).

(3) Obhoy Churn *v.* Woomesh Chunder, 2 Hyde, 263 (1864); Kishun Pershad *v.* Bhowanee Deen, 1 Agra (1860), 47 F. B.; Eshan Chunder *v.* Shama Churn Bhutto, 6 W. R. P. C. 57 (1866); Sharoda Koomaree *v.* Mohinee Mohun, 20 W. R. 272 (1873); Virasvami Gramini *v.* Ayyasvami Gramini, 1 M. H. C. R. 471 (1863).

(4) Obhoy Churn *v.* Woomesh Chunder, *supra*.

(5) Parashram *v.* Miraji, 20 B. 569 (1895).

(6) Thakoorance Dossee *v.* Goluck Chunder, 5 W. R. 157 (1866).

(7) Radha Kishore *v.* Goluck Chunder, 11 W. R. 366 (1869).

(8) Kutty Sabramaniya *v.* Chinna Muttu, 3 M. H. C. R. 25 (1866); Parbooddeen Mullick *v.* Molaem Bibee, 14 W. R. 149 (1870); Miss Alack *v.* Luchmo Narain, 17 W. R. 504 (1872); Shorkoomar Singh *v.* Cruise, 6 W. R. 105 (1866).

(9) Muzboot Singh *v.* Mt. Chunder Mashee, 16 W. R. 44 (1871); Nundo Lall Mitter *v.* Prosunnomoyee, 19 W. R. 333 (1873); Khoob Chund *v.* Uchul Singh, S. D. N. W., 1862, p. 87.

(10) Bykunt Nath Sandyal *v.* Kalee Churn Paul, 17 W. R. 149 (1871); Pransookh Khan *v.* Ramzan Khan, S. D. N. W., 1863, p. 300, account settled; Kishen Pershad *v.* Bhowanee Deen, 1 Agra F. B. 47 (1866); Obhoy Churn *v.* Woomesh Chunder, 2 Hyde, 263 (1864).

(11) Achul Mahta *v.* Rajun Mahta, 6 C. 812 (1881); Rajrup Koer *v.* Abul Hossein, 6 C. 394 (1880).

(12) East Indian Railway *v.* Jordan, 14 W. R. 11 (1870), A. O. J.

(13) Avul Khadar *v.* Andhu Set, 2 M. H. C R. 423 (1865).

(14) Doorga Narain *v.* Birjo Kishore, 23 W. R. 172 (1875).

(15) Ranee Madhub Lahoree *v.* Biprodass Dey, 15 W. R. 169 (1871).

(16) Narayan Ganesh *v.* Hari Ganesh, 13 B. 664 (1889).

(17) Baboo Ram Buddeen *v.* Sirdar Dyal Singh, 17 W. R. 101 (1872).

by them.(1) Where a defendant pleaded limitation but placed that issue upon the simple fact that he himself had possession for twelve years and upwards, which issue was found against him: held it was too late for the defendant in appeal to object that that finding did not dispose of the issue of limitation.(2)

Order of disposal.—A Court is not under any obligation as to the order in which it is to try the issues which are raised before it, but may dispose of them in the way which it considers most likely to conduce to the ascertainment of the truth.(3) But issues should be tried separately, and not mixed up together.(4) Issues of law may, under the circumstances stated in r. 2, be tried first.(5)

"Nothing in this rule."—It was held under the Code of 1859, that if both parties appear, issues should be recorded, but if the defendant does not appear it is not possible to ascertain the points at which the parties are at variance. In such a case a Court does not frame issues, but hears the cases *ex parte*.(6) The rule expressly excludes such a case.

Amendment of issues.—It will be observed that the word "may" occurs in the early part, and the word "shall" in the concluding portion of the first paragraph of r. 5. The power of amending issues is almost the same as that given by the Common Law Procedure Act, and it has been held that a Judge is not bound to make such amendments, except for the purpose of more effectually putting in issue, and trying, the real question in controversy as disclosed by the pleadings on either side. In some cases the Courts, in their discretion, have gone beyond this, and, where no injustice would be done to either party, have allowed issues to be raised on matters which do not strictly come within the scope of the pleadings. The power to allow such amendments is given by the first part of the rule, which give a discretion, and not under the obligatory words of the latter part of the rule.(7) The power which is given to the Court by r. 5 (corresponding with sect. 141 of the Code of 1859) to modify the issues in the course of the trial, is meant to enable it to bring out the questions really arising out of the counter-averments of the parties. It is not intended that the Judge should take the case altogether out of the hands of the litigants and make for the plaintiff or defendant a case which he had no intention of making for himself.(8) A Court's power of raising additional issues is co-extensive with

(1) Shew Sukoy Lall *v.* Wajed Ali Khan, 13 W. R. 205 (1870); Moondur Beebee *v.* Hunooman Pershad, 11 W. R. 277 (1869); Beni Chunder *v.* Tarinee Chunder, 11 W. R. 20 (1869).

(2) Kisto Mohun *v.* Noyan Tara, 10 W. R. 389 (1868).

(3) Sitanath Doss *v.* Doyadronath Doss, 25 W. R. 54 (1874).

(4) Umbika Soondaree *v.* Woodin, 3 W. R. 226 (1865).

(5) See Secretary of State *v.* Jehangir, 4 Bom. L. R. 342 (1902), where an application to this effect was refused on the ground that the issues of law and fact were not separate.

(6) Ameer Ali *v.* Imamoddeen, 15 W. R. 145 (1871).

(7) Nehora Roy *v.* Radha Pershad Singh, 5 C. 64 (1879). See Shamu Patter *v.* Abdul Kadir, P. C., 16 C. W. N. 1109 (1912); 14 Bom. L. R. 1034; 39 I. A. 218.

(8) Naro Hari *v.* Anpurnabai, 11 B. 160 n., at p. 164 n. (1874).

its power of amending plaints, and is subject to the same restrictions. A Court therefore was held not authorized by the corresponding section to this rule to frame new issues which had the effect of altering the nature of the suit.(1) A permission to a defendant to file a supplemental answer does not entitle him to make a new case or raise a fresh issue in contradiction of his former defence.(2) Every matter fairly within the scope of the plaint, if important for the decision of the substantive difference between the parties, should be framed into an issue, and the duty of framing them is thrown on the Court in order to render substantial justice, and to prevent a party suing from being remitted to a new suit, when, by a suitable order as to terms upon which amendment shall be made, the Court, by framing additional issues, can determine in the existing suit the real question in controversy between the parties.(3)

The rule says "*at any time*" before decree. But when there has been a hearing and settlement of issues, the Court will, ordinarily, not exercise its discretionary power to raise a new issue except on clear proof of inadvertence, or mistake, or the discovery of new matters affecting the merits not within the knowledge of the parties at the date of the former settlement of issues.(4) If the Court intends to frame an additional issue, it should do so and then fix a day for the further hearing upon such issue. It should not merely record its intention to do so and leave the actual framing for the time of giving judgment.(5) A plaint has been amended in first appeal, and the suit remanded for the determination of a fresh issue arising upon such amendment.(6) The form, however, of a suit may not allow of particular rights being declared in it.(7) An amendment may be set aside in appeal.(8)

Although, under certain circumstances, a Judge at a trial may allow amendments or raise issues other than those settled, yet when a Judge at the settlement of issues, has refused to raise a certain issue, that question ought not to be re-opened at the trial, and the Judge at the trial ought not to modify the issues so as to re-open any question which the Judge settling the issues has decided.(9) When a Judge transfers a case to his own file he is at liberty to amend the issues first laid down, and to frame additional issues, and to go into the whole case, except upon any question upon which there has been a judicial finding. (10) The first part of cl. (1) of r. 5 leaves it in the discretion of the Court to frame such

(1) Narayan Ganesh *v.* Hari Ganesh, 13 B. 664 (1889); but see observations at p. 614, in Modhe *v.* Dongre, 5 B. 609 (1881); and as to amendments of plaints, see notes to O. VI. r. 17.

(2) Douglas *v.* Collector of Benares, 5 M. I. A. 271 (1851).

(3) Kishen Pershad *v.* Bhawenee Deen, 1 Agra, F. B. 46.

(4) Baboo Lall *v.* Ram Narain, Coryton, 8 n. (1865). In Bolye Meah *v.* Khetoo Gorai, 20 W. R. 208 (1873), amendment was allowed after all the evidence had been taken. As to new matter turning up during trial, see Aga Syud Saduck *v.* Hadjee Jackariah Mahomed, 2 Ind. Jur. N. S. 309 (1867).

(5) Kamul Kaminee *v.* Obhoy Churn Ghose, 15 W. R. 151 (1871); Sreehurree Mundul *v.* Judoonath Ghose, 10 W. R. 169 (1868).

(6) Abdul Kadar *v.* Mahomed, 15 M. 15 (1890).

(7) Ameeroonissa Khatoon *v.* Abedoonissa Khatoon, 2 I. A. 87, 112 (1875). See Sharoda Koomaree *v.* Mohinee Mohun, 20 W. R 272.

(8) Narayan Ganesh *v.* Hari Ganesh, 13 B. 664 (1889).

(9) Bolye Chund Sing *v.* Moulard, 4 C. 572 (1878).

(10) Tarucknath Mookerjee *v.* Gource Churn Mookerjee, 3 W. R. 147 (1865).

additional issues as it thinks fit; but the latter part makes it imperative to frame such additional issues as may be necessary for determining the matters in controversy.(1)

Appellate Courts.—In appeal the case should be dealt with not on the mere wording of the plaint, but on the issues settled for trial, and the manner in which the case was tried by the first Court.(2) A ground of defence, which was not taken in the written statement nor made the subject of issue, was not allowed to be argued.(3) Where issues have not been settled, but the judgment states the points for consideration which appear to have been raised by the parties, then these points have been taken as the issues.(4) Where a new issue is raised in the Appellate Court, it should be done in such a way as to give the parties the fullest opportunity of producing evidence upon it.(5) See O. XLI. rr. 25, 26.

Questions of fact or law may by agreement be stated in form of issues.

6. *Where* the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

(*a*) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(*b*) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(1) Shamu Patter *v.* Abdul Kadir, P. C., 16 C. W. N. 1009 (1912); 14 Bom. L. R. 1034; 39 I. A. 218.

(2) Rajah Rup Singh *v.* Rani Baisni, 11 I. A 149, at p. 155 (1884); 7 A. 1.

(3) Moung Hmoon Htaw *v.* Mah Hpwah, 11 I. A. 109, at p. 120 (1884); 10 C. 777; and see Punchanan Roy *v.* Troylucko Mohinee, 14 W. R. 466 (1870) [departure from case made in Lower Court].

(4) Gunga Pershad Sahu *v.* Maharani Bibi, 12 I. A 47, 50 (1884).

(5) Latoo Mundul *v.* Bhoobun Mohun, 17 W. R. 361 (1872); Rani Persaud Dutt *v.* Krishto Mohun Shaw, 18 W. R. 297 (1872); Mahomed Rasid *v.* Jadoo Mirdha, 20 W. R. 401 (1872); but the party should move the Court to allow him to give evidence: Eshan Chunder *v.* Shaikh Dhonaye, 11 W. R. 61 (1869).

(*c*) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

7. *Where* the Court *is* satisfied, after making such inquiry as it deems proper,— [s. 151.]

(*a*) that the agreement was duly executed by the parties,

(*b*) that they have a substantial interest in the decision of such question as aforesaid, and

(*c*) that the same is fit to be tried and decided,

it *shall* proceed to record and try the issue and state its finding or *decision* thereon in the same manner as if the issue had been framed by the Court;

and *shall*, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so *pronounced*, a decree shall follow.

Agreement to state issue.—These rules deal with the stating by consent of a special issue in a suit, whilst O. XXXVI. deals with proceedings without suit on the agreement of the parties.(1) These rules provide for what may be called the adjustment or compromise of a suit, not absolutely, as does O. XXIII. r. 3, but contingently on the opinion of the Court on certain issues of fact or law submitted to it.(2) Upon the finding of that issue the adjustment or compromise becomes absolute, and when it does, the duty of the Court is to pronounce judgment.(3) The word "may" in the corresponding section to r. 7 meant "shall," and the Court was bound to give judgment according to the agreement, even though specific performance of it might ordinarily be refused.(4) In a case decided under the Code of 1859 the defendants filed a regular appeal. The respondent objected that no appeal would lie, as both parties had entered into an agreement in writing to abide by the determination of a single issue set forth in the agreement, and which had been decided against the appellant. It was held that the Lower Court's decision on an issue so determined by agreement, could not be contested in the appeal which was dismissed.(5) These rules deal with a question being referred to the finding of the Court. But where the question of fact was referred to the finding of a Commissioner, it was held that the principles laid down in these rules were applicable, and that the defendants were estopped

(1) See cases in notes to O. 34, rr. 1-8, Annual Practice, 1905, p. 449, and rr. 235-239.

(2) Goculdas *v.* Scott, 16 Bom. 202, 216 (1891).

(3) Ib.

(4) Ib. at p. 216.

(5) Hadee Alee *v.* Khorshed Begum, S. D. N. W. 1861, p. 335.

from impugning the decree given by the Court in accordance with the finding of the Commissioner.(1) In the absence of such an agreement the Court cannot go outside the allegations in the plaint to decide an issue as to whether the plaint discloses a cause of action.(2)

(1) Bahir Das Chackravarti *v.* Nobin Chunder Pal, 29 C. 306 (1901); s. c., 6 C. W. N. 121.

(2) Kshitish *v.* Osmond Beeby, 39 C. 587 (1912); 15 C. W. N. 516.

ORDER XV.

Disposal of the Suit at the first Hearing.

1. *Where* at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment. [s. 152.]

Parties not at issue.

Parties not at issue.—This rule corresponds with sect. 144 of the Code of 1859, and 152 of the last Code. If the defendants voluntarily appear in Court and confess judgment, no summons is necessary for their appearance, and the Court may at once give judgment for the plaintiffs.(1) When the plaintiff sues the right person, but serves the summons on another person of a similar name, who appears and denies liability, the suit should be dismissed with costs.(2)

2. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants. [s. 153.]

One of several defendants not at issue.

One defendant not at issue.—In an action commenced against several joint debtors, judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others.(3)

3. (1) *Where* the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court *is* satisfied that no further argument or evidence than the parties can at once *adduce* is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit: [s. 154.]

Parties at issue.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(1) Bank of Bengal *v.* Currie, 3 B. L. R. 403; s. c., 12 W. R. 432 (1869).

(2) London, Bombay and Mediterranean Bank *v.* Mahomed Ibrahim, 4 B. 619 (1880).

(3) Dick *v.* Dhunji, 25 B. 378 (1901).

(2) *Where* the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

Determination of issue.—A Judge cannot dispose of a suit at the first hearing if a party appears and objects to the adoption of that procedure.(1) When a summons has been issued for the settlement of issues only, a Judge should not proceed and try the cause unless under the circumstances laid down in this rule, for otherwise he might preclude a party from adducing evidence in support of his case; (2) but if the evidence adduced is decisive of the matter in dispute, then the Judge may dispose of the cause, unless either of the parties distinctly objects and asks for time to produce evidence in support of his case.(3)

In the under-mentioned case (4) the Privy Council observed: "Before entering upon the particular questions raised by this appeal, it may be right to observe, that the Courts in India, in disposing of the case, were bound to proceed as the High Court appears to have proceeded, upon the facts alleged by the plaint, and upon the assumption of the truth of those facts. When a plaintiff, on certain alleged facts, asks relief, and is unable to obtain a trial of the facts, and a hearing on the facts that he may establish, by reason of the conclusions of law which the Judge forms on the case in its then condition, justice requires that the Court should proceed upon the plaintiff's allegations. The case must be determined as if it had arisen on a demurrer to a pleading or to evidence where such procedure exists. Courts cannot be justified in refusing to allow cases to go to proof upon any other assumption than that the facts alleged are capable of proof, and are proved. This assumption of the truth of the facts alleged must, however, be limited to the consideration of the legal effect of the facts alleged upon the bars raised against the trial of those facts."

Failure to produce evidence.

4. *Where* the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary *for* its decision upon such issues.

Failure to produce evidence.—It was held under sect. 145 of the Code of 1859, which corresponds to this rule, that although a case may have been set down for final disposal, yet if it be a case in which further evidence is required, the Judge is bound to adjourn the case, unless he is satisfied that the plaintiff has, without sufficient cause, failed to produce his evidence.(5)

(1) Krishnabhupati *v.* Rama Murti, 16 M. 198 (1892).

(2) Jeewun *v.* Goolab Khan, 1 N. W. P. 147 (1869).

(3) Soorendro Pershad *v.* Jugobundho, 22 W. R. 426 (1874).

(4) Nuzur Ally *v.* Ojoodhyaram Khan, 10 M. I. A. 540, 552, 553 (1866).

(5) Moonshee Syud Ameer Ali *v.* Baboo Run Bahadoor Singh, 7 W. R. 84 (1867). See Bai Kashibai *v.* Shidapa Annapa, 37 B. 682 (1913) (case should not be adjourned for production of further evidence after the hearing is closed).

ORDER XVI.

Summoning and Attendance of Witnesses.

1. *At any time* after the *suit is instituted*, the parties may obtain, on application to the Court, or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents. [s. 159.]

Summons to attend to give evidence or produce documents.

Summons on witness.—Where the evidence of a witness or the production of a document is material to a party's case, it is his business to move the Court to take the necessary steps in the matter.(1) Application for summonses might under the last Code be made at any time before the day fixed for settlement or disposal as the case may be.(2) To these the party was entitled as of right,(3) unless the application was not a *bonâ fide* one but made with the desire of obstructing the course of Justice ; (4) the Court having an inherent power to prevent the abuse of its procedure.(5) Now the application may be made at any time after the suit is instituted. The circumstance that the application is made at a late stage is no ground for refusing it, though the Court may, when the case is heard, refuse to adjourn the hearing.(6)

(1) Nobin Chunder Roy *v.* Anungo Munjuree, 23 W. R. 83 (1874), where the Court added that parties who have the benefit of legal advice ought to be left to manage their own cases without interference from the Court.

(2) Bai Kali *v.* Alarakh Pirbhai, 15 B. 86 (1890).

(3) Ib. ; Kaji Ahmad *v.* Kaji Mahamad, 9 B. 308 (1884); Gora Chand Ghose *v.* Raj Coomar Doss, 5 W. R. 111 (1866); Ram Phul Pandey *v.* Wahed Ali Khan, 14 W. R. 66 (1870). Under the Code of 1859 the Court had very little, if any, discretion at all in the matter, and the present as well as the last Code show there is none except where there is abuse of procedure : see Rajendro Narain *v.* Rajah Kumud Narain, 3 C. L. R. 569; as regards exemption from giving evidence in Court, see s. 401.

(4) Ram Phul Pandey *v.* Wahed Ali Khan, *supra*.

(5) Sect. 151. Cf. 257, Cr. Pr. Code; though there was no express provision of the same character in the last Code, the matter might have been dealt with under the inherent power stated.

(6) Kaji Ahmad *v.* Kaji Mahamad, 9 B. 308 (1884); Abdool Kadir *v.* Shaikh Abin Mirdha, 24 W. R. 290 (1875). Under the Code of 1859 the Court had a discretion to refuse summons if the application was made at a time which appeared to render it impossible that the witnesses should be brought : Rajendro Narain *v.* Rajah Kumad Narain, 3 C. L. R. 569 (1878); Indro Chunder *v.* Dunlop, 9 W. R. 530 (1868); but see Brojo Nath Mookhopadhya *v.* Pretap Chunder, 22 W. R. 296 (1874); and now the Court should issue summonses at the applicant's risk, and unless proper cause is shown refuse to adjourn the hearing if the witness is not in attendance : Bhagwat Das *v.* Debi Din, 16 A. 218 (1894).

Where the party had himself originally undertaken to bring the witnesses it was held that his failure to do so was no sufficient reason for depriving the party of his right to have subpœnas issued, although it might be a reason for not waiting for them if the plaintiff's case had been in other respects finished before they could be examined.(1) In fact the question whether a Court should issue a summons or should adjourn, are two entirely distinct matters.(2) The Court has, except in cases of manifest abuse of procedure, no discretion to refuse an application for summons. Even after issues have been fixed or the hearing has commenced, the Court must grant summonses if applied for, though it may inform the party applying that it does not intend to adjourn the hearing for the attendance of the witness. For it might happen that the hearing was not concluded before the witness appeared and that it would be right to hear the witness so summoned ; (3) and a Court cannot tell beforehand what means a party may have for facilitating the attendance of his witnesses.(4) If the Court wrongly refuses summons the High Court may interfere in revision.(5) If summons has been granted and the witness does not appear, the Court will proceed unless an application is made to adjourn. And it will not grant this unless good cause is shown. The Court has a discretion either to issue a second summons when the first fails, or to take stronger measures, as to which see O. XVI. rr. 10–12, 17, 18. It is, however, the business of the party to move the Court to do what is necessary for his case.(6) When, however, a witness has been summoned to give evidence in a case which is not reached, it is not necessary to issue a fresh summons to the witness. He need only be warned that his attendance will be required on the day to which the hearing of the case may be postponed.(7) The question of the issue of summons must also be distinguished from the question whether a party will be allowed to supplement his evidence after his case has been closed.(8)

Expenses of witness to be paid into Court on applying for summons.

2. (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(1) Pandurang Anpai *v.* Keshavji Jadhavji, 6 B. 742 (1882).

(2) Abdool Kadir *v.* Shaikh Abia Mirdha, 24 W. R. 290, 291 (1875).

(3) Bai Kali *v.* Alarakh Pirbhai, 15 B. 86 (1890); Krishna Churn Baisakh *v.* Protab Chunder Surma, 7 C. 560, 565 (1881) [Court should not refuse application merely because in its opinion the witness cannot be present or document cannot be produced before termination of the trial. The application may in the event prove fruitful].

(4) See Kaji Ahmad *v.* Kaji Mahamad, 9 B. 308, at p. 310 (1884).

(5) Ib.

(6) Dowlut Mundur *v.* Omrao Singh, 14 W. R. 336 (1870).

(7) Subbarayadu *v.* Chenchuramaya, 24 M. 200 (1900); Vijayaraghava *v.* Komarappa, 22 M. L. J. 409 (1912).

(8) Syud Abdool Ali *v.* Mullick Sudderoodeen, 14 W. R. 493 (1870).

Experts.

(2) *In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.*

Scale of expenses.

(3) *Where* the Court *is* subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to *any* rules *made in that behalf.*

Expenses of witnesses.—See sect. 151 of Act VIII. of 1859. Before a witness is summoned, a sufficient sum for his expenses in going to and from the Court and for one day's attendance must be deposited in Court.(1) It was in an early case (2) held that the sum fixed must have reference to the travelling expenses or other charges of a similar nature; and where a witness who had incurred no expense in travelling asked for compensation for loss of time the application was refused. A party need not pay any more into Court until it has fixed what is reasonable.(3) Once sworn, a witness must give his evidence even though his expenses have not been paid. But he does not cease on that account to be under the protection of the Court, and he is entitled to be paid his expenses though he has not applied for them before giving his evidence.(4) The provisions relating to the payment of witnesses no doubt contemplate that the expenses should be paid by the party who asks the Court to summon the witness before he gives his evidence, but they do not declare that unless this is done the Court has no power to require their payment. They are intended for the benefit of the person summoned, and there is nothing in them to protect the party who asks the Court to issue a summons from his liability to pay the expenses of the witness if the Court *per incuriam*, or in order to save delay, issues the summons without seeing that the party applying for it discharges the duty imposed on him by law. If he partially fails in such duty, and deposits some part, but not the whole of the expenses, the Court may require him to pay a further sum, and may levy the amount summarily from him. There is no reason why the party should be in a better position when he fails to deposit any part of the expenses, or if the witness has given his evidence than if he has not done so.(5) A Court while bound to fix a reasonable amount to defray the expenses of a witness may allow only travelling expenses and charges of a similar nature not including compensation for loss of time. It may be a question whether this is in all cases sufficient. The case of expert witnesses is, however, recognized as exceptional, and the section has been amended to allow of a fee to such a witness.

(1) See Saran *v.* Biswas, 5 W. R. S. C. Ref. 6 (1866); as to further expenses, see r. 4.

(2) Nawab Nazim *v.* Prosono Narain, 2 Hyde 236 (1864).

(3) Mohun Mundur *v.* Brij Bhookan, 9 W. R. 127 (1868).

(4) London, Bombay & Mediterranean Bank *v.* Mahomed Ibrahim, 4 B. 619 (1880).

(5) Voleti Chenchuramaya *v.* Annamraju Narasimhayya, 17 M. L. J. 435 (1907).

Tender of expenses to witness.

3. The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

Tender of expenses to witness.—Act VIII. of 1859, sect. 151. After the list of witnesses have been filed and cost of service, etc., deposited, the Court's officers, and not the party, are responsible for the service and return of process.(1)

Procedure where insufficient sum paid in.

4. (1) *Where* it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses *or reasonable remuneration*, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Expenses of witnesses detained more than one day.

(2) *Where* it *is* necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of *such* party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Levy and discharge.—Under the present section the Court can both order a levy and discharge. Under sect. 157 of the Code of 1859, the powers given were alternative.(2)

Time, place and purpose of attendance to be specified in summons.

5. Every summons for the attendance of a person to give evidence or *to* produce a document shall specify the time and place at which he is required to attend, and also whether his

(1) Mt. Mussitee Khanum *v* Hookoom Bibee, 15 W. R. 88 (1871).

(2) See Bijoykishen *v.* Joykishen, 12 W. R. 430 (1869). In consequence of the provisions of the section it was held that no action for the expenses of a witness will lie: Saran *v.* Biswas, 5 W. R. S. C. Ref. 6 (1866).

attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Summons to give evidence.—Sect. 152, Act VIII. of 1859. A written summons distinctly describing the nature of the document required must be issued on a party required to produce it; a verbal order to his pleader is not such a summons as is contemplated by law, and is not sufficient.(1)

Summons to produce document.

6. Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same. [s. 164.]

Power to require persons present in Court to give evidence or produce document.

7. Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power. [s. 165.]

Summons how served.

8. Every summons *under this Order* shall be served as nearly as may be in *the same* manner *as a* summons *to a* defendant, and the rules in *Order V.* as to proof of service shall apply in the case of all summonses served under this *rule*. [s. 166.]

Summons, how served.—Act VIII. of 1859, sects. 154–157. The Code of 1859 contained separate sections dealing with service of summons on a witness. The rules of service both in the last as under the present Code are assimilated to those referring to service on defendants, as to which see rules dealing with same.

Time for serving summons.

9. Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required. [s. 167.]

Time for service.—The provision in this rule is one in favour of the witness, and for enforcing diligence on the party; it does not give to the Courts any discretion as to granting or enforcing summonses in consideration of their being applied for at a late period. If, however, there has been delay, the Court may refuse to adjourn the case for the attendance of the witnesses.(2)

(1) Doorgamonee Dossee *v.* Benode Monee Dossee, W. R. 1864, p. 164.

(2) Kaji Ahmed *v.* Kaji Mahamad, 9 B. 308, 310 (1884); see notes to r. 1, *ante*.

Procedure where witness fails to comply with summons.

10. (1) *Where* a person *to whom* a summons *has been issued* either *to attend* to give evidence or to produce a document *fails to attend or to produce the document in compliance with such summons*, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the *service or* non-service of *the summons*.

(2) *Where the Court sees reason to believe* that such evidence or production is material, and that *such* person *has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally* avoided service, *it* may issue a proclamation requiring him to attend to give evidence or *to* produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door *or other conspicuous part* of the house in which he ordinarily resides.

(3) *In lieu of or at the time of issuing* such proclamation, *or at any time afterwards*, the Court may, in its discretion, *issue a warrant, either with or without bail, for the arrest of such person, and may* make an order for the attachment of *his* property to such amount as *it* thinks fit, not exceeding the amount of the costs of attachment and of *any* fine which may be imposed under *rule 12*:

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

Absconding witness.—This section corresponds with sect. 159 of Code of 1859. The words in first paragraph, "*shall* . . . by *another Court*," were inserted in this section in the last Code by sect. 16, Act VII. of 1888. The present section has been reconstructed and the penultimate paragraph omitted.

If the return of service has not been verified, the Court must examine the serving-officer on oath. In other cases it has a discretion. See notes to r. 12. Before issuing a proclamation, the Judge must satisfy himself whether the evidence of the witness is material, and that there is no excuse for non-attendance, or that he is keeping out of the way. Both these conditions must be fulfilled, and then the Court can act under this section and let the case stand over.(1) When the return of service is made on the day of trial, the party is entitled to some time to prove that the evidence is material, and that the witness is keeping away.(2)

(1) Bhubun Moyee *v.* Kishoree Dossee, 6 W. R. 235 (1866); Ajoodhya Doss *v.* Bibee Misrun, 15 W. R. 176 (1871); Kalee Dass Chuckerbutty *v.* Eshan Chunder Chatterjee, 13 W. R. 416 (1870).

(2) Prem Chand Roy *v.* Becharam, 6 W. R. 126 (1866).

Inasmuch as the Judge is given a discretion, he is not bound to act on an application, but the discretion must be exercised in a reasonable manner.(1) Where the conditions mentioned exist the Judge should not refuse an application unless it appears that the applicant is not entitled to the assistance of the Court either by reason of having aided in or connived at the absconding of the witness, or of having otherwise placed himself in such a position that it would be inequitable to grant it.(2) If the Court refuses to issue process, it is advisable that it should tell its reasons for such refusal.(3) It is for the party to produce his evidence, or, at all events, to exhaust all the means that the law gives him for its production. He should, therefore, it was held, on the expiry of the proclamation, apply for attachment. If he does not, but goes to trial upon the evidence which he has succeeded in getting, the Court must decide the case upon the evidence before it.(4) The third clause is new, and gives the Court power to issue a warrant with bail instead of compelling a witness, as was formerly the case, to submit to the humiliation of production in custody before he could obtain an order for his release.

If witness appears, attachment may be withdrawn.

11. *Where, at any time after* the attachment of his property, such person appears and satisfies the Court,— [s. 169.]

(*a*) that he did not, *without lawful excuse, fail to comply with the summons or intentionally* avoid service, and,

(*b*) *where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule,* that he had *no* notice of *such* proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

Procedure if witness fails to appear.

12. The Court may, *where* such person does not appear, or appears *but* fails *so* to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as *it* thinks fit, having regard to his condition in life and all the circumstances of the case, and may order *his* property, or any part thereof, to be *attached and sold or, if already attached under rule 10, to be* sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any: [s. 170.]

Provided that, if the person whose attendance is required

(1) Poran Chunder *v.* Gopeenath Singh, 8 W. R. 505 (1867).

(2) Rajoo Singh *v.* Balgobind, 1 W. R. 26 (1864); see also Shaikh Jafur *v.* Gooroo Pershad, 3 W. R. 97 (1865).

(3) Ozeer Mahomed *v.* Bydnath, 5 W. R. Act X. 6 (1866).

(4) Luchmun Singh *v* Chokowree Singh, 25 W. R. 154 (1876).

pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

Nazir's Report.—The Nazir's report of service of summons, or issue of proclamation, is sufficient to admit of the Court taking steps to enforce the attendance of a witness, but when the Court proceeds to impose the penalty, the serving-officers should ordinarily be examined and cross-examined on oath.(1)

Sales.—Such sales require confirmation by the Court.(2)

Appeal.—No appeal lies from an order releasing property from an attachment under this proviso.(3)

Mode of attachment.

13. *The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.*

Court may of its own accord summon as witnesses strangers to suit.

14. Subject to the *provisions* of this Code as to attendance and appearance and to *any law for the time being in force, where* the Court at any time thinks it necessary to examine any person other than a party to the suit and not *called* as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Duty of persons summoned to give evidence or produce document.

15. Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit *shall* attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document *shall* either attend to produce it, or cause it to be produced, at such time and place.

(1) *Re* Nilkant Bhuttacharjee, 1864, W. R. Misc. 9; but see now O. XVI. r. 10, where a discretion is given where the certificate has been verified.

(2) Badri Prasad *v.* Tej Singh, 33 A. 68 (1910).

(3) Badri Prasad *v.* Tej Singh, 33 A. 68 (1910).

16. (1) *A* person so summoned and attending shall, unless the Court *otherwise directs, attend at each hearing* until *the suit has been disposed of.* [s. 178.]

When they may depart.

(2) *On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.*

Departure of witnesses.—This section in the last Code got rid (1) of a difficulty felt in an early case,(2) in which it was held that when a case was adjourned for further hearing before the witnesses had been examined, the Court could not bind them down to attend again. The provision is now still further simplified, and power is given to enforce attendance by taking a recognizance. As to the recall of a witness, see O. XVIII. r. 17.

17. *The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with* a summons, departs, *without lawful excuse*, in contravention *of rule 16.* [cf. s. 174 first para

Application of rules 10 to 13.

18. *Where* any person *arrested under a warrant is* brought before the Court *in custody and* cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, *and, in default of his giving such bail or security, may order him to be detained in the civil prison.* [s. 174, last para.

Procedure where witness apprehended cannot give evidence or produce document.

Enforcement of attendance.—Every Court is bound in justice to render all reasonable assistance to a party to enforce the attendance of his witnesses.(3) It is, however, the duty of the parties themselves to move the Court when their

(1) See O'Kinealy, Civil Pro. Code, s. 173.

(2) Venkatappa *v.* Papammah, 5 Mad. H. C. R. 132 (1870).

(3) Nilmonee Banerjee *v.* Shurbo Mongola, 6 W. R. 14 (1866). Though the Court has been given a discretion, it should be exercised properly, and not so as to encourage witnesses evading attendance: Saroda Dossee *v.* Buroda Kant Roy, 5 W. R. Act X. 49 (1886); Ozeer Mahomed *v.* Bydnath, 5 W. R. Act X. 6 (1866). Cf s. 168 of the Code of 1859.

witnesses do not appear.(1) This rule is of a penal character, and its provisions must be strictly complied with.(2) Due service of summons is the foundation for an order under this rule; and, therefore, if the summons has not been duly served, the power under this rule is not exerciseable.(3) The rule contemplates the case of a person who has been served, and, failing to attend, has been arrested and brought before the Court; it does not apply to the case of a person who attends and says he has not the document required.(4) The Court must, on an application, satisfy itself of due service and failure to attend or departure. It is, however, not necessary to institute a formal investigation and come to a determination on the evidence adduced. If service is proved, and the proof leads the Judge to believe that the summons had come to the knowledge of the witness, and he sees no reason to doubt that the witness can give material evidence, and there is no one in attendance who can account for the absence of the witness, a warrant may issue.(5) What is lawful excuse must depend upon the circumstances of each case, but there is no obligation to issue a warrant when absence is due to non-payment or non-tender of the necessary expenses.(6) The Court must, in all cases, pass some order on an application; (7) and should grant it where the witness is material, and there is no reason to believe that the applicant is responsible for his non-appearance, or has otherwise placed himself in such a position that it would be inequitable to grant his application.(8) And if a case falls within the rule, the applicant having done all that lay upon him to secure the attendance of the witness, the attendance should be enforced, and the applicant should not be required to take out fresh summonses.(9) The opinion of the Judge that the witnesses are not likely to benefit a party's case,(10) or his belief that he could inflict no punishment under the penal Code,(11) affords no valid reason for refusing the application. A witness who has failed to appear on his summons can only be fined after he has been arrested and brought before the Court.(12)

No witness to be ordered to attend in person *unless resident within certain limits.*

19. No one shall be ordered to attend in person to give evidence unless he resides—

(*a*) within the local limits of *the Court's* ordinary original jurisdiction, or

(1) Bachman *v.* Lall Beharee, 13 W. R. 324 (1870); Nand Mohun Chowdhry *v.* Goluck Nath Neogee, 11 W. R. 99 (1869).

(2) Kali Narain Roy *v.* Shaikh Bajoo, 3 C. W. N. 307 (1898).

(3) Kali Narain Roy *v.* Shaikh Bajoo, 3 C. W. N. 307 (1898).

(4) *In re* Prem Chand, 12 B. 63 (1887).

(5) Periyanna Chetty *v.* Govinda Gounden, 5 M. H. C. R. 104 (1869).

(6) Todar Mal *v.* Said Muhammad, 17 A. 277 (1895).

(7) Nilmoney Chowdhry *v.* Hossein Ally, 5 W. R. 222 (1866).

(8) Rajoo Singh *v.* Balgobind, 1 W. R. 26 (1864).

(9) Bissambhur Sircar *v.* Sooroodhuny, 3 W. R. 21 (1865).

(10) Ozeer Mahomed *v.* Bydnath, 5 W. R. Act X. 6 (1866).

(11) Nilmoney Banerjee *v.* Shurbo Mongola, 6 W. R. 14 (1866).

(12) Kali Narain Roy *v.* Shaikh Bajoo, 3 C. W. N. 307 (1898).

(*b*) without such limits *but* at a place less than fifty or (where there is railway *or steamer* communication *or other established public conveyance* for five-sixths of the distance between the place where he resides and the place where the Court is situate) *less than* two hundred miles distance from the Court-house.

20. *Where* any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may *pronounce judgment* against him or make such order in relation to the suit as *it* thinks fit. [s. 177.]

Consequence of refusal of party to give evidence when called on by Court.

21. *Where* any party to a suit is required to give evidence or to produce a document, the *provisions* as to witnesses shall apply to him so far as they are applicable. [s. 178.]

Rules as to witnesses to apply to parties summoned.

Parties.—The preceding rules deal with witnesses who are not parties. A party may appear by pleader or in person. In the former case if the pleader refuses or is unable to answer any material question, the Court may direct the absent party to attend under O. X. r. 4, and on his failure to do so may pronounce judgment against him. If a party, whether appearing by pleader or in person, who is present in Court refuses without lawful excuse to carry out an order under r. 20 the penalty is that stated therein. Under sect. 170 of the Code of 1859, a party who being summoned to give evidence or to produce a document, failed without lawful excuse to comply with the order, was also liable to have judgment passed against him. But this section has not been re-enacted, and by sect. 178 of the last Code and r. 21 of this Code a party is to be dealt with in such a case on the same footing as any person summoned as a witness. The liability, therefore, to judgment in case of default is limited to the specific instances mentioned in O. X. rr. 4 and 20, *supra*. Contempt of Court may be punished by fine and imprisonment.(1) This rule gives a further power which is one to be used with forbearance and is to be enforced generally in cases of contumacious refusal.(2) What is or is not lawful excuse must depend upon the circumstances of each case. The decision in one case can scarcely be a guide in another, unless the facts are precisely the same.(3) R. 20 applies to Probate cases, but it will not justify the Judge in dispensing with proof of the execution of a will.(4) It has

(1) See ss. 480-484, Cr. Pr. Code.

(2) See Jeshta Ramji *v.* Awaker Mullandcagata, 3 M. H. C. R. 299 (1867), where, though the case was under the Code of 1859, the circumstances were similar to those of r. 20.

(3) See Baboo Durga Dutt *v.* Jhengoor Jha, 18 W. R. 63, 64 (1872).

(4) Ravji Ranchod Naik *v.* Vishnu Ranchod Naik, 9 B. 241 (1884), ref. Monmohinee Guha *v.* Banga Chandra Das, 31 C. 357 (1903).

been held by the Privy Council that even when no order is made by the Court under this rule it is incumbent on plaintiffs to give evidence in support of their claims; (1) and in a recent Privy Council decision where plaintiffs who had executed separate mortgages abstained from giving evidence to explain how these could be consistent with jointness, it was held that this abstention helped to rebut the presumption of jointness.(2)

(1) Lal Kunwar *v.* Chiranji Lal, 37 I. A. 1, 4 (1909).

(2) Ram Singh *v.* Musst. Tursa Kunwar, 17 C. W. N. 1085 (1913).

ORDER XVII.

Adjournments.

1. (*1*) The Court may, if sufficient cause *is* shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit. [s. 156.]

Court may grant time and adjourn hearing.

(*2*) In *every* such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Costs of adjournment.

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing *beyond the following day* to be necessary for reasons to be recorded.

"**Grant time.**"—That is at the instance of the parties. It has been held that the sections in the last Code which correspond with this and the next rule did not apply to an adjournment which is not made at the instance of the parties, but which is necessitated by the rules of Court which regulates the disposition of its own business.(1)

"**Sufficient cause.**"—This must depend upon the circumstances of each particular case, and precedents (2) are not generally of use. The Court, however, should act reasonably and with indulgence towards litigants where there is no ground for imputing a deliberate intention to delay. A party has a legal right to ask the assistance of the Court in obtaining summons to, or a commission for the examination of, a witness. But if he has delayed so long that he fails to get the process executed in sufficient time, he, of course, must take the consequences of his delay. The Court will not adjourn the case to remedy his neglect.(3)

Costs.—This rule gives the Court ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment.

(1) Sm. Toolsey Monee Dassee *v.* Sm. Prosad Money Dassee, 2 C. W. N. 490 (1898).

(2) See Baboo Seetaram Sahoo *v.* Gollam Sahoo, 18 W. R. 325 (1872); Simon Elias *v.* Forawar Mull, 24 W. R. 202 (1875); Dadabhai *v.* Sorabji, 3 Bom. H. C. R. 55 (1866); Sm. Toolsey Monee Dassee *v.* Sm. Prosad Money Dassee, 2 C. W. N. 490 (1898).

(3) Hari Dass *v.* Meer Moazam, 15 W. R. 447 (1871).

Sufficient opportunity should be given to the party obtaining the adjournment to enable him to carry out the order of the Court and produce his evidence.(1)

Review: Appeal.—Once an order for adjournment has been made it should not be rescinded on review unless on good and sufficient cause shown and in the presence of the other party.(2) Orders under this rule are not open to appeal.(3) Their propriety can be questioned in an appeal from the final decree. An Appellate Court, however, is not generally inclined to interfere with inferior Courts, in the exercise of the discretion allowed to them to grant or refuse an adjournment.(4) An order made by a Judge of the High Court at settlement of issues fixing a distant date for the hearing of a suit is not an order under this rule and is appealable under the Letters Patent.(5)

Procedure if parties fail to appear on day fixed.

2. *Where*, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by *Order IX.* or make such other order as it thinks fit.

Applicability.—This rule is an application to adjourned hearings of the procedure prescribed for the first hearing. The distinction between this rule and the next is that where there is a default in the appearance of the parties and their pleaders on the date fixed for the adjourned trial of the suit, a decree may be passed under this rule, and subsequently the case may be revived under O. IX. r. 9; but where time has been given to one of the parties to do an act and he fails, the order is passed under the next rule, and the matter cannot be revived but is only subject to review of judgment or to appeal.(6) This rule, which speaks of the disposal of the suit, includes cases in which there may not be any materials before the Court to enable it to pronounce a decision on the merits. The next rule contemplates a case in which the Court has materials before it to enable it to proceed to a decision of the suit. The contingency, however, contemplated in this rule may happen in a case which falls within the letter of the next rule. In such a case, if there are no materials on the record, the appropriate procedure to follow would be that laid down in this rule, whereas if there are materials the Court should proceed under the next rule.(7) The effect of this rule is to make O. IX. r. 8 applicable to adjourned hearings of cases.(8) See notes to that rule.

(1) Dhaniram *v.* Murli Lal, 13 C. W. N. 525 (1909).

(2) Bishen Perkash *v.* Ruttun Geer, 20 W. R. 3 (1873).

(3) O. XLIII. r. 1.

(4) Simon Elias *v.* Jorawar Mull, 24 W. R. 202 (1875).

(5) R. *v.* R., 14 M. 88 (1890).

(6) See Ryall *v.* Sherman, 1 M. 287 (1877); Ambalavana *v.* Subramania, 6 M. H. C. R. 262 (1871); [under the corresponding section of the Code of 1859], Sriraja Venkataramaya *v.* Anumukonda Rangaya, 7 M. 41 (1883); Alwar Ayyangar *v.* Seshammal, 10 M. 270 (1887); Kader Khan *v.* Juggeswar, 35 C. 1023 (1908).

(7) Mariannissa *v.* Ramkalpa Gorain, 34 C. 235 (1907), discussed in Chandramathi *v.* Narayanasami, 33 M. 241 (1909); Enatulla Basunia *v.* Jibon Mohan, 19 C. L. J. 535 (1914).

(8) Ib., at p. 237.

"**Any day.**"—That is the specific day to which the suit is adjourned. The rule does not apply unless a day has been fixed for hearing under the last rule.(1) It is illegal to decide a case in the absence of any party without fixing a day for the hearing of the case, if the hearing had not taken place on the day originally fixed.(2)

"**Dispose.**"—This term in this rule refers not only to the disposal of the suit *ex parte*, but also to the final disposal of it, and includes therefore not only the procedure up to the passing of the decree, but also the procedure for setting aside that decree when made. A Court, therefore, which has rightly dismissed a suit on an adjourned hearing by virtue of the provisions of this rule and O. IX. r. 8, may also restore it under r. 9 of that Order.(3)

"**Other order.**"—The Court is not bound to proceed under the rules mentioned.(4)

Appeal.—It was held that an order dismissing a suit at an adjourned hearing for non-appearance of the plaintiff and his pleader was an order under sect. 157 of the last Code, and its consequential sect. 102 and not 158, and a refusal to consider an application under sect. 103 of that Code was appealable.(5) No appeal was held to lie from an order under the section corresponding with this rule read with sect. 108 of the last Code, setting aside a decree passed *ex parte* in default of appearance of the defendant on the day to which the hearing of the suit had been adjourned. Under O. XLIII. an appeal is given in the case of orders under rr. 9 and 13.(6)

Court may proceed notwithstanding either party fails to produce evidence, etc.

3. *Where* any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith. [s. 158.

Applicability.—This rule applies to a party to whom time has been given to do some act and who makes default.(7) As to the distinction between it and

(1) Baboo Seetaram *v.* Roy Baboo, 18 W. R. 325 (1872).

(2) Meer Mukhoo *v.* Ameerun, 5 S. D. N. W. 1865, p. 197, O'Kinealy, s. 157.

(3) Bangsidhari Ghose *v.* Digamber Mitra, Cal. H. C. Rule 2072 of 1906, 18th July, 1906, referring to Janardhun Dobey *v.* Ramdhone Singh, 23 C. 738 (1896) [which was a case of a defendant applying under sect. 108 and not of (as was the case in the decision first cited) a plaintiff applying under sect. 103]. Alwar Ayyangar *v.* Seshammal, 10 M. 270 (1887), proceeds upon a similar view. Sriraja Venkataramaya *v.* Anumakonda Rangaya, 7 M. 41 (1883); Shrimant Sagajirao *v.* Smith, 20 B. 736 (1895); in which two latter cases the subordinate Courts were directed to hear applications under sect. 103 of the last Code.

(4) See Hira Dai *v.* Hira Lal, 17 A. 538 (1885).

(5) Shrimant Sagajirao *v.* Smith, 20 B. 736 (1895); dissented from in Naganada *v.* Krishnamurti, 34 M. 97 (1910); see s. 588, clause (8) of last Code.

(6) Bhagwan Dai *v.* Hira, 19 A. 355 (1897).

(7) See Kader Khan *v.* Juggeswar, 35 C. 1023 (1908).

the last rule, see notes to that rule and *post*. It was held under the last Code that the former section did not apply to proceedings in execution.(1)

"**Any party.**"—The rule does not refer to adjournments by the Court at its own motion; (2) and appears to apply, to a case where any one party and not both has had a case adjourned.(3) Where, after issues had been settled the hearing was adjourned to a fixed date for final disposal, and on that date plaintiff did not appear, on which the suit was dismissed, it was held that the former section did not apply, as it had been adjourned in the ordinary way and not in favour of either party for the purposes mentioned.(4)

"**To whom time.**"—A date must be fixed within which the act must be done. The stringent provisions of the rule cannot be put in force unless the party has had distinct notice in respect of time, of what is required of him, and default in the matter of time is of the essence of the particular kind of default contemplated.(5)

"**Fails.**"—It must be shown that a specific order has been disobeyed, either as regards time (*vide ante*) or otherwise. So as costs are ordinarily recoverable in execution there is no default to obey an order as to costs in the absence of a specific direction, making the payment of costs a condition precedent to the hearing of the evidence of the party in default.(6) Where the Court refused to grant plaintiff's application to be allowed to examine a defendant as a witness on her behalf, and on the adjourned date of hearing the plaintiff failed to produce any other witness, it was held that as plaintiff's application should not have been refused she had not committed default.(7)

"**Any other act.**"—The rule, while mentioning the production of evidence and the attendance of witnesses,(8) says *any other act;* provided that that act is necessary to the further progress of the suit, such as the payment of costs for the issue of a commission; (9) but not where the plaintiff fails to make up a deficiency in respect of stamp, such matter having been provided for by sect. 54, now O. VII. r. 11, *ante*.(10)

"**To decide the suit.**"—Default does not lead to the dismissal of the plaintiff's suit, or the decreeing of the claim against the defendant if the plaintiff or defendant make default respectively; (11) nor is an order striking the case off

(1) Ramaya *v.* Rangaya, 7 M. 41, 42 (1883). See Tirthasami *v.* Annappayya, 18 M. 131 (1874); Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893).

(2) Pearee Mohun Bera *v.* Shama Churn Mytee, 19 W. R. 34 (1872).

(3) Alwar *v.* Seshammal, 10 M. 270, 271 (1887).

(4) Ryall *v.* Sherman, 1 M. 287 (1877).

(5) Shaik Saheb *v.* Mahomed, 13 M. 570 (1890).

(6) Virabhadrappa *v.* Chinnamma, 21 M. 403 (1897).

(7) Latchmana Rau *v.* Raghunatha Rau, 6 M. H. C. R. 299 (1871).

(8) See Comalammal *v.* Rangasawmy Iyengar, 4 M. H. C. R. 56 (1866); Rangasamy *v.* Serangan, 4 M. H. C. R 254 (1869).

(9) Sitara Begam *v.* Tulshi Singh, 23 A. 462 (1901).

(10) Muhammad Sadik *v.* Muhammad Jan, 11 A. 91 (1888).

(11) Sitara Begam *v.* Tulshi Singh, 23 A. 462, 464 (1901).

the file regular.(1) The words "*notwithstanding such default*" clearly imply that the Court is to proceed with the disposal of the suit, in spite of the default upon such materials as are before it. If in the case of a plaintiff such materials fail to substantiate the claim the suit will be dismissed for this reason and not for the default. If default be by the defendant the suit cannot be decreed without taking any evidence or without reference to the evidence which has already been adduced. In both cases the decree is on the merits.(2) The effect of a decision, provided that the case comes within the terms of the rule,(3) is to bar a second suit.(4) Under the Code of 1859 the Court was bound to decide the suit "*on the record.*" The effect of these latter words was that though the Appellate Court could remand a case for decision the Lower Court could not admit any evidence after the remand, but was bound to decide it on the record as it stood when the case was remanded.(5) These words were omitted in the former Code. Where a suit is dismissed under this rule on the merits, the plaintiff's remedy is by way of appeal.(6)

(1) Alwar *v.* Seshammal, 10 M. 270 (1887).

(2) Sitara Begam *v.* Tulshi Singh, 23 A. 462, 464 (1901); Badam *v.* Nathu Singh, 25 A 194, 195 (1902).

(3) Shaik Saheb *v.* Mahomed, 13 M. 570 (1890).

(4) Venkatachalam *v.* Mahalakshmamma, 10 M. 272 (1886).

(5) See Puddo Lochun *v.* Sirdar Khan, 12 W. R. 23 (1869); Lochun Mundal *v.* Wuzeer Paramanick, 13 W. R. 464 (1870).

(6) Gaura Bibi *v.* Ghasita, 34 A. 123 (1911)

ORDER XVIII.

Hearing of the Suit and Examination of Witnesses.

Right to begin.

1. The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

"**Right to begin.**"—This rule is taken from the Explanation to sect. 179 of the last Code, the remainder of the section being incorporated in the next rule. The party on whom the *onus probandi* lies as developed by the record must begin. As to this, see the Authors' Evidence Act, 5th ed., pp. 629–705. At the hearing of a case on a preliminary issue the defendant by whom the issue is raised has the right to begin ; (1) and if in appeal the respondent objects that no appeal lies the appellant begins.(2)

Statement and production of evidence.

2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

Evidence where several issues.

3. Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party ; *and*, in the

(1) Fatmabai *v.* Aishabai, 12 B. 454 (1888) [and two counsel may be heard].

(2) Rustomji Burjorji *v.* Kessowji Naik, 8 B. 287 (1884).

latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

Statement and production of evidence.—The first paragraph of r. 2 is the first paragraph of sect. 179 of the last Code. The third rule is taken from sect. 180. The plaintiff and such of the defendants as support the plaintiff's case, wholly or in part, must address the Court and call their evidence first, and the other party (namely the persons opposed to the plaintiff's case and that of the defendants supporting it) must address the Court and call their evidence.(1)

Witnesses to be examined in open Court.

4. The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge. [s. 181.]

Witnesses.—The parties must select their witnesses, summon them, and if they do not attend, move the Court to secure their attendance, and when a Commission has been issued the Court must be moved to wait for the return. It is not the business of the Court to determine what witnesses shall be examined. They should then call upon the Court to examine such of them as may be offered for examination.(2) It is the duty of the Court to examine every witness tendered, though he has not been summoned or his name has not been enlisted in the list; (3) unless it is clear that the intention of the party producing the witness is to delay or obstruct justice.(4) He should not select a certain number only for examination; (5) nor send some away because he had examined as many on one side as on the other; (6) or because he thinks their evidence will probably not be of much value,(7) or because they would only prove the same facts as already deposed to.(8) It is in the discretion of the Court of first instance to allow a party to call further evidence after he has closed his case.(9) A plaintiff who does not care to be present to support his own case when he knows it is tried, cannot of

(1) Haji Bibi *v.* Sultan Mahomed, 32 B. 599 (1908).

(2) Nund Mohun Chowdhry *v.* Goluck Nath Neogee, 11 W. R. 99 (1869); Morno Moyee *v.* Bheem Coomar, 6 W. R. 231 (1866): Deen Dyal *v.* Dance Roy, 13 W. R. 185 (1870). In Ramjiwun Singh *v.* Radha Proshad Singh, 16 W. R. 109 (1871), summons was not taken out as the Court considered the evidence unnecessary.

(3) Rakhal Dass Mundal *v.* Protap Chunder Hazrah, 12 W. R. 455 (1870).

(4) Chowdhry Khoorgo *v.* Shib Tohul, 17 W. R. 172 (1872); Ramdhan Mundal *v.* Rajballab Paramanik, 6 B. L. R. App. 10 (1870).

(5) Ramdhan Mundal *v.* Rajballab Paramanik, *supra*.

(6) Gopee Ojha *v.* Hur Gobind Singh, 12 W. R. 229 (1869).

(7) Looloo Singh *v.* Rajendur Laha, 8 W. R. 364 (1867); Shaik Ibhram *v.* Shaik Suleman, 9 B. 147, 149, 150 (1884).

(8) Joswant Singhjee *v.* Jet Singhjee, 2 M. I. A. 424, 427 (1841).

(9) Rakhal Dass Mundal *v.* Protap Chunder Hazrah, 12 W. R. 455 (1869) [and there is no right of special appeal on that point].

course be allowed to urge the plea that he had no opportunity of rebutting the defendant's evidence.(1) New matter discovered after the plaintiff's case is closed ought not to be admitted unless it is such as would probably occasion a different determination.(2) It was ruled that when a witness had been examined on behalf of the plaintiff he cannot be recalled as a witness for the defendant without leave obtained at the end of the first examination.(3) As regards the examination of purdanashin women, see sect. 132. There should be cogent reasons to necessitate the Court to order principals to leave the court-room while the evidence of witnesses is being recorded. But the other witnesses should not be present.(4) Where the first Court did not consider it necessary to examine further witnesses whom the plaintiff adduced, it was held that the Appellate Court, if not satisfied with that evidence, should have given the party an opportunity of examining their other witnesses.(5) The Court should, however, be satisfied that the witnesses were present, and that a *bonâ fide* application for their examination was made.(6) In second appeal the Court has refused to interfere when the point was not taken in the first Appellate Court.(7) It ought to be shown that the evidence would have been material to the case.(8)

How evidence shall be taken in appealable cases.

5. In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

Taking of evidence in appealable cases.—This rule corresponds to part of sect. 172, Act VII. of 1859, and sect. 103 of the last Code. Under the last-mentioned section, as under the present rule, the evidence had and has to be read in the presence of the parties and their pleaders and no provision is made for signature by the witness. The deposition is to be read over in the presence of the Judge and the witness. Evidence which has been received in the absence

(1) Radhajeebun *v.* Grees Chunder Roy, 8 W. R. 461 (1867).

(2) Kazi Gulam Alli *v.* Aga Khan, 6 Bom. H. C. R. 93, 97 (1869).

(3) Mackintosh *v.* Nobin Money Dassee, 2 Ind. Jur. N. S. 160 (1867).

(4) Buddreenath *v.* Issoree Proshad, 2 Hyde, 249 (1864).

(5) Hurish Chunder Ghose *v.* Gopal Chunder Ghose, 20 W. R. 203 (1873); Khuda Buksh *v.* Imam Ali Shah, 9 A. 339 (1886).

(6) Kenoo Singh *v.* Eshan Chunder, 6 W. R. 213 (1866); Surm Rae *v.* Ubhman Rae, 2 A. H. C. R. 209 (1870); as to proof of refusal by the Court to take evidence, see Ramessur Bhattacharjee *v.* Shib Narain, 14 W. R. 419 (1870); Gooroo Dass Akhoolee *v.* Poran Mundle, 12 W. R. 363 (1869); Parmeshari Proshad *v.* Mahomed Syed, 6 C. 608, 611 (1881).

(7) Gooroo Dass Akhoolee *v.* Poran Mundle, 12 W. R. 363 (1869); Osman Singh *v.* Chummun Mahtoon, 15 W. R. 871 (1871).

(8) Nilkanth Sarmah *v.* Soosila Debia, 6 W. R. 324 (1866).

of the opposite party, will be rejected if objected to.(1) Failure to comply with the provisions of this and the next rule will render the deposition inadmissible on a charge of giving false evidence based on such deposition; and under sect. 91 of the Evidence Act no other evidence is admissible.(2) In second appeal the case will be remanded to have the evidence properly recorded, provided that the objection has been taken in a regular appeal.(3) Corrections in depositions should be attested by the initials of the officers making them.(4) The rule does not apply to High Courts or Punjab Chief Courts in their Civil jurisdiction.(5) As to Oudh, see Act XVIII. of 1876, sect. 19; Central Provinces, sect. 2, Act II. of 1879; Burmah Law or Burmah Courts' Act. It was held to apply to cases under Act X. of 1870 (6) (Land Acquisition).

When deposition to be interpreted.

6. *Where* the evidence is taken down in a language different from that in which it *is* given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it *is* given. [s. 188.]

Interpretation of deposition.—Act VIII. of 1859, sect. 171, clause 3. This rule does not apply to High Courts, or the Punjab Chief Court in the exercise of their original Civil jurisdiction. See note to last rule. As to Oudh, see Act XVIII. of 1876, sect. 19.

Evidence under section 138.

7. Evidence taken down under section 138 shall be in the form *prescribed by rule 5* and *shall* be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that *rule*. [s. 185A, para. (3).]

Memorandum when evidence not taken down by Judge.

8. *Where* the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record. [s. 184.]

Memorandum of evidence.—Act VIII. of 1859, sect. 172, sentence 8. This rule does not apply to High Courts or the Punjab Chief Court in the exercise

(1) Bommarauze Bahadur *v.* Rangasamy, 6 M. I. A. 232 (1855).

(2) R. *v.* Mayadeb Gossami, 6 C. 762 (1881); ref. Hari Churn Singh *v.* R., 4 C. W. N. 249 (1900).

(3) Shaikh Lall *v.* Shaikh Peer, 18 W. R. 112 (1872).

(4) 1 C. O. N. W. 183, cited in O'Kinealy's Civ. Pr. Code.

(5) O. XLIX. r. 3, *post*; Punjab Courts Act, s. 16 (2), Act XVIII. of 1884.

(6) Heysham *v.* Bholanath Mullick, 17 W. R. 221 (1871).

of their original Civil jurisdiction. See note to r. 5. It is not in force in the Central Provinces (Act II. of 1879). As to Oudh, see Act XVIII. of 1876, sect. 19. A separate memorandum on each witness should be recorded at the time of the examination in the vernacular of the Judge, and it should contain every material answer made by the witness in the examination-in-chief, the cross-examination, and in reply to questions put by the Court in the form of a narrative.(1) The vernacular record and not the memorandum is looked upon as the deposition of the witness, and where there is any discrepancy, the vernacular record must be followed.(2)

When evidence may be taken in English.

9. Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

Evidence in English.—Act VIII. of 1859, sect. 172, sentence 4. This rule does not apply to High Courts or the Punjab Chief Court in the exercise of their original Civil jurisdiction. See note to r. 5. The former section was not in force in the Central Provinces, Act II. of 1879; sect. 2, modified in Oudh, Act XVIII. of 1876, sect. 19.

Any particular question and answer may be taken down.

10. The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears *to be* any special reason for so doing.

Taking down of question, answer, and objection.—Act VIII. of 1859, sect. 172, sentence 5, and sect. 186 of the last Code, which applied to High Courts, and was in force in a modified form in Oudh (Act XVIII. of 1876, sect. 19). This is excepted by O. XLIX. r. 3, *post*. The words "*or cause to be taken down*" have been omitted.

Questions objected to and allowed by Court.

11. *Where* any question put to a witness *is* objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Remarks on demeanour of witnesses.

12. The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

(1) Suheeoodeen *v.* Luchmeeput, 6 W. R. 112, in which the manner of recording evidence is laid down, 4 Civ. O. N. W., 1866, cited in O'Kinealy's C. P. C.

(2) Heeranath Kooeree *v.* Burm Narain, 15 W. R. 375 (1871); see also R. *v.* Beharee Bose, 9 W. R. Cr. 69 (1868).

Demeanour of witness.—Act VIII. of 1859, sect. 172, sentence 7, and sect. 188 of the last Code which applied to High Courts, but not to P.S.C.C., and was modified in Oudh, Act XVIII. of 1876, sect. 19; sect. 3, *ante*. This rule is not excepted in O. XLIX. r. 3, *post*.

13. In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record. [s. 189.]

Memorandum of evidence in unappealable cases.

Evidence in appealable cases.—This rule does not apply to High Courts or the Punjab Chief Court in the exercise of their original Civil jurisdiction. See O. XLIX. r. 3, and note to r. 5. It is not in force in the Central Provinces: see Act II. of 1879, sect. 19 and sect. 3, *ante*. The rule is also applicable to suits for the recovery of rent in Bengal whether an appeal is allowed or not (sect. 148 (*f*), Act VIII. of 1885). For power to direct that evidence in suits between landlord and tenant in agricultural villages in Ajmere and Merwara be taken in the form prescribed by the rule, see the Ajmere Courts Regulation (I. of 1877), sect. 29. In Bengal there is no fixed practice, but, as a rule, the memorandum is written legibly in the vernacular of the Judge, or in English, if he is sufficiently acquainted with that language, and signed by the Judge and dated.(1) A Judge of a Small Cause Court is bound to take down in the language of the witness the substance of what each deposes.(2)

14. (*1*) *Where* the Judge *is* unable to make a memorandum as required by this *Order*, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court. [s. 190.]

Judge unable to make such memorandum to record reasons of his inability.

(*2*) Every memorandum so made shall form part of the record.

Inability to make memorandum.—Act VIII. of 1859, sect. 172, sentence 9. This rule applies to all rent suits in Bengal (Act VIII. of 1885, sect. 143 (2)); but not to the Chartered High Courts or the Punjab Chief Court, in the exercise of their original Civil jurisdiction (O. XLIX. r. 3, and Act XVIII. of 1884, sect. 16 (2)): modified in Oudh (Act XVIII. of 1876, sect. 19), and in the Central Provinces (Act II. of 1879, sect. 2). This section in the last Code, it was said, seemed to contemplate some personal inability. Press of business should not, unless under exceptional circumstances, be accepted as a

(1) O'Kinealy's Civ. Pr. Code, s. 189.

(2) Amrita Shaha *v.* Panchkori Shaha, 1 Cal. W. N. ccxxix. (1897); s. c., 9 C. W. N. 418.

reason for the inability of any officer to record his memorandum.(1) In the present rule, however, the words "*is unable*" are substituted for "*rendered unable*" in the former section.

Power to deal with evidence taken *before* another Judge.

15. (1) Where *a* Judge is prevented by death, transfer or other cause from concluding the trial of *a* suit, *his* successor may deal with *any* evidence or memorandum *taken down or made under the foregoing rules* as if *such evidence or memorandum* had *been* taken down or made by *him or under his direction under the said rules and may* proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-*rule* (1) shall, so far as they *are* applicable, *be deemed to* apply to *evidence taken in* a suit transferred under section *24*.

Evidence taken down by other Judges.—This is sect. 191 of the last Code remodelled. This proviso has been omitted. As to this, see sect. 24, sub-sect. 2, *ante*. Where evidence has been taken in another Court and on another trial, the Judge cannot rely on it, but is bound himself to record the evidence which is to be the material for his decision.(2) But the parties may agree to treat the former record as incorporate in the latter,(3) and where such an agreement has been entered into the witnesses should not be re-examined without some good reason being adduced.(4) *A fortiori* where evidence had been taken in the same case by the predecessor of the Judge the parties may waive the retaking of evidence.(5) Sect. 191 of the last Code, with which this rule corresponds, was substituted for the former section by Act VII. of 1888, with reference to the decisions noted.(6) Exception is made to the general rule where the Judge has died,(7) or been transferred, or is prevented by other cause from concluding the trial of the suit, or the suit itself has been transferred.(8) As to High Courts, see O. XLIX. r. 3.

Power to examine witnesses immediately.

16. (*1*) *Where* a witness *is* about to leave the jurisdiction of the Court, or other sufficient cause *is* shown to the satisfaction of the Court why his

(1) O'Kinealy's Civ. Pr. Code. s. 190.

(2) Ali Buksh *v.* Shaikh Sumeerooddeen, 12 W. R. 477 (1869). See R. *v.* Kalundar Dass, 2 A. H. C. R. 100 (1870) [reading over their previous depositions to the witnesses in a criminal case and asking them if they are true is wrong].

(3) Maharajah Jugatendur Bunwaree *v.* Din Dyal, 1 W. R. 310 (1864).

(4) Sreenath Ray *v.* Goluck Chunder Sein, 15 W. R. 348 (1871).

(5) Syud Mahomed *v.* Oomdah, 13 W. R. 184 (1870); Naranbhai *v.* Narroshankar, 4 B. H. C. R., A. C. J. 98 (1867).

(6) Jagram Das *v.* Narain Lal, 7 A. 857 (1885); Afzal-un-nissa Begam *v.* Ali, 8 A. 35 (1885); Jadu Rai *v.* Kanizak Husain, 8 A. 576 (1886).

(7) See Sukram *v.* Kalakahar, 3 B. L. R. A. C. J. 105 (1869), where the Judge died after hearing and deciding the case, but the only record of his decision was an entry in the Court Order Book.

(8) See Palanisami Cowndari *v.* Thondama Cowndari, 26 M. 595 (1902); Naranbhai *v.* Narroshankar, 4 B. H. C. R., A. C. J. 98 (1867).

evidence should be taken immediately, the Court may, upon the application of *any* party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(*2*) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(*3*) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, *and the Judge shall, if necessary, correct the same, and shall sign it*, and *it* may then be read at any hearing of the suit.

Power to examine witnesses immediately.—This rule, which deals with what is called examination *de bene esse*, corresponds with sect. 173, Act VIII. of 1859. It does not apply (so far as relates to the manner of taking evidence) to the Chartered High Courts, or the Punjab Chief Court in the exercise of their Original Civil Jurisdiction. See O. XLIX. r. 3 and Act XVIII. of 1884, sect. 16 (1). The necessity for the signature of the Judge is a new provision. An examination under this rule being on the same footing as the examination of a witness in a cause, must be conducted by counsel.(1) and before the Court; not before a Commissioner unless by consent.(2) Where a Subordinate Judge, after reserving judgment, examined without notice to the parties or their pleaders a judgment-debtor who offered evidence concerning a point in dispute, it was held that this was not justified by sect. 165 of the Evidence Act and was a material irregularity.(3)

17. The Court may at any stage of the suit recall any witness who has been examined and may (subject to the *law* of evidence *for the time being in force*) put such questions to him as the Court thinks fit. [s. 193

Court may recall and examine witness.

Recall of witness.—This rule corresponds with sect. 193 of the last Code, but the last paragraph of that section, which was added by Act VII. of 1888, sect. 19, has been omitted.

18. *The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.*

Power of Court to inspect.

(1) Hoffman *v.* Framjee, Coryton 7.

(2) Edwards *v.* Muller, 5 B. L. R. 252 (1870). See, however, the reporter's note to this case, in which it is pointed out that a Court of Equity has an inherent jurisdiction to issue a commission to take evidence *de bene esse*.

(3) Peary Lal Das *v.* Peary Lal Dawn, 18 C. L. J. 646 (1913).

ORDER XIX.

Affidavits.

Power to order any point to be proved by affidavit.

1. Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Provided that where it appears to the Court that either party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

Affidavits at the final hearing.—Ordinarily witnesses at the trial of any action are examined *vivâ voce* and in open Court. This rule, which is taken from English O. 37, r. 1, permits the Court to allow particular facts to be proved by affidavit subject to the proviso. Affidavits cannot in this case be used without an order of Court, nor at all if the opposite party desires the production of the witness for cross-examination.(1) It is common practice to admit affidavits at the hearing when there is no contention as to the facts, which, however, have to be proved and cannot be admitted as against minor parties to the suit. The words "*of first instance and any Appellate Court*" after the words "any Court" have been omitted as doubtless redundant.

Power to order attendance of *deponent* for cross-examination.

2. (*1*) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the *deponent*.

(*2*) Such attendance shall be in Court, unless the *deponent* is exempted from personal appearance in Court, or the Court otherwise directs.

Affidavits in interlocutory proceedings.—This rule is taken from O. 38, r. 1. The practice here is the reverse of that which takes place at the hearing, affidavits being the rule and attendance for *vivâ voce* cross-examination the exception. There is no obligation on the Court to make an order for cross-examination upon an affidavit filed in a motion.(2) As a rule in interlocutory

(1) Blackburn Union *v.* Brooks, 7 C. D. B. H. C. R.,

(2) La Trinidad *v.* Browne, 36 W. R. 138 (Eng.).

proceedings, cross-examination is not allowed because it would defeat the whole object of such proceedings, namely, despatch. The party moving has, however, a right to file affidavits in reply. Ordinarily these affidavits are confined to rebutting the allegations of the opposite party and should not bring forward further direct proof of the applicant's case which should have been given in the original affidavits upon which the application is made. As to persons exempted, see sects. 133, 135, *ante*.

3. (*1*) Affidavits shall be confined to such facts as the [s. 196.]

Matters to which affidavits shall be confined.

deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: *provided that* the grounds thereof *are stated*.

(*2*) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party *filing* the same.

Form and contents of affidavits.—The affidavit consists firstly of the "title." Every affidavit should be constituted in the cause or matter in which it is sworn, giving the style of the Court, the matter or suit in which it is made and the names of the parties as given in the proceedings. Then follow the name and place of abode of the deponents, and after this the matter of the affidavit. This rule states what this should be.(1) Evidence on information and belief, though generally admissible on interlocutory application as a matter of necessity, is not, it has been held, admissible in a proceeding which, though interlocutory in form, finally decides the rights of the parties.(2) But it is necessary that the grounds for this belief should be shown.(3) Though in practice this is frequently not done, nevertheless a party against whom such an affidavit is made is entitled to take the objection, and if it be one of substance the Court is bound to pay regard to it.(4) And the English Court of Appeal has commented strongly on the irregularity of an affidavit founded upon information and belief merely without giving the source of such information and belief.(5) The final part is the "jurat," which states that the deponent or deponents was, or were, sworn and the day of the month on which the affidavit was made, and should describe the person before whom it was sworn and show that such person was authorized to administer the oath of the declarant. As to who are such persons, see sect. 139.

(1) In Gooroochurn *v.* Goluckmoney, Fulton, 164, 165 (1843), an affidavit to show that the certificate of an officer of Court was wrong was refused.

(2) *Per* Woods, V.C., in Bird *v.* Lake, 1 H. & M. 118; Gilbert *v.* Endean, 9 C. D. 259.

(3) See judgment of Jessel, M.R., in Quartz, etc., Co. *v.* Beall, 20 C. D. 508; and Damodar *v.* Panalal, 9 Bom. L. R. 540 (1907), in which the Court drew attention to the necessity of following the provisions of the rule; Padmati *v.* Rasik, 37 C. 259 (1909), the provisions of this rule should be strictly followed.

(4) Bidder *v.* Bridges, 26 C. D. 1; Quartz Hill, etc., Co. *v.* Beall, *supra*; Bonnard *v.* Perryman (1891), 2 Ch. 269.

(5) *Re* J. L. Young Manufacturing Co. (1900), 2 Ch. 753 C. H.; and see Lumley *v.* Osborne (1901), 1 K. B. 532.

ORDER XX.

Judgment and Decree.

Judgment when pronounced.

1. The Court, after the *case has* been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

Judgment.—Act VIII. of 1859, sect. 183. It does not apply to High Courts (1) in their original jurisdictions. As to the taking of evidence, see Order XVIII. The meaning of the rule is (2) that judgment must be given upon evidence duly recorded before the Judge himself, except where the Code allows of such evidence being taken before another Judge or person, as in the case of O. XVIII. rr. 15, 16, or commissions under Order XXVI. As to the meaning of the term "*judgment*," see notes to sect. 2, *ante*. There is no objection to a Judge at the close of the hearing stating at once orally the judgment which he intends to record and deliver, but he must afterwards pronounce his written judgment in open Court.(3) It was held that the pronouncing of judgment out of Court—though an irregularity—was not a good ground of appeal.(4) At the same time a failure to observe the provisions of the section in this respect has been strongly disapproved of; for apart from its being contrary to law the omission to pronounce judgment in open Court is highly inconvenient, and deprives the Court and litigants of a valuable safeguard against error. Pleaders should attend when judgment is pronounced and assist the Court by pointing out any error that may occur.(5)

Power to pronounce judgment written by Judge's predecessor.

2. A Judge may pronounce a judgment written but not pronounced by his predecessor.

(1) O. XLIX. r. 3.

(2) See Naranbhai *v.* Naroshankar, 4 B. H. C. R. 98, 102 (1867).

(3) Madras H. C. R. Rulings, viii. (1869).

(4) Nilmoney Sing *v.* Bhobany Churn Panda, Marsh, 327 (1864); and see Venkatesa Iyengar *v.* Kamalammal, 22 M. L. J. B. 212 (1911), "open Court" refers to the place and manner of the pronouncement, and a judgment delivered on a holiday is not on that account a nullity.

(5) Bai Dahi *v.* Hargovandas, 30 B. 455 (1906).

Predecessor's Judgment.—This rule adopts the decision in Parbutty *v.* Higgin,(1) which distinguished Mutty Lull Sen *v.* Desh Kar Roy,(2) where the written opinions were regarded as mere minutes, and not as judgments, on the ground that in order to there being a final judgment of the Court, there must have been a final meeting and consideration by all the Judges who heard the case as to what their judgment was to be.(3) An objection having been raised to the legality of a judgment on the ground that the Judge wrote it after he had been transferred, it was held that this section afforded an answer.(4) It is not necessary that the judgment should have been written by the Judge before he has taken leave or left the post which he was occupying when he heard the case.(5) This rule is not mandatory.(6)

Judgment to be signed.

3. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, *when once signed*, shall not afterwards be altered or added to, save *as provided by section 152* or on review. [s. 202.]

"**Altered.**"—Act VIII. of 1859, sect. 185. Rule does not apply to Chartered High Courts (O. XLIX. r. 3) in their original jurisdictions. Where a party dies after hearing, but before judgment, which is reserved, entry may be made *nunc pro tunc*.(7) The judgment, which must be written, may be altered either before pronouncement, or after pronouncement, but before signature, provided that in such latter case the alteration is itself pronounced. This rule prohibits the Judge, subject to the exceptions stated, from adding to (or altering (8)) his judgment after he has pronounced, dated, and signed it.(9) Where a Court raises several issues, and records findings on some only of them, it is not open to it subsequently to add to its judgment further findings on the remaining issues, although they may lead to the same conclusions as previously arrived at.(10) In the High Court, where judgments are often delivered orally and taken down by the Assistant Registrar, the Judge may, and does usually, revise the judgment out of Court before signature, and then returns the judgment to the record.

(1) 17 W. R. 475 (1872); as to the opinion of a Judge dying before judgment is delivered, see R. *v.* Keigh, 2 Ex. D. 65, 238; and 5 M. H. C. R. Rulings, viii. (1869).

(2) 9 W. R. 1, 61 (1867).

(3) And see Khelat Chunder Ghose *v.* Para Churn Koondoo. 6 W. R. 269 (1866); Rohilchand, etc., Bank *v.* Row, 6 A. 468, 474 (1884).

(4) Girjashankar *v.* Gopalji, 30 B. 241 (1905); Satyendra *v.* Kastura Kumari, 35 C. 756 (F. B.) (1908); Basant Bihari Ghoshal *v.* Secretary of State, 35 A. 368 (1913).

(5) Sunder Kuar *v.* Chandreshwar Prasad, 34 C. 293 (1907).

(6) Lachman *v.* Ram, 33 A. 236 (1910).

(7) Chetan Charan Das *v.* Balbudhra, 21 A. 314 (1899), and cases there cited.

(8) Kishan Kunwar *v.* Ganga Prasad, 31 A. 153 (1908).

(9) And therefore prohibits the practice referred to in Madden *v.* Todd Finlay, 7 W. R. 286 (1867). The P. C., referring to another matter, said that reasons ought to be stated publicly at the hearing below, and should not be reserved to influence the decision of the Court of Appeal: Becher *v.* Voyer, 5 L. R. P. C. 481.

(10) Shedaya *v.* Shivaya, 4 Bom. L. R. 129 (1902); such addition being contrary to the provisions of the section.

Judgments of Small Cause Courts.

4. (1) Judgments of *a* Court of Small Causes need not contain more than the points for determination and the decision thereupon.

Judgments of other Courts.

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Small Cause Courts.—See sect. 185 of Code of 1859. The rule does not apply to Chartered High Courts (O. XLIX. r. 3). It is in conformity with the limited summary jurisdiction of Small Cause Courts that their judgments should also be of a summary character. The first paragraph applies also to Courts invested with Small Cause Court powers.(1) Other judgments should state the reasons for the decision, and thus give the Appellate Court both a proof that the case has received such consideration, as also that assistance which it is entitled to expect.(2) As to judgments of Appellate Courts, see O. XLI. r. 32, *post*, and in the case of appeals to the Privy Council, sect. 42 of the Charter.(3) A decree founded on a judgment not in accordance with this rule is not according to law; and therefore the High Court, under sect. 25 of the P. S. C. C. Act (IX. of 1887), has jurisdiction to pass such order in the matter as it thinks fit.(4) In such a case the High Court may set aside the decree and remand the case for trial upon the merits with reference to the order which it has made.(5) When a judgment is defective, an Appellate Court, which is a Court of fact, may itself deal with the case as it appears on the record; (6) and on second appeal it should remand the case, directing the Judge to record his decision and the grounds thereof,(7) unless it elects to act under the new sect. 103, *ante*.

Court to state its decision on each issue.

5. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons there*for*, upon each separate issue, unless the finding upon any one or more of the issues *is* sufficient for the decision of the suit.

Findings on issues.—Act VIII. of 1859, sect. 186, does not apply to High

(1) Narayan *v.* Bhagu, 31 B. 314 (1907).

(2) See Khajah Mohamed *v.* Ashrufoonissa, 1 M. I. A. 492, 503 (1863).

(3) See Katchekaleyana *v.* Kachivijaya, 2 M. I. A. 495, 502 (1869); Ramasami *v.* Bhaskasami, 2 M. at p. 70 (1879); Muhammad Mumtaz Ahmad *v.* Zubaida Jan, 11 A. 460, 470 (1889).

(4) Bai Jasoda *v.* Bamansha, 23 B. 334 (1898).

(5) Matik Rahmat *v.* Shiva Prasad, 13 A. 533 (1891), *sed qu.* as to decision stated in first paragraph of headnote.

(6) See Katchekaleyana *v.* Kachivijaya, 12 M. I. A. at p. 502 (1869).

(7) Kamat *v.* Kamat, 8 B. 368 (1884); Shurbessur Ghose *v.* Sachoo Churn Ghose, 15 W. R. 130 (1871); but where Judge has been removed, see Kristna Reddi *v.* Srinivasa Reddi, 5 M. H. C. R. 174 (1870), and died before giving his reasons for a decree said to have been made by him, Nobo Chunder Banerjee *v.* Ishur Chunder Mitter, 12 W. R. 254 (1869).

Courts (O. XLIX. r. 3). This rule renders it imperative upon the Court to pronounce its opinion upon such issues as may be necessary for the disposal of the suit. It does not, however, disable the Court from determining the other issues also.(1) In fact, it is convenient that this should be done where evidence has been allowed to be given on all the issues, since by omitting to do so a case may have to be remanded which might otherwise have been finally decided on appeal.(2) The findings, however, on issues other than those upon the determination of which the decree is based ought not to form part of the Court's decree, and will on application for that purpose be struck out.(3)

Contents of decree.

6. (*1*) The decree *shall* agree with the judgment: it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit. [s. 206.]

(*2*) The decree shall also state the amount of costs incurred in the suit, and by *whom or out of what property* and in what proportions such costs are to be paid.

(*3*) The Court may direct that the costs payable to one party by *the other* shall be set off against *any* sum which is admitted or found to be due from the former to the latter. [s. 221.]

Applicability of rule.—Act VIII. of 1859, sect. 189. This rule does not apply to High Courts (4) in original jurisdiction. An opinion has been expressed that the section of the former Code, by virtue of the operation of sects. 582 and 632 of that Code, was applicable to the High Courts on the appellate side, but that if that was not so the Court had an inherent jurisdiction to bring its decrees in accordance with its judgments.(5) As to decrees in appeal, see O. XLI. r. 35, *post*. A judgment ordering a decree to be entered up in terms of a petition of

(1) Dwarakonda *v.* Dwarakonda, 4 M. 134, 136 (1881).

(2) Ib.; Tara Kant Banerjee *v.* Puddomoney Dossee, 5 W. R. P. C. 63, 66 (1866); s. c., 10 M. I. A. 476; Baldeo Singh *v.* Dharam Kunwar, 26 A. 234 (1903); and see observations of P. C. in Muhammad Mumtaz Ahmad *v.* Zubaida Jan, 17 A. 460, at pp. 470, 471 (1889); but see Barhamdeo Narain Sing *v.* Mackenzie, 10 C. 1035 (1884). As regards this case, it is to be observed that the Court need not have tried the question of occupancy at all. The question referred to in the text is whether, if evidence is taken on an issue, the Judge should express his finding on it. The case cited, however, expresses an opinion in the negative.

(3) Baldeo Singh *v.* Dharam Kunwar, 26 A. 234 (1903); and see Nanda Lal Rai *v.* Bonomali Lahiri, 11 C. 544 (1885); *sed qu.* as to amendment of judgment.

(4) O. XLIX. r. 3. See as to amendment by High Court, Karim Mahomed *v.* Rajooma, 12 B. 174 (1887) [inherent power to rectify record]; Pherozsha Pestonje Randeria *v.* Sun Mills, Ltd., 22 B. 370 (1897); and see Advocate-General *v.* Mahammad Huseni, 4 B. H. C. R. 203 at p. 207 (1867) [order for substitution; minutes directed to be drawn up; before minutes matured into order, Court altered directions].

(5) Muhammad Naim-ul-lah Khan *v.* Ihsan Ullah Khan, 14 A. 226 (1892).

compromise is not such a judgment as is contemplated by this rule, there being no expression of judicial opinion on the merits of the case.(1)

Contents of decree.—The decree must agree with the judgment, and under the next rule the Judge should be satisfied of such agreement before he signs it. The material findings in each case should be embodied in the decree, and if they are not, it is incumbent on the parties to avoid their being bound by decisions against which they have no right of appeal, to apply to the Court which passed the decree to amend it in accordance with the judgment,(2) for evidence cannot be given in execution to clear up uncertainty in the decree.(3) Decrees should be drawn up in such a way as to be certain and capable of execution,(4) and as to be self-contained and capable of execution without reference to any other document.(5) But if on reference to the record the defect in the decree can be so far met as to render the decree capable of execution, it should be executed.(6) For though Courts should be careful not to draw up imperfect decrees, it is also just that litigants should not be deprived of the fruits of their success owing to the carelessness of the Court or its officers in the preparation of the decree.(7)

In order to see what an ambiguous decree really means, the Court may look both to the judgment, pleadings and the record, for the decree states only the relief or other determination of the suit, but not the grounds of determination, nor does it afford any information as to the matters which were in issue.(8) And the Judge passing the decree being the most suitable person to construe it, a Superior Court will not ordinarily feel itself justified in placing on it any different construction.(9) In a recent case in the Calcutta High Court a decree of a lower Appellate Court was set aside on second appeal, not because it was erroneous but because its meaning was doubtful.(10)

A person cannot get anything by execution other than that which the decree describes.(11) No person takes anything under a decree unless it is given

(1) Rameshwar Prosad *v.* Chandreshwar Prosad, 7 C. W. N. 880 (1903).

(2) Niamut Khan *v.* Phadu Buldia, 6 C. 319 (1880).

(3) Dwarkanath Haldar *v.* Kamalakanth Haldar, 3 B. L. R. App. 128 (1869).

(4) Ib.

(5) Joytara Dassee *v.* Mahomed Mobaruck, 8 C. 975 (1882); Lachmi Narain *v.* Jwala Nath, 18 A. 344, 347 (1896).

(6) Jawahir Mal *v.* Kishur Chand, 13 A. 343 (1891).

(7) Lachmi Narain *v.* Jwala Nath, 18 A. 344, 347 (1896).

(8) Lachman Singh *v.* Mohan, 2 A. 497, 498 (1879); Lachmi Narain *v.* Jwala Nath, 18 A. 344 (1896) [dist. and observing upon Muhammad Sulaiman *v.* Muhammad Yar, 6 A. 30 (1893),; Jawahir Mal *v.* Kishur Chand, 13 A. 340 (1891); Sankara *v.* Kelu, 14 M. 29, 31 (1889); Radha Pershad Sing *v.* Torab Ali, 18 C. 108 (1890); Kali Krishna Tagore *v.* Secretary of State, 16 C. 173 at p. 183 (1888); s. c., 15 I. A. 186; Bremabai *v.* Yamunabai, 13 M. 313 (1890); Jagatjit *v.* Sorabjit, 19 C. 159 (1891); s. c., 18 I. A. 165; Shivlal Kalidas *v.* Jumaklal Nathiji, 18 B. 542 (1893); Sri Raja Rao Lakshmi *v.* Sri Raja Inuganti, 25 I. A. 102 (1898); as to construction of judgment inconsistent in parts, see Bykunt Chunder *v.* Dhunpat Singh, 19 W. R. 104 (1873).

(9) Shaikh Bisharut Ali *v.* Shah Golam Nujuf, 4 W. R. 13 Misc. (1865).

(10) Devendra Nath Chowdhry *v.* Annada Hadi, 19 C. L. J. 545 (1914), p. 548, *per* Jenkins, C.J.

(11) Dwarkanath Haldar *v.* Kamala Kanth Haldar, 3 B. L. R. App. 128 (1869).

to him in the ordering part, even though his name is mentioned in it elsewhere.(1) What is intended to be ordered should be expressly declared.(2) For anything which the party executing the decree is to recover must be found in the decree which he is executing, and not elsewhere: and which decree must be executed as it stands; such as costs; (3) interest; (4) mesne profits; (5) or interest on mesne profits.(6) The title-deeds of an estate, leases, and other documents of the like kind are accessory to the estate, and pass with it, whether the transfer is made by conveyance, certificate of sale, or decree for possession.(7)

A decree "according to the terms of the judgment-debtor's written statement," incorporates the terms of it.(8) A decree for "the plaintiff's claim with costs," was held to mean the claim as laid in the plaint.(9) The words "the plaintiff is to have judgment for his moiety with interest at the full legal rate and the costs of the proceedings in the Court below," have been held to give plaintiff a decree for the moiety claimed by him, *i.e.* the sum which he alleged to be due for principal *plus* interest, with interest from the date of suit up to realization.(10) A decree declaring that the defendant has a right of occupancy on payment of a proper rent without defining the rent is defective,(11) and so is a decree for exclusive possession of land not in the sole possession of the judgment-debtors, the shares of the different shareholders not having been defined;(12) as also a declaratory decree regarding the possession of an idol from time to time by contending parties which does not define the period of worship by each, and provide for the reconveyance of the idol.(13) As to decrees for accounts,(14)

(1) Nawab Syud Zoynul Abdeen *v.* Phoolash Chunder, 15 W. R. 126 (1871) [mistake in heading].

(2) Krishtokishore Dutt *v.* Rooplall Dass, 8 C. 687 (1882).

(3) *Vide post.*

(4) Musoodun Lall *v.* Bheekaree Singh, 6 W. R. 109 (1866); Sadasiva Pillai *v.* Ramalinga Pillai, 2 I. A. 219, 228 (1875); Seth Gokuldass *v.* Murli, 5 I. A. 78 (1878); Kalee Nath Paul *v.* Nubodeep Chunder, 17 W. R. 175 (1872).

(5) Musoodun Lall *v.* Bheekaree Singh, *supra.*

(6) Mahomed Yakoob *v.* Mahomed Zuhoorul Huq, 22 W. R. 533 (1874).

(7) Shri Bhawani Devi *v.* Devrao Madhavrao, 11 B. 485 (1887). As to buildings, see Ram Dhone *v.* Ishanee, 2 W. R. 123 (1865); *In re* Paramanick, B. L. R. (F. B.) 595 (1866); Juggut Mohinee *v.* Dwarka Nath Bysack, 8 C. 582 (1882); Dhunia Lal Seal *v.* Gopi Nath Khettry, 22 C. 820 (1895); Ismai Kani Rowthan *v.* Nazarali Sahib, 27 M. 211 (1903).

(8) Ram Nandan Rai *v.* Lal Dhar Rai, 3 A. 775 (1881).

(9) Soudo Shrinivasapa *v.* Krishnapa Hegde, 11 B. 177 (1886). In Thamman Singh *v.* Ganga Ram, 2 A. 342 (1879), the Court refused to give a relief not mentioned in the decree "in favour of his claim," though it was alleged it formed part of the claim.

(10) Gopee Kissen *v.* Brindabun Chunder, 19 W. R. 41 (1872)

(11) Kalee Narain *v.* Chunder Narain, 23 W. R. 228 (1875).

(12) Hurry Mohun *v.* Dwarkanath Sein, 18 W. R. 42 (1872).

(13) Ram Soondur *v.* Taruck Chunder, 19 W. R. 28 (1872).

(14) Annoda Prosad Roy *v.* Dwarkanath Gangopadhya, 6 C. 754 (1881); Shushee Shekhur *v.* Suleem Biswas, 22 W. R. 191 (1874); Shoshi Bhoosun Pal *v.* Guru Churn Mukhopadhya, 7 C. 89 (1881); Hurrinath Rai *v.* Krishna Kumar Bakshi, 14 C. 147, 153 (1886); Partab Bahadur Singh *v.* Chitpal Singh, 19 C. 174 (1891).

cancellation of instrument,(1) contribution,(2) of a declaratory character,(3) maintenance,(4) in mortgage,(5) and in Hindu law cases,(6) see cases cited below. Where the plaintiffs were entitled to ask for the performance of the part of a contract in which they were interested, and the defendant claimed execution of the whole, to which the plaintiffs did not object, the Court, it was held, ought to have passed a decree directing execution of the whole contract instead of rejecting the claim.(7)

In a suit against a legal representative, the decree should state that it is against the defendant in that character.(8)

During the pendency of a suit brought by A for immoveable property, A died, and his only son was allowed to represent him. It was held that in the decree he should be described as "substituted appellant as representative of his father A." (9)

The relief granted must be clearly specified. It is not within the scope of this note to discuss what relief should be granted in any particular case, but certain principles of general application may be here referred to. The relief granted should be consistent with the pleadings.(10) As a general rule a plaintiff should not be decreed more than, or a relief different from, that

(1) Ajit Singh *v.* Bejai Bahadur Singh, 11 C. 61 (1884).

(2) Bhurut Pandey *v.* Numthoora Kooer, 23 W. R. 421 (1875); Mohadeo Misser *v.* Lahori Misser, 24 W. R. 250 (1875); Suput Singh *v.* Imrit Tewari, 5 C. 720 (1880); Rash Munjoree *v.* Radha Soondoree, 23 W. R. 283 (1875). The liability is several in contribution suits. As to default where decrees are joint and several, see Salig Ram *v.* Ram Sewak, 2 Agra Misc. 14.

(3) Pirthi Pal Kunwar *v.* Guman Kunwar, 17 C. 933 (1890); Dhunput Singh *v.* Narain Pershad, 20 W. R. 94 (1873); Rangacharian *v.* Yegna Dikshatur, 13 M. 524 (1890); Venayak Amrit *v.* Abaji Haibatrav, 12 B. 416 (1887); Ram Soondur *v.* Taruck Chunder, 19 W. R. 28 (1872).

(4) Vishnu Shambhog *v.* Manjamma, 9 M. 108 (1884); Ashutosh Bannerjee *v.* Lukhimoni Debya, 19 C. 139 (1891); Mansa Devi *v.* Jivan Lal, 9 A. 33 (1896); Sathanatha *v.* Subba Lakshmi, 7 M. 80 (1883); Abdool Futteh *v.* Zabunessa Khatun, 6 C. 631 (1881); Mullia *v.* Virammal, 10 M. 283 (1886); Rajah Prithee Singh *v.* Rance Raj Kooer, 2 A. H. C. R. 170 (1870).

(5) See Gour's Transfer of Property Act; Rashbehary Ghose's Law of Mortgage. A few cases will be found collected in O'Kinealy's notes to s. 206.

(6) See some cases collected in O'Kinealy's C. P. C., notes to s. 206, on "Hindu representative," "Fathers' debt," "Kurta," "Manager of infants' estate," "Karnarvan," "Uralars," "Hindu widow," which are not here dealt with as being beyond the scope of the Commentary. See Mayne's Hindu Law.

(7) Hari Raghunath *v.* Krishnaji Anant, 19 B. 546 (1894).

(8) Girdharlal Krishnavalabh *v.* Bai Shiv, 8 B. 309 (1884); and as to decree sought to be executed against representative of joint family, Guruvappa *v.* Thimma, 10 M. 316 (1887); as to decree against wrong person as representative of a deceased debtor, see Baswantapa Shidapa *v.* Ram, 9 B. 86 (1884); Akoba Dada *v.* Sakharam, id. 429 (1885); Fanindro Deb Raikut *v.* Rani Jugudishwari, 14 C. 316 (1887) [decree against executors acting under a will afterwards found invalid].

(9) Ran Bijai *v.* Jagatpal Singh, 18 C. 111, 120 (1890).

(10) Eshan Chunder *v.* Shamachurn, 11 M. I. A. 7; s. c., 6 W. R. P. C. 57; Mylapore Iyasami *v.* Yeo Kay, 14 C. 802 (1887); and with the evidence. So exclusive possession can only be decreed if exclusive possession is proved: Parashram *v.* Mirarji, 20 B. 569 (1895); Nana *v.* Appa, 20 B. 627 (1895).

which he asked for; (1) though relief may be prayed for in the alternative.(2) Where, however, the amount of mesne profits is directed by the decree to be ascertained in execution, the plaintiff is not limited to the amount claimed in the plaint.(3) As to purchase by plaintiff during pendency of proceedings, see note.(4) Where a plaintiff sued, while his lease was still running, to recover possession, and the loan expired after action brought, but before decree: held that the decree should have declared right to possession with mesne profits, but should not have declared actual possession to be given.(5) The relief given must of course be one authorized by law. So in decreeing a claim on a simple money bond a Court has no authority to direct the realization of the money out of any named property, and thus make it a charge upon such property.(6)

Where a decree of a Lower Court is confirmed on appeal, and that decree directs something to be done within a specified time, the time is to be counted from the date of the appellate decree.(7) But the rule does not apply if the appeal is withdrawn; (8) and the fact that an appeal has been presented does not enlarge the time for payment of the sum decreed, or prevent the decree from being executed.(9) The mention in a decree of a term when a particular right is to become enforceable is not a condition precedent, but indicates a term from which limitation runs.(10)

If the decree is not accurately and properly drawn up, the party should apply to amend (*vide post*).

Costs.—The actual amount of costs may not be settled in the judgment, but, under the second paragraph of the rule, have to be determined subsequent to judgment for entry in the decree. An order passed by the Court determining such amount must be treated as a continuation or completion of the judgment.(11) The decree must state the amount of costs, and by whom, and in what proportions, they are to be paid. No costs, nor interest on costs, can be recovered unless they

(1) Ghyrullah *v.* Kishorenath, 5 W. R., Act X., 60 (1866); Samat *v.* Amra, 6 B. 394 (1882); Narasimha Charyalu *v.* Appa Rau, 18 M. 122 at p. 124 (1894); Sambayya *v.* Gopala Krishnamma, 15 M. 489 (1892); Krishna Pillai *v.* Rangasami Pillai, 18 M. 462 (1895); Madava Naikan *v.* Appava Naikan, 2 M. H. C. R. 394 (1865); Palaniyandi *v.* Muttusami, 2 M. H. C. R. 441 (1865); as to whether in a suit for exclusive possession joint possession may be given, see Antu Singh *v.* Mandil Singh 15 A. 412 (1893); as to accessory right, see Hayagreeva *v.* Sami, 15 M. 286 (1891); in Parshotam Bhaishankar *v.* Rumal Zunjar, 20 B. 196 (1896), a suit for ejectment was turned into a redemption suit.

(2) Perumal *v.* Kaveri, 16 M. 121 (1892); Nana *v.* Appa, 20 B. 627 (1895).

(3) Jadoomoney Dabee *v.* Hafez Mahomed, 8 C. 295 (1881); Gaffri Prosad Koondo *v.* Reilly, 9 C. 112 (1882). Under the present Code, however, mesne profits are determined in the suit and not in execution.

(4) Wamanrao *v.* Rustomji, 21 B. 701 (1896).

(5) Umanund Roy *v.* Sreekishen Bannerjee, 7 W. R. 248 (1867).

(6) Omrito Lall Sircar *v.* Ramdhun Chakee, 18 W. R. 503 (1872).

(7) Daulat *v.* Bhukandas, 11 B. 172, 173 (1886) [time to redeem]; Rupchand *v.* Shamsh-ul-Jehan, 11 A. 346 (1889); Kodai Singh *v.* Jaisri, 13 A. 376 (1889) [pre-emption]; *contra* as to redemption, Bhola Nath Bhuttacharjee *v.* Kanti Chundra Bhuttacharjee, 25 C. 311 (1897).

(8) Patloji *v.* Ganu, 15 B. 370 (1890); Chudasama *v.* Manabhai, 16 B. 243 (1891).

(9) Aminabi *v.* Sidu, 17 B. 547 (1892).

(10) Narayan Chitko *v.* Vithul Parshotam, 12 B. 23 (1887).

(11) Venkata Jogayya *v.* Venkatasimhadri, 24 M. 25, 26 (1900).

are mentioned in the decree, though the judgment says they should be given.(1) The mere specification of costs without an allotment of responsibility for them is not sufficient.(2) But it was said to be not necessary that the specific sums which go to make up the costs should be set forth.(3) Where an order denotes generally that costs should be paid, and then afterwards specifies a particular sum in respect of those costs, the specified sum comprises all the costs to which the party will be entitled.(4) It is not the practice, where costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs.(5) If there is a set-off on account of costs, interest should only run after the set-off has been deducted.(6) The third clause is taken from sect. 221 of the last Code. It has been held that a decree for the payment of money and for costs in the suit is indivisible; so that its benefit as regards costs cannot be transferred apart from the rest.(7) See notes to sect. 35, *ante*.

Amendment of decree.—Every Court has inherent power over its own records so long as those records are in its power, and it can set right any mistake in them.(8) A decree is the decree of the Court and not of the parties. It is the bounden duty of a Court, of its own motion, to see that its decrees are in accordance with the judgments, and to correct them if necessary. There is, therefore, no limitation for an application to amend the decree.(9) R. 3 prohibits the alteration of a signed and dated judgment save (except in the case of clerical errors) by review. Sect. 152, which embodies the third paragraph of the former sect. 206, gives a power to amend the decree, it being a right incident

(1) Nobo Kristo Mookerjee *v.* Parbutty Churn Bhuttacharjee, 13 W. R. 23 (1870); Chowdhry Goluck Chunder *v.* Chowdhry Gunga Narain, 18 W. R. 111 (1872); Muddun Thakoor *v.* Morrison, 18 W. R. 253 (1872); Rajah Leelanund Singh *v.* Court of Wards, 14 W. R. 387 (1870); Forester *v.* Secretary of State, 4 I. A. 137 (1877); but see Rajah Rughoonundun *v.* Arcott, 19 W. R. 46 (1872), where the rate was not specified in the decree and the executing Court estimated the rate; foll. Madhub Lall Khan *v.* Noyan Ghose, 6 C. L. R. 231 (1880); Syud Shah *v.* Meer Reasut, 17 W. R. 414 (1872).

(2) Janokee Nath Mookerjee *v.* Joy Kishen Mookerjee, 15 W. R. 4 (1871).

(3) Mothoora Mohun *v.* Hury Kishore, 18 W. R. 286 (1872); Raghu *v.* Rajendra, 14 C. W. N. 556 (1909).

(4) Sharoda Pershad *v.* Luchmeeput Singh, 18 W. R. 89 (1892); but as to costs of translation in appeals to P. C., see ib.; Asgur Ali *v.* Nugendro Chunder, 23 W. R. 463 (1875); Muddun Thakoor *v.* Morrison, *supra*; Ram Coomar Ghose *v.* Prosunno Coomar Sannyal, 10 C. 106 (1883); Nilmadhub Doss *v.* Bissumbhur Doss, 21 W. R. 411 (1874), where even interest on these costs was given.

(5) Radha Pershad Singh *v.* Ram Purmeswar Singh, 10 I. A. 113 (1882).

(6) Amanat Ali *v.* Mt. Bindhoo, 13 W. R. 138 (1870).

(7) Ram Chandra *v.* Abdul Hakim, 35 A. 204 (1913).

(8) Karim Mahomed *v.* Rajooma, 12 B. 174 (1887); and this power exists independent of the provisions of the Code: Muhammad Naim-ul-lah *v.* Ihsan-ul-lah, 14 A. 226, 229 237 (1892). See cases cited in Ann. Pr., notes to O. 28, r. 11.

(9) Kalu *v.* Latu, 21 C. 259 (1893); Jivraji *v.* Pragji, 10 M. 51 (1886); Shivapa *v.* Shivpanch, 11 B. 284 (1886); Raghunath Das *v.* Raj Kumar, 7 A. 276, 280 (1884); Tarsi Ram *v.* Man Singh, 8 A. 492 (1886); Darbo *v.* Kesho Kai, 9 A. 364 (1887); Muhammad Sulaiman Khan *v.* Muhammad Yar Khan, 11 A. 267, 290 (1888); *contra*, Gaya Prasad *v.* Sikri Prasad, 4 A. 23 (1881), which is overruled; Langat *v.* Janki, 14 C. L. J. 481 (1911).

to any Court to correct its formal records in such way, if needed, as will make them represent truly the decision which was intended to be judicially expressed when the judgment was delivered.(1) This may be done where there is clerical or arithmetical error,(2) or a variance with the judgment.(3) The power is, however, limited to this, and should not be exercised except in accordance with the terms of r. 3 or sect. 152, *ante*.(4) When a decree is in perfect accordance with the judgment, it cannot, subject to the provisions of sect. 152, *ante*, be altered, however erroneous the latter may be.(5) The Code gives no power to alter or vary the decree. A review of judgment or an appeal can alone do this.(6) The High Court has no power to alter its own decrees except under the provisions of this rule or sect. 114, *ante*.(7) It has, however, been recently held that a party is not limited to the remedy given by these provisions, and that a suit will lie to rectify a mistake in a decree ; (8) but in another case it has been stated that this can only be in special circumstances, and that as a general rule such a suit is not maintainable.(9) An application to amend may be refused if made a long time after the date of the decree, and the latter should not be amended after execution is barred.(10) A decree, however, has been amended subsequently to a Court sale.(11)

Apparently, according to one view under the last Code, a decree might have been altered either by way of application under sect. 206 or under sect. 623.(12) If an application for review was made on several grounds, and one of them referred to a clerical mistake, and if the other grounds were held to be untenable, the Court might reject the application and refer the applicant to his remedy under sect. 206. If it did not do so, but on the application for a review amended the clerical mistake, the decree drawn up became the final decree, and an appeal lay if it was brought within the prescribed time from such final decree.(13)

Proceedings under sect. 206 could not, it has been said, be regarded as of the same nature in any respect as proceedings under sect. 623 corresponding with sect. 114. In the former case the correctness of the judgment is not questioned,

(1) Lucas *v.* Stephen, 9 W. R. 301 (1868) ; Dhan Singh *v.* Basant Singh, 8 A. 519, 534 (1886) ; but see Raghunath Das *v.* Raj Kumar, 7 A. 276, 278 (1884).

(2) See, for instance, Dhan Singh *v.* Basant Singh, 8 A. 519, at p. 534 (1886).

(3) Even after the decree has been signed by the Judge and even if it does not fall within sect. 152 : Brijratan *v.* Jaynarain, 37 C. 649 (1910).

(4) See Abdul Hayai Khan *v.* Chunia Kuar, 8 A. 377 (1886), where the amendment was illegal, the decree being in conformity with the judgment ; and Parameshraya *v.* Seshagiriappa, 22 M. 364 (1899), where this being the case, the added words were expunged : Raghunath Das *v.* Raj Kumar, 7 A. 276 at p. 281 (1884) ; s. c., at p. 876.

(5) Lakho Bibi *v.* Salamat Ali, 20 A. 337 (1898).

(6) Lachman Singh *v.* Mohan, 2 A. 497, at p. 505 (1879). But see also now sect, 152, *ante*.

(7) Kotagiri Venkata *v.* Vellanki Venkatarama, 4 C. W. N. 725 (1900) ; s. c., 24 M. 1 ; Langat *v.* Janki, 14 C. L. J. 481 (1911).

(8) Jogeswar Atha *v.* Ganga Bishnu, 8 C. W. N. 473 (1904).

(9) Bhandi Singh *v.* Dowlat Ray, 17 C. W. N. 82 (1912).

(10) Goluck Chunder *v.* Gunga Narain, 20 W. R. 111 (1873) ; Tarsi Ram *v.* Man Singh, 8 A. 492, 495 (1886).

(11) Pydel *v.* Chathappan, 14 M. 150 (1890).

(12) See Kali Prosanna Basu Roy *v.* Lal Mohun Guha Roy, 2 C. W. N. 219 at p. 222 (1897) ; dissented from in Ahsan-ul-Lah *v.* Dakkhini Din, 27 A. 575 (1905).

(13) Joy Kishen Mookerjee *v.* Atsoor Rohoman, 6 C. 22 (1880).

it is assumed; but the jurisdiction arises from the fact that the decree as drawn up and signed is not in accordance with the judgment. In the latter case, not only the correctness of the decree but the correctness of the judgment is questioned, and if the application under sect. 623 (now 114) is allowed, a rehearing of the suit or appeal becomes necessary. In the former case there is no rehearing.(1) It has, however, also been held that there may be a review not only where there is something faulty in the judgment itself, but in cases of amendment of decree which do not necessitate any alteration in the judgment, and that therefore an order passed on an application under the former section was substantially an order passed on review within the meaning of Art. 179 of the Limitation Act.(2)

There is a distinction between a case of amendment and one of novation or substitution. Where an instrument is amended so as to express the real intention which it was intended to express, but which it did not completely express, the transaction is not in substance varied, but its inaccurate description is only rectified. Except, therefore, as specially provided for in sect. 32 of the last Code (now O. I. rr. 8–10, 11), an amended decree is operative from the date of the original decree.(3) Assuming, however, that the date of the decree is the date of the judgment, and therefore the date of the decree is not the date of amendment when the date of the judgment remains unaltered, the question arises whether an application for execution of a decree is affected by an application under this rule. It has been held that such an application is not a step in aid of execution,(4) and therefore as such does not save limitation. It has, however, also been held that an order passed upon an application under the former section was substantially an order passed upon review of judgment within the meaning of the third clause of Art. 179 of the Limitation Act, and that such an application saved limitation.(5) A decree, moreover, is not operative until the amount for which execution is to be had has been ascertained by the Court.(6) It was held by Subramania Ayyar, J., that where a decree is rightly amended, the date of the rectification is immaterial with reference to the calculation of the time in which any appeal may be preferred against such decree. But where a decree is wrongly varied, a party affected by such variation is entitled to calculate the time during which an appeal may be preferred as commencing

(1) Daya Kishan *v.* Nanhi Begam, 20 A. 304, 305, 306 (1898).

(2) Kali Prosanna Basu Roy *v.* Lal Mohun Guha, 2 C. W. N. 219 (1897); s. c., 25 C. 258 [though not for all purposes, as explained in Nalinakshya Ghosal *v.* Mafakshar Hossain, 28 C. 177, 179 (1900)]; and see Venkata Jogayya *v.* Venkatasimhadri, 24 M. 25, 26 (1900).

(3) Pydel *v.* Chathappan, 14 M. 150 (1890), where a decree was amended after sale in execution, and was held to bind the party against whom the amendment was directed.

(4) Daya Kishan *v.* Nanhi Begam, 20 A. 304 (1898); Muhammad Umayan *v.* Zinat Begam, 25 A. 385 (1903); Kali Prosanna Basu Roy *v.* Lal Mohun Guha, 2 C. W. N. 219, 221 (1897).

(5) Kali Prosanna Basu Roy *v.* Lal Mohun Guha, 2 C. W. N. 219 (1897); s. c., 25 C. 258; Venkata Joyayya *v.* Venkatasimhadri, 24 M. 25 (1900); Kishen Sahai *v.* Collector of Allahabad, 4 A. 137 (1881).

(6) Muhammad Umarjan Khan *v.* Zinat Begam, 25 A. 385 (1903) [decree for mesne profits to be subsequently assessed—application for assessment application in the suit and not in execution].

from the date of the variation.(1) The rest of the Court, however, apparently held that the time for appealing must be reckoned from the date of the original decree and not from the date of the amendment, but that it could strike out the improper amendment, no petition for revision being necessary.(2)

What Court may amend.—Where a decree requires amendment, the party aggrieved should apply to the Court in which it was granted, and should not appeal on this ground, as in default of such application an appeal is unnecessary.(3) Where the decree was imperfect and could not be drawn up from the judgment, and the Judge who gave the judgment was no longer Judge of the district, the High Court ordered a fresh trial.(4) The decree of an Appellate Court supersedes the decree of the first Court, even where the appellate decree merely affirms the original decree and does not reverse or modify it. Where a decree has been affirmed on appeal, the only decree which can be amended is the decree to be executed, viz. that of the Appellate Court; and the only Court which has jurisdiction to amend the appellate decree is the Court of Appeal. If, therefore, the Appellate Court reverses, modifies, or affirms by dismissal of the appeal the decree of the first Court, the Lower Court has, after the appellate decree, no power to amend.(5) The Bombay High Court has held (6) that an exception exists to this rule in the case of appeals dismissed under sect. 551 (now O. XLI. r. 11), it being said that such a dismissal leaves the decree of the Lower Court untouched, neither confirmed nor varied nor reversed, with the result that it remains the decree of the Lower Court, which can amend it. Practically, however, the effect of such dismissal is to confirm the decree, and it has also been held that the Lower Court cannot amend either in the case of appeals dismissed under sect. 551 (now O. XLI. r. 11) or tried after notice to the respondent.(7) Where a decree after being affirmed on appeal is amended by the original Court and no step is taken to set aside the amended decree, the latter is binding between the parties, and its validity cannot be challenged in execution proceedings on the ground that the original Court had no jurisdiction to make the

(1) Parameshraya *v.* Seshagiriappa, 22 M. 364 (1889).

(2) See ib., at p. 371.

(3) Bunwaree Chand Thakoor *v.* Mudden Mohun Chuttoraj, 21 W. R. 41 (1874).

(4) Kishen Dyal Lail *v.* Abdool Luteef, 19 W. R. 267 (1873).

(5) Muhammad Sulaiman Khan *v.* Muhammad Yar Khan, 11 A. 267, F. B. (1888) [overruling in effect Ram Saran *v.* Persidhar Rai, 10 A. 51 (1887)]; Tarsi Ram *v.* Man Singh, 8 A. 492, 494 (1886); Muhammad Sulaiman Khan *v.* Fatima, 11 A. 314 (1889); Daya Kishan *v.* Nanhi Begam, 20 A. 304, 307 (1898); Pichuvayyangar *v.* Seshayyangar, 18 M. 214 (1892) [overruling Sundara *v.* Subbanna, 9 M. 354 (1886), which had been previously followed in Ram Saran *v.* Persidhar Rai, 10 A. 51 (1887), but doubted in 1891, in Chathappan *v.* Pydel, 15 M. 403]; Shivlal Kalidas *v.* Jumaklal Nathiji, 18 B. 542 (1893); Onraet *v.* Sunkur Dutt, 14 W. R. 26 (1870); s. c., 5 B. L. R. App. 60; Chowdhry Wahid Ali *v.* Mullick Enaet Ali, 14 W. R. 288 (1870); Ram Churn Bysack *v.* Luckhee Kant Bornick, 16 W. R. (F. B.) 1, 3 (1871) [no distinction between decree of affirmance and of modification].

(6) Bapu *v.* Vajir, 21 B. 548 (1896).

(7) Munisami Naidu *v.* Munisami Reddi, 22 M. 293 (1898); Isma Sundari Devi *v.* Bindu Bashini Chowdhrani, 24 C. 759 (1897).

amendment.(1) The Court of first instance has no jurisdiction to amend a decree on the application of a non-appealing defendant, when the decree has been confirmed on an appeal by the other defendants.(2)

In executing a decree the Court of execution must take the decree as it finds it. It cannot amend the decree or alter it in any way, though it is bound, of course, to construe the decree. The decree in execution may be the decree of the High Court, and the proper Court to execute that decree may be the Court of the Munsif by whom the suit was first decided. The Munsif in respect of a decree made by an Appellate Court would be bound, as the Court executing the decree, to execute the decree whether he approved of it or not, even if the decree had been one made by himself.(3) And no evidence can be given in execution to amend uncertainty in the decree sought to be executed.(4)

Notice.—The Court can only amend the decree after such notice as may enable either party to prefer objections.(5)

Erroneous order of amendment; how to be attacked.—An order passed amending a decree is a separate adjudication and is not merely a part of the original decree.(6) Such an order is not appealable.(7) It may, however, be revised under sect. 622 (now s. 115),(8) or, it has been held, sect. 15, of the Charter.(9) As already observed, the decisions are not entirely agreed upon the point whether a wrong order should be attacked by way of appeal from the decree as amended or by way of revision of the order of amendment. It is plain that if a decree is properly amended and exception is taken to the decree and not to the amendment, then an appeal should be brought against the amended decree. If no objection is taken to the decree as originally framed, but it is alleged that it has been improperly amended, then, as what is complained of is the order of amendment, the remedy should be according to the weight of authority by way of revision of the order of amendment, and not by way of appeal against the

(1) Menat Ali *v.* Amdar Ali, 9 C. W. N. 605 (1905); foll. on the question of the appealable character of an amended decree in Brojo Lal Rai Chowdhury *v.* Tara Prasanna Bhattacharyi, 3 C. L. J. 188 (1905).

(2) Sri Gobind Sing *v.* Gangatu Pershad Singh, 6 C. L. J. 542 (1907).

(3) Daya Kishan *v.* Nanhi Begam, 20 A. 304, 307 (1898); and see Pillai *v.* Pillai, 2 I. A. 219 (1875); Forester *v.* Secretary of State, 4 I. A. 137 (1877); Seth Gokuldass *v.* Murli, 5 I. A. 78 (1878); s. c., 3 C. 602.

(4) Dwarkanath Haldar *v.* Kamalakanth Haldar, 3 B. L. R. App. 128 (1869): as to imperfect decrees involving necessity for further suit, see Kalee Narain *v.* Chunder Narain, 23 W. R. 228 (1875).

(5) Raghunath Das *v.* Raj Kumar, 7 A. 276, at p. 279 (1889); and see Abdul Hayai Khan *v.* Chunia Kuar, 8 A. 377 (1886), where the preceding was held to be bad for want of notice.

(6) Raghunath Das *v.* Raj Kumar, 7 A. 876 (1885); s. c., at p. 276.

(7) Under O. XLIII. r. 1; Raghunath Das *v.* Raj Kumar, *supra*; Nalinakshya Ghosal *v.* Mafakshar Hossain, 28 C. 177 (1900); s. c., 5 C. W. N. 192; Narayanasanu *v.* Natesa, 16 M. 424, 425 (1892), *per* Best, J.; but see Visvanathan Chetti *v.* Ramanathan Chetti, 24 M. 646 (1901), where it was held that an appeal would lie against the amended decree; nor to the Privy Council, Sunder Koer *v.* Chandishwar Prosad, 30 C. 679 (1903); nor under the Charter, Muhammad Naim-ul-lah Khan *v.* Ihsan-ullah-Khan, 14 A. 226 (1892).

(8) Raghunath Das *v.* Raj Kumar, *supra*; Dhan Singh *v.* Basant Singh, 8 A. 519 (1886); Balmakund *v.* Sheo Jatan Lal, 6 A. 125 (1882); Hasan Shah *v.* Sheo Prasad, 15 A. 121 (1892).

(9) Muhammad Sulaiman Khan *v.* Fatima, 9 A. 104 (1886).

amended decree. The third case is where there is objection both to the original decree and to the amendment on the ground that it was not warranted, there being no variance or clerical error. It is not clear on the authorities what course should be taken, but it would appear reasonable to allow all questions in such a case to be raised in an appeal from the amended decree. An order amending can be objected to in execution of the decree (1) and an appeal lies from an order passed in execution.(2)

High Court.—Rules 1–8 of this Order do not apply. See O. XLIX. r. 3.

Revision.—It was held that proceedings under sect. 206 of the last Code terminated in an order which could be dealt with on revision, as where the Court acted beyond its jurisdiction in making an addition to the decree not warranted by the judgment.(3)

Date of decree.

7. The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree. [s. 205.]

Decree.—This rule does not apply to High Courts in exercise of original jurisdiction, O. XLIX. r. 3. When a person has the judgment of the Court that he shall have a decree, it may be said that he then obtains his decree. The decree, when it is drawn up afterwards, relates back to that time.(4) But a formal decree must follow judgment, and is a necessary part of the ultimate procedure in all suits, though inadvertently it is not in so many terms required by the Code as a necessary proceeding after judgment. Without a decree a judicial record does not speak, and wanting it no proceeding subsequent to the judgment can with any certainty be taken. It is in substance as well as form the mouthpiece of the suit in its immediate result.(5) Whatever be the form of decree a separate formal decree should be drawn up. A copy of the judgment with the schedule of costs appended is insufficient.(6) A decree must be in a civil suit,(7) and differs from an order in that the former expresses the result of the judicial proceeding by way of suit or appeal, and so far as suits and appeals are concerned, the latter are confined to such orders as are given in the course of proceedings, and do not finally dispose of them. See generally notes to sect. 2, *ante*.

(1) Abdul Hayai Khan *v.* Chunia Kuar, 8 A. 377 (1886); Muhammad Sulaiman Khan *v.* Fatima, 11 A. 314 (1889).

(2) Ib.; Nalinakshya Ghosal *v.* Mafakshar Hossain, 28 C. 177 (1900); s. c., 5 C. W. N. 192.

(3) Bai Shri Vaktuba *v.* Agarsangji, 31 B. 447 (1907).

(4) Mungniram Marwari *v.* Gursahai Nand, 17 C. 347, at p. 357 (1889).

(5) Ranjit Singh *v.* Ilahi Baksh, 5 A. 520, 526 (1883); but as to applications for partition under the N. W. P. Land Revenue Act, see Niaz Begam *v.* Abdool Karim Khan, 14 A. 500 (1892).

(6) Purmessuree Dutt *v.* Joynath Thakoor, 15 W. R. 326 (1871).

(7) Minakshi Naidu *v.* Subramanya, 11 M. 26, 35 (1887); 14 I. A. 160.

Date.—The decree must bear the date on which judgment is delivered, and not the date on which it is drawn up,(1) and a decree operates from this date and not from that on which it may be subsequently amended.(2) Limitation thus runs from the date the decree bears, that is, the date of the judgment; (3) though a suitor is entitled, in computing the period within which he can appeal, to deduct the time between the delivery of the judgment and the actual issuing of the decree.(4)

"**Satisfied himself.**"—It is the duty of the parties, or rather of their pleaders, to see that a decree is drawn up in the proper form, and the signatures of the pleaders are generally obtained before the decree is finally signed.(5) But though the duties of the pleaders remain as they were, the Judge is not relieved by any action on their part from satisfying himself personally as to the correctness of his decree.

"**Sign.**"—After the decree has been duly signed it becomes and must be regarded as a decree of that date. Once a judgment is pronounced and the decree signed, it becomes a final decree, which may become the subject-matter of appeal or review. It cannot be altered except under the provisions of sect. 152 or O. XX. r. 3, or those relating to review.(6)

Procedure where Judge has vacated office before signing decree.

8. *Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.*

Decree for recovery of immoveable property.

9. *Where* the subject-matter of the suit is immoveable property, *the decree shall contain a description of such property sufficient to identify the same,* and *where* such property *can be* identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

(1) See Afzul Hossain *v.* Umda Bibi, 1 C. W. N. 93 (1895); Beni Madhub Mitter *v.* Matungini Dassi, 13 C. 104 (1886); Ramey *v.* Broughton, 10 C. 652 (1884).

(2) Raghunath Das *v.* Raj Kumar, 7 A. 276, 279 (1884); and see notes to O. XX. r. 6.

(3) Golam Gaffar Mandal *v.* Goljan Bibi, 25 C. 109 (1897); Afzul Hossain *v.* Umda Bibi, 1 C. W. N. 93 (1895).

(4) Beni Madhub Mitter *v.* Matungini Dassi, *supra*; *contra* if the party has not applied for a copy, Yamaji *v.* Antaji, 23 B. 442 (1898); Bechi *v.* Ahsan-ullah Khan, 12 A. 461 (1890).

(5) Ram Lochun Doss *v.* Munsoor Ali, 10 W. R. 96 (1868); Goluck Chunder *v.* Gunga Narain, 20 W. R. 111 (1873); Tarsi Ram *v.* Mari Singh, 8 A. 492, 495 (1886); Prince Mahommed Ruhimooddeen *v.* Beer Protab, 18 W. R. 303 (1872).

(6) Raghunath Das *v.* Raj Kumar, 7 A. 276, 279, 280 (1884).

Decree for immoveable property.—Act VIII. of 1859, sect. 190. Sect. 207 of last Code. The words "*can be*" have been substituted for "*is identified.*" The decree should show distinctly and accurately what property it deals with, giving the boundaries and details of the property which the Court intends shall be covered by the decree, for if these are not given the decree may be impossible of execution.(1) Where this is not done the decree-holder's remedy lies in an immediate application to the Court which made the decree to have it rectified.(2) Evidence cannot, however, be given in the execution department to amend any uncertainty in the decree.(3) Where a Judge decreed possession with *wasilat* without declaring specifically that plaintiffs were to recover the share which they had purchased in an undivided estate or specific land representing that share, the plaintiffs were held not entitled to be put in possession of any specific lands.(4)

10. *Where* the suit is for moveable property, *and* the decree *is* for the delivery of such property, *the decree* shall also state the amount of money to be paid as an alternative if delivery cannot be had. [s. 208.]

Decree for delivery of moveable property.

Suit for moveable property.—Act VIII. of 1859, sect. 191. If there is a dispute as to the moveable property claimed, the Court must of course determine it before passing its decree. It cannot leave the matter to be settled in execution.(5) If it then passes a decree for delivery, it must state the amount to be paid as an alternative. This is ordinarily the value of the property in question.(6) The Court may also pass a decree for damages.(7) This section is in accordance with English law which took away from the defendant the option to retain the goods or pay their value. Now payment can only be made if delivery cannot be had. If the goods are capable of delivery they must be delivered.(8) An alternative prayer for value of goods as compensation does not alter the character of a suit.(9)

(1) Sushteedhur Bhuttacharjee *v.* Kaleo Doss Dey, 24 W. R. 479 (1875); Mahomed Ismail *v.* Lalla Dhundur, 25 W. R. 39 (1876); Dwarkanath Roy *v.* Jannobee Chowdhrain, 19 W. R. 81 (1873); Darbaree Sayal *v.* Fatu Dhalee, 23 W. R. 285 (1875); Kangal Chandra Ruj *v.* Kanye Lall Ruj, 4 C. 69 (1878); see Ram Lochun *v.* Munsoor Ali, 10 W. R. 96 (1868); though where a question arises in a subsequent suit as to what was decreed in an earlier one, an ineffective definition may be cured by the acts of the parties: Secretary of State *v.* Durbjoy Singh, 19 C. 312 (1891).

(2) Darbaree Sayal *v.* Fatu Dhalee, *supra.*

(3) Dwarkanath Haldar *v.* Kamalakanth Haldar, 3 B. L. R. App. 128 (1869).

(4) Ram Lochun *v.* Munsoor Ali, 10 W. R. 96 (1888).

(5) Sheo Gobind *v.* Sham Narain, 7 A. H. C. R. 75 (1875); see observations on this point of Sir Barnes Peacock, C.J., in Dwarkanath Haldar *v.* Kamalakanth Haldar, 3 B. L. R. App. 128, at p. 130 (1869).

(6) Bombay Burmah Trading Corp. *v.* Mirza Mahomed, 19 W. R. 123 (1873), where the defendants had at their own risk removed the timber, and the Court held that the plaintiff was entitled to its delivery or its value without deduction of charges of removal; Kashee Nath Kooer *v.* Deb Kristo Ramanooj, 16 W. R. 240 (1871) [in this case the H. C. took the exceptional course of calling a case to its file and tried it as a regular appeal].

(7) Kashee Nath Kooer *v.* Deb Kristo Ramanooj, *supra.*

(8) Ib., at pp. 243, 244.

(9) Murugesa *v.* Jotharam, 22 M. 478 (1889).

Decree may direct payment of instalments.

11. (1) *Where and in so far as a* decree *is* for the payment of money, the Court may for any sufficient reason *at the time of passing the decree* order that *payment of* the amount *decreed* shall be *postponed or shall be made* by instalments, with or without interest, *notwithstanding anything contained in the contract under which the money is payable.*

Order, after decree, for payment by instalments.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that *payment of* the amount decreed *shall* be *postponed or shall be made* by instalments on such terms as to the payment of interest, the attachment of the property of the *judgment-debtor*, or the taking of security from him, or otherwise, as it thinks fit.

Decree for payment of money.—Act VII. of 1859, sect. 194. Ordinarily, if a party is entitled to relief, he is also entitled to a decree awarding it to him at once. Therefore it was held that a Court in making a decree could not allow the defendant a period for payment of the amount decreed, for the effect of such an order is that the decree-holder is debarred from executing his decree until the expiration of such period.(1) This rule, however, authorizes the Court in a particular class of cases, viz. decrees for money, to give the debtor time to discharge the amount awarded by directing payment in instalments. But the authority given is strictly limited to these cases. Therefore the section is not applicable in a suit for the recovery of the amount of a bond debt by the sale of property hypothecated by such bond, such a suit not being merely one for money; (2) nor to a suit to enforce a lien or an annuity called *nankar*.(3) It was, however, held to apply to cases referred to in sect. 58 of Act VII. of 1869, and to give the Courts powers to make rent decrees payable by instalments.(4) The former section, it was held, did not confer any authority on the Courts to relieve a contracting party from an express stipulation, in a bond payment by instalments, as to the consequence of default in punctual payment of the instalments.(5) In the case cited the decree did not in compliance with the Code contain any direction as to the agreement to pay by instalments.(6) It has been held that a decree for payment of money includes a decree made under O. XXXIV. r. 6.(7)

(1) Bachchu *v.* Madad Ali, 2 A. 649 (1880). See Tata *v.* Ramachandra, 7 M. 152 (1883), where, however, the decree-holder took no steps to remedy what was alleged to be an illegal order in this respect. Agreements to give time were dealt with in s. 257A of the last Code, which is now omitted.

(2) Hardeo Dur *v.* Hukam Singh, 2 A. 320 (1879); Shankarapa *v.* Danapa, 5 B. 604 (1881) [Dekkhan Agriculturists' Relief Act]; Mahadaji Karandikar *v.* Chikni, 7 B. 332 (1883).

(3) Bachchu *v.* Madad Ali, 2 A. 649 (1880).

(4) Gureebullah Sirkar *v.* Mohun Lall Shaha, 7 C. 127 (1881).

(5) Ragho Govind *v.* Dipchand, 4 B. 96 (1879).

(6) Kedar Nath Banerjee *v.* Kulman Sardar, 5 C. L. J. 25 (1906).

(7) Bidhu Sudhury *v.* Mahatabuddin, 16 C. W. N. 44 (1911); and see Datto Atmaram *v.* Shankar Dattatrya, 38 B. 32 (1913) (consent decree for instalments).

"**The Court.**"—That is to say, the Court which passed the decree.(1) The order may be made in or at the time of passing the decree, or subject to consent after the decree. If the case is one in which the Court itself could not have made a decree for payment by instalments, much less can the Court of execution vary that decree so as to give it an illegal effect in carrying it into execution.(2) On the other hand, an order under this rule alters the decree, which can only be executed subject to such alteration; (3) and therefore if the Court erroneously grants time to pay, the order, if not corrected, must be executed as passed.(4)

"**Sufficient reason.**"—The existence of this will depend upon the facts of the particular case. The Court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and instalments should be directed where the defendant shows his *bona fides* by offering to pay anything like a fair proportion of his debt at once.(5)

"**Postponed.**" "**Instalments.**"—Payment by instalments means that the defendant is to be directed to pay the amount decreed by partial payments to be made at specified periods. The former section did not authorize a Court to say that the defendant has the option of paying the amount decreed within a particular period after the decree.(6) Now the rule expressly provides for an order postponing payment of the decretal amount. A temporary postponement is a smaller concession than a scheme of instalments, and in many cases such a discretion might be fitly exercised without waiting, as under the former Code, for a judgment-debtor's arrest under sect. 337A of that Code. The powers given should be exercised with a due consideration for the interests of the creditor as well as those of the debtor. Thus, an order allowing nine years to pay a debt of Rs.440 was reversed, and the period reduced by half.(7) The rule gives the Court a discretion, and it is not unusual to state in the order for payment by instalments that in default of payment of one instalment the whole debt shall become payable.(8) The Court has a discretion to order or refuse interest, but if it be the intention to give interest this should be expressly declared.(9)

(1) See Gandharap *v.* Sheodarshan, 12 A. 571 (1890); which may be the High Court; Ponna; Dongra *v.* Gillespie, 31 B. 348 (1907); as to orders under s. 15B. of the Dekkan Agriculturists' Relief Act, see Bhagirathibai *v.* Hari Ravji, 19 B. 318 (1894).

(2) Mahadaji Karandakar *v.* Chikne, 7 B. 332, 335 (1883).

(3) Tata *v.* Ramachandra, 7 M. 152, 154 (1883); see Gandharap *v.* Sheodarshan, 12 A. 571 (1890).

(4) Tata *v.* Ramachandra, *supra*.

(5) See Sabatollah Sircar *v.* Thompson, 1 Hyde, 98 (1862-3); Jafree Begum *v.* Ahmed Ameen, 1 Agra, 270; Khoda Buksh *v.* Abdool Rahman, S. D. N. W. 1863, p. 489, cited in O'Kinealy, C. P. C.

(6) Bachchu *v.* Madad Ali, 2 A. 649, 651 (1880).

(7) Koowersain *v.* Kishun Lall, S. D. N. W. (1861), p. 655; cited in O'Kinealy, C. P. C.; and see Hur Gobind *v.* Hurkho, 1 Agra, 116.

(8) See as to execution of such decrees, Mon Mohun Roy *v.* Durga Churn Goose, 15 C. 502 (1888); Sitab Chand *v.* Hyder Malla, 24 C. 281 (1896); and as to waiver of right to execute entire decree, see Bir Narain *v.* Darpa Narain, 20 C. 74 (1892); Kashiram *v.* Pandu, 27 B. 1 (1902).

(9) See Surno Moyee Dassee *v.* Kishen Coomaree Bibee, 14 W. R. 324 (1870).

"Interest" in sect. 20 of the Limitation Act of 1908 means the interest, or any part of the interest, due.(1)

Order after decree.—As the effect of such an order is to alter the decree, this can only be done with the consent (2) of both parties. Where a debtor applied for time to pay and notice was served on the decree-holder, who did not object, the order was made absolute.(3) In the under-mentioned cases the question was considered whether the order passed was (4) or was not (5) an order under the second clause of this rule. The limitation for an application to pay in instalments by consent is six months from the date of the decree.(6)

Decree for *possession* and mesne profits.

12. (1) *Where a* suit is for the recovery of possession of immoveable property and for *rent or* mesne profits, the Court may *pass a* decree—

(*a*) *for* the possession of the property;

(*b*) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit *or* direct*ing* an inquiry *as to such rent or* mesne profits;

(*c*) *directing an inquiry as to* rent or mesne profits from the institution of the suit until—

(*i*) the delivery of possession to the *decree-holder*,

(*ii*) *the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court*, or

(*iii*) the expiration of three years from the date of the decree,

whichever event first occurs.

(2) *Where an inquiry is directed under clause* (*b*) *or clause* (*c*), *a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.*

Application of rule.—This rule embodies, with alterations, the substance of sects. 211 and 212 of the last Code. The corresponding sections of the Act VIII. of 1859 were sects. 196, 197. The rule only applies to suits of the nature described where the plaintiff has a specific interest and not to a suit for partition where

(1) Abdul Ahad *v.* Mahtab Bibi, 35 A. 378 (1913); distinguishing Kallu *v.* Halki, 18 A. 295 (1896); and Anwar Husain *v.* Lalmi Khan, 26 A. 167 (1903).

(2) See Chandra Kuar *v.* Tukha Ram, 3 A. 809 (1881).

(3) Tata *v.* Ramachandra, 7 M. 152 (1883).

(4) Jhoti Sahu *v.* Bhubun Gir, 11 C. 143 (1884).

(5) Abdul Rahaman *v.* Dullaram Marwari, 14 C. 348, 350 (1886); Jogobundhoo Dass *v.* Hori Rawoot, 16 C. 16 (1888).

(6) Abdul Rahaman *v.* Dullaram Marwari, *supra*.

the plaintiff has no specific interest until decree.(1) A suit for mesne profits only is not within the section.(2)

"**Recovery of possession of immoveable property.**"—The section does not apply to other suits for damages, in which suits the question of damages must ordinarily be determined at the trial.(3) O. XXVI. r. 9, however, allows a commission to issue to ascertain the amount both of any mesne profits or damages.(4)

"**Mesne profits.**"—The Code of 1859 did not contain any definition of this term. The Code of 1877 added an Explanation, which was the same as that attached to sect. 211 of the last Code down to the word "*thereupon.*" That section repeated that explanation with an addition, viz. "*together with interest on such profits.*" (5) The definition of mesne profits has now been removed to sect. 2, clause (12).

Mesne profits are in the nature of damages, which the Court may mould according to the justice of the case.(6) There is no analogy between interest awarded under sect. 34 and mesne profits claimed and awarded under this rule.(7)

The object of a suit for mesne profits is to compensate the owner of land for being kept out of possession and deprived of the profits of the land. The measure of the compensation is ordinarily the loss which he has suffered.(8) Where a party is dispossessed of immoveable property, the cause of action as to *wasilat* accrues to him on the date on which he would, but for the fact of dispossession, have received such *wasilat.*(9) Parties in possession are liable for *wasilat* to the legal owners whom they keep out of possession, even though there was no *mala fides* on their part,(10) and whether the wrongdoer derived any profit himself from the possession of the land or not; (11) though, as the

(1) Pirthi Pal *v.* Thakur Jawahir, 14 I. A. 37, at p. 59 (1886), dist. in Shankar Buksh *v.* Hardeo Buksh, 16 I. A. 71, at p. 83, where the parties though joint were entitled to specific shares. As to mesne profits in partition cases, see Bhivrav *v.* Sitaram, 19 B. 532 (1894). For effect of this rule, see Ramana *v.* Babu, 37 M. 186 (1914).

(2) Chaku *v.* Dullabh, 9 B. H. C. R. 7 (1872).

(3) Bheenuk Singh *v.* Jugger Singh, 10 W. R. 299 (1868); Ramtuhul Lall *v.* Sheonath Singh, 1 A. H. C. R. 22 (1869); and see Dina Nath Chuckerbutty *v.* Protap Chunder Goswami, 4 C. W. N. 79 (1899).

(4) In Indurjeet Singh *v.* Radhey Singh, 21 W. R. 269 (1874), the deputation of inquiry to an Ameen was held, under the circumstances, unnecessary.

(5) See Grish Chunder Lahiri *v.* Soshi Shikhareshwar, 2 Bom. L. R. 709, 713 (1900); s. c., 4 C. W. N. 631; 27 C. 951; Radha Raman *v.* Surnamoyi Debi, 7 C. W. N. 473 (1903); s. c., 30 C. 506.

(6) Grish Chunder Lahiri *v.* Soshi Shikhareshwar Roy, 27 I. A. 110, 124 (1900); Adbul Ghafur *v.* Raja Ram, 23 A. 252, 255 (1901).

(7) Dwarka Nath Biswas *v.* Debendro Nath Tagore, 33 C. 1232 (1906).

(8) Abdul Ghafur *v.* Raja Ram, 23 A. 252 255 (1901); Mobarak Ali *v.* Boistub Churn, 11 W. R. 25 (1869); a suit for mesne profits is in the nature of an action of trespass for damages: Radha Churn *v.* Zumuroonnissa, 11 W. R. 83, 84 (1868).

(9) Luckhee Kant Doss *v.* Deen Dyal Doss, 14 W. R. 82 (1870); see Thakoor Doss *v.* Shoshee Bhoosun, 17 W. R. 208 (1872).

(10) Byjnath Pershad *v.* Badhoo Singh, 10 W. R. 486 (1868).

(11) Ghoogly Sahoo *v.* Chunder Pershad, 21 W. R. 246 (1874); and see Bheekumbhur Singh *v.* Roy Chunder, 15 W. R. 196 (1871) [lessor preventing ryots from paying rent to lessee]; Suroop Chunder Roy *v.* Mohender Chunder, 22 W. R. 539 (1874) [mortgagor not directing lessee to pay to mortgagee after foreclosure].

principle is that the defendant should make up to the plaintiff what he has lost, a Court is right in excluding lands of such a nature as would under ordinary circumstances yield no profit.(1)

All persons in wrongful possession, irrespective of how they got in, are liable,(2) such as a mortgagor from date of foreclosure ; (3) an auction purchaser whose purchase is declared invalid ; (4) a person in *bonâ fide* possession without knowledge of defect in his title ; (5) an *ijaradar* together with his *zemindar*,(6) a body of intermediate holders combining to keep the true owner out of possession ; (7) a *sebait* claiming the land as such.(8) In the under-mentioned case the defendants were not all in possession, yet as they had all combined to oppose the plaintiff's possession, they were held all jointly liable for the *wasilat*.(9) But where a person is in rightful possession until a sale or decree is set aside, though he is bound to account for mesne profits, the calculation of which is to be based on a proper discharge of the stewardship of the property, he is not a trespasser, and as such liable to make good any loss sustained by the rightful owner being kept out of possession.(10) In the case, moreover, of any wrong, the liability of a defendant is limited to damages for the wrong which he has himself done, and if the defendant was excluded from possession he cannot be said to have actually or even impliedly received the profits, nor could he with diligence have received them.(11) So the Privy Council have held that a person who had not himself received the mesne profits, having come into possession of a *taluq* upon its being released from management under the Oudh Taluqdar's Relief Act, 1870, would not be chargeable with sums which, as it was alleged, might have been received by way of mesne profits, but had not been received in consequence of the manager's wilful default. Whatever case might have been made against the manager of the estate, the *taluqdar* could not be charged with anything more than was actually received by him.(12) Mesne profits ought not to be estimated for any period during which the defendant who is to be made responsible for them was not active in keeping the plaintiff out of possession. Therefore a defendant cannot be made to pay in respect of years when possession was in the hands of an officer of the Court.(13) But where a defendant who had

(1) Becharam Doss *v.* Brojonath Pal, 9 W. R. 369 (1868).

(2) Bebee Pearun *v.* Ahmed Ali Khan, 4 W. R. 7 (1865); Suttya Nundo *v.* Suroop Chunder, 14 W. R. 76 (1870).

(3) Suroop Chunder *v.* Mohender Chunder, 22 W. R. 539 (1874); but where the mortgagee was the tenant, see Raisuddin Chowdhry *v.* Khoda Newaz, 12 C. L. R. 479 (1883); Woomesh Chunder Roy *v.* Markund Mookerjee, 12 W. R. 35 (1869).

(4) Jey Narain *v.* Torabun, 4 Agra, 216.

(5) Mugun Chunder *v.* Surbossur Chuckerbutty, 8 W. R. 479 (1867); Byjnath Pershad *v.* Badhoo Singh, 10 W. R. 486 (1868).

(6) Biddya Moyee *v.* Ram Lall Misser, 17 W. R. 148 (1872).

(7) Ram Chunder Surmah *v.* Ram Chunder Pal, 23 W. R. 226 (1875).

(8) Ranee Shibeshuree *v.* Mothooranath Acharjee, 5 W. R. 202 (1866).

(9) Shama Sunkur Chowdhry *v.* Sreenath Banerjee, 12 W. R. 354 (1869).

(10) Perumaladayar *v.* Krishnama Chettyar, 17 M. 251 (1894); and see Dakhina Mohun Roy *v.* Saroda Mohun Roy, 20 I. A. 160.

(11) Abbas *v.* Fassih-ud-din, 24 C. 413 (1897); and see Haradhun Dutt *v.* Joy Kisto Banerjee, 11 W. R. 444 (1869); Indurjeet Singh *v.* Radhey Singh, 21 W. R. 269 (1874).

(12) Kishnanand *v.* Kunwar Partab Narain, 10 C. 758 (1884); s. c., 11 I. A. 88.

(13) Indurjeet Singh *v.* Radhey Singh, 21 W. R. 269 (1874).

been in wrongful possession abandoned the land without notice to the decree-holder, it was held that the land must be held to have continued in the judicial possession of the judgment-debtor, who was liable for mesne profits.(1) In a suit for damages against several persons for jointly combining to keep plaintiff out of possession they are all equally liable to him, and none of them can restrict their liability for mesne profits to that portion only of which, by their joint agreement, they were in possession.(2) In some cases, however, the liability has been decided in proportion to the amount of profits that each has derived from his own individual wrongful possession.(3) The Court is competent to apportion the damages in respect of the portions of land held by the defendants; *aliter* where the defendants have jointly taken possession of a particular portion of such land.(4) It was held that a plaintiff must bring a suit against joint wrongdoers, though what he does in execution of his decree is another matter.(5)

If the Court finds that a plaintiff has been dispossessed he is *primâ facie* entitled to mesne profits in respect of the period of dispossession, and it is not necessary for him to prove the actual collections made during this period, for this is proof which he would possibly be unable to supply. It is sufficient to show what is the annual profit which in ordinary years can be collected, as, for instance, the profits for the years preceding or subsequent to the period of dispossession.(6)

Mesne profits include profits actually received, or which might have been received. In other words, if the mesne profits actually received are those which ought to have been received, the plaintiff gets them. If, however, they are less than what the plaintiff could have got, they must be assessed on the basis of his possible profits. The Court has to ascertain what the person in wrongful possession could have realized by ordinary diligence and not merely what he actually received.(7) This really means what the plaintiff could have realized, for the person in wrongful possession may place himself in the position of, and for this purpose is taken to be in the position of, the true holder, so as to charge him with the profits which might have been made by the true owner.(8)

(1) Rajah Padmanund *v.* Madhu Singh, 3 C. W. N. clxxxvii. (1899).

(2) Ajoodhya Doss *v.* Lalljee Paurey, 19 W. R. 218 (1873).

(3) Nawab Nazim *v.* Raj Coomaree Debee, 6 W. R. 113 (1866); Bulwant Singh *v.* Sheo Sahoye, 2 W. R. Misc. 52 (1864); Gunesh Dutt *v.* Bulwant Singh, 14 W. R. 175 (1870).

(4) Krishna Mohun Basak *v.* Kunjo Behari Basak, 9 C. L. R. 4 (1881).

(5) Suttya Nundo *v.* Suroop Chunder, 14 W. R. 76 (1870).

(6) Bhawanee Deen *v.* Mohun Sahoo, 1 A. H. C. R. 273 (1869); and see *post*, "*Proof necessary.*"

(7) Grish Chunder Lahiri *v.* Soshi Shikhareshwar, 4 C. W. N. 631 (1900); s. c., 2 Bom. L. R. 709; 27 C. 951; Thakoor Doss Roy *v.* Nobin Kristo Ghose, 22 W. R. 126 (1874) [the Court must see what it may reasonably be supposed the plaintiff could have collected]; Luckhy Narain *v.* Kally Puddo, 4 C. 882 (1879); s. c., 4 C. L. R. 60; De Silva *v.* Syud Teharance, 9 W. R. 374 (1868); Doorga Soondaree *v.* Shibeshuree Debia, 8 W. R. 101 (1867) [everything will be assumed against the wrongdoer]. As to the meaning of ordinary care and diligence, see Dwarkanath Mitter *v.* Ram Dhun Biswas, 8 W. R. 103 (1867).

(8) Ib.; Lalljee Shahay Singh *v.* Walker, 6 C. W. N. 732, at p. 734 (1902).

It was said to be not clear whether a Court of Equity would ear-mark the profits of a trespasser invested in real property and follow them.(1)

Wilful default is charged against persons in rightful possession, though accountable for their dealings with the property. Mesne profits are chargeable against those wrongfully (2) in possession. Indeed, the adoption of the principle of wilful default would be more favourable to the defendant than the principle of the Code; for there may be values recoverable by ordinary diligence which yet it would not be wilful default not to recover.(3)

Mesne profits, how calculated.—There is no abstract principle independent of the particular facts which determines the assessment of mesne profits in every case. The Court ought first to ascertain the facts and the nature of the plaintiff's possession of the land before ouster, and then determine the principle applicable in the particular case.(4) When the facts are disclosed, the determining principle is this—What was the character of the possession of the plaintiff before he was ousted? and what has the owner lost? (5) Mesne profits are thus whatever profits the wrongdoer might with ordinary diligence have received from an occupation or position similar to that of the party wrongfully dispossessed, whether it be that of a cultivating ryot, landlord or zemindar (6) or talookdar.(7) Where a person claiming mesne profits was himself the cultivator before dispossession, he is entitled to the profits which he would have made cultivating the land if he had not been dispossessed. The measure of damages is the value of the crops.(8) And there is no distinction in respect of assessment of mesne profits between *raiyati* land held by a *raiyat* and the proprietor's *zerait*, or private land ordinarily cultivated by him, except as to the costs of cultivation.(9) Where land is *raiyati*, and the true owner is a rent receiver, assessment of mesne profits should be made on the basis of fair and reasonable rent.(10) *Primâ facie* it is fair to infer that a

(1) Run Bijai Bahadur *v.* Jagatpal Singh, 18 C. 111, 119 (1890).

(2) See Grish Chunder Lahiri *v.* Shikhareshwar, *ante;* and Dina Nath Chuckerbutty *v.* Protap Chunder Goswami, 4 C. W. N. 79, 81 (1899).

(3) Grish Chunder Lahiri *v.* Shikhareshwar, 2 Bom. L. R. 709, 714 (1900); s. c., 4 C. W. N. 631; 27 C. 951.

(4) Surja Pershad Narain *v.* Reid, 6 C. W. N. 409 (1902).

(5) Lalljee Shahay Singh *v.* Walker, 6 C. W. N. 732, 734 (1902); Chardon *v.* Ajeet Singh, 12 W. R. 52 (1869).

(6) *Vide post.*

(7) Bhyrub Chunder *v.* Huro Prosunno, 17 W. R. 257 (1872); Bireshur *v.* Baroda, 15 C. W. N. 506 (1906).

(8) Lalljee Shahay Singh *v.* Walker, 6 C. W. N. 732, 733 (1902); Nursingh Roy *v.* Anderson, 16 W. R. 21 (1871); Soudamince Dabee *v.* Anund Chunder, 13 W. R. 37 (1870); Shistee Pershad Chuckerbutty *v.* Kumla Kant Roy, 17 W. R. 348 (1872); Watson *v.* Pyari Lal Shaha, 7 B. L. R. 175 (1870); Hurruck Lall *v.* Sreenibash Kurmokar, 15 W. R. 428 (1871); Gooroo Dyal Mundur *v.* Baboo Gopal Singh, 24 W. R. 271 (1875). See Bhiro Chandra *v.* Bamundas, 3 B. L. R. A. C. 88 (1869); s. c., 11 W. R. 461; and *contra*, Madhub Chunder *v.* Haradhun Paul, 14 W. R. 294 (1870).

(9) Lalljee Shahay Singh *v.* Walker, 6 C. W. N. 732 (1902); Mt. Rookumee Kooer *v.* Ram Tuhul Roy, 17 W. R. 156 (1872).

(10) Lalljee Shahay Singh *v.* Walker, 6 C. W. N. 732, 733 (1902); Ranee Asmed Kooer *v.* Indurjeet Kooer, 9 W. R. 445 (1868), F. B.; B. L. R., F. B. 1003; Maharaja Luchmeswar Singh *v.* Chairman Darbhanga Municipality, 17 I. A. 90, at p. 97 (1890); Raghu Nandan Jha *v.* Jalpa Pallaji, 3

person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land, and that the true owner wrongfully dispossessed has been a loser by that amount.(1)

If the true owner is placed in the same position as if he had all along been in possession, that is all that he is ordinarily entitled to, and it is not reasonable that he should receive any additional benefit, or that the person in wrongful possession should not only make compensation but be fined as well. On this principle it has been held that ordinarily the collection and other expenses incurred by the trespasser will be allowed, and that it is only when the trespass is of a very aggravated character (2) that the Court, in its discretion, may refuse such expenses.(3) The principle has been stated in another form, namely, that costs of collection and expenses should only be allowed when the trespasser entered the land in the exercise of a *bonâ fide* claim of right; but that when the trespass is malicious and without *bona fides*, though the trespasser may still claim all necessary payments, such as Government revenue or ground rent, it is not imperative on the Court to allow him even such charges as would ordinarily but voluntarily be incurred by an owner in possession.(4) But though a person, when sued may be entitled to a deduction, he has no right to sue to recoup himself for his losses against the true owner, and must bear the burthen of his own wrong.(5)

C. W. N. 748 (1897); Rugho Nath Dobey, 1 Agra Misc. 17; Chardon *v.* Ajeet Singh, 12 W. R. 52 (1869); Thakoor Doss *v.* Nobin Kristo, 22 W. R. 126 (1874); De Silva *v.* Syud Teharanee, 9 W. R. 374 (1868).

(1) Grish Chunder Lahiri *v.* Soshi Shikhareshwar, 4 C. W. N. 631 (1900); 27 C. 951; 2 Bom. L. R. 709.

(2) See Altaf Ali *v.* Lalji Mal, 1 A. 518 (1877), where the trespass was "tortious and malicious"; Dungar Mal *v.* Jai Ram, 24 A. 376 (1902).

(3) Abdul Ghafur *v.* Raja Ram, 23 A. 252 (1901), dissenting from Shitab Dei *v.* Ajudhia Prasad, 10 A. 13 (1887), if that decision means that a tort feasor should never be allowed a deduction; and dist. in Dungar Mal *v.* Jai Ram, 24 A. 376 (1902). See also Gooroo Doss *v.* Anund Moyee, 15 W. R. 203 (1871); Dinobundhoo Nundee *v.* Keshub Chunder, 3 W. R. Misc. 25 (1865); Ram Dhul Singh *v.* Purmessuree Pershad, 7 W. R. 78(1868). See Erfoonissa Chowdrain *v.* Rukeeboonissa, *post* [mesne profits are assets of estate minus costs of collection, Government revenue, losses by desertion, and death of ryots, by drought, etc.]; Thakoor Dass *v.* Shoshee Bhoosun, 17 W. R. 208 (1872) [endowed lands, deduction of expenses of worship]; Palmer *v.* Mohunt Bal Gobind, 7 W. R. 230 (1867) [judgment-debtor left to recover Government revenue]; Erfoonissa Chowdhrain *v.* Rukeeboonissa, 9 W. R. 457 (1868) [*Surunjamee* allowed, and it was pointed out it was unreasonable that defendant should pay what the plaintiff could not possibly have collected]; Becharam Doss *v.* Brojonath Pal, 9 W. R. 369 (1868); Tiluck Chand *v.* Soudamini Dasi, 4 C. 566, 569 (1878); Dakhina Mohan Roy *v.* Saroda Mohan Roy, 21 C. 142 (1893) [allowance of revenue paid by claimant of estate holding under decree subsequently reversed]; s. c., 20 I. A. 60; Sharf-ud-din Kahn *v.* Fatehyab Khan, 20 A. 208 (1897) [expenses of decrees for rent under circumstances disallowed]; Kachar Ala *v.* Sha Oghadbai, 17 B. 35 (1892) [mesne profits can only be ascertained after making deductions from the gross earnings of all such payments made by the defendant as the plaintiff would have been bound to make if in possession].

(4) Dungar Mal *v.* Jai Ram, 24 A. 376 (1902): see also Abdul Ghafur *v.* Raja Ram, 22 A. 262 (1900), where it was held there was no *bona fides*. See, however, latter case in appeal in 23 A. 252 (1901).

(5) Tiluck Chand *v.* Soudamini Dasi, 4 C. 566 (1887).

The mode of calculation in cases of decrees for and against each of the parties, is to calculate and rateably divide them, and then to allow a set-off to the extent of the profits actually received by each sharer, the deficit in each year being made good by the party who received in excess of his share.(1)

Proof necessary.—In a suit for mesne profits it is, as in other cases, incumbent on the plaintiff to establish not only the existence of his right, but also the extent of it. The first he does by proof that the defendant has wrongfully deprived him of enjoyment,(2) and the second by proof of the duration of the wrongful possession, and it is for that period only that damages are claimable.(3) Where, however, it is shown that a particular *jama* is payable in respect of a property, it lies upon the wrongdoer to show that the sum has not been realized.(4) On him, as the party in possession and having the means of information, lies the onus of proving what is the actual amount of mesne profits.(5) It cannot be laid down, however, as a general proposition that the burden of proof in this respect is always on the defendant. It depends on the circumstances, according to which presumptions may or may not arise in favour of the plaintiff.(6)

In calculating *wasilat*, evidence is usually taken of the rent paid. The party in possession is called on to produce his accounts, which are compared with the *pottahs* and *dakhilas* in the ryot's possession. *Jummabundi* papers filed by *patwaris* under the zemindar's supervision have been accepted as *primâ facie* evidence of the profits of the estate.(7) But settlement papers thirty years old without inquiry into the actual proceeds of the estate during the period of dispossession are useless as a basis to work on.(8) When the amount of mesne profits demanded is merely approximately given, the plaintiff is not bound by what he has said in the plaint, but may be given more, though, of course, such statement may be used as evidence against him.(9) The ordinary rule, however, being that a plaintiff cannot recover more than he claims in the plaint,

(1) Bijoy Gobind *v.* Kalee Prosunno, 16 W. R. 294 (1871).

(2) Ishan Chandra Burdhan *v.* Ainuddin Mia, 5 C. W. N. 720 (1901), as to possession and dispossession; Dwarkaram Missar *v.* Jogessur Lall, 21 W. R. 276 (1874); Radha Churn *v.* Zumuroonissa, 11 W. R. 82 (1868); Lep Singh-Khasia *v.* Nimar Khasia, 21 C. 244 (1893); Kalidas *v.* Vallabhdas. 6 B. 79 (1881).

(3) Ishan Chandra Burdhan *v.* Amuddin Mia, 5 C. W. N. 720 (1901).

(4) Brojendro Coomar Roy *v.* Madhub Chunder Ghose, 8 C. 343, 351 (1882), everything being assumed against the wrongdoer; Doorga Soonduree *v.* Maharanee Shibeshuree, 3 W. R. 101 (1867).

(5) Dinobundhoo Nundee *v.* Keshub Chunder, 3 W. R. Misc. 25 (1865).

(6) Krishna Mohun Basak *v.* Kunjo Behari Basak, 9 C. L. R. 1 (1881).

(7) Rajah Deonarain Singh *v.* Nack Pershad, 2 A. H. C. R. 217 (1870).

(8) Puran Chunder Roy *v.* Juggessur Mookerjee, 17 W. R. 298 (1872).

(9) Pearee Soonduree *v.* Eshan Chunder, 16 W. R. 302 (1871); Huro Gobind Bhukut *v.* Degumburee Debia, 9 W. R. 217 (1868); Jadoomony Dabee *v.* Hafez Mahomed Ali Khan, 8 C. 295 (1881); Gauri Prosad Koondoo *v.* Reily, 9 C. 112 (1882); s. c., 12 C. L. R. 41; and see Fakharuddin Mahomed *v.* Official Trustee, 8 I. A. 197 (1881), where the schedule to the plaint estimated the *wasilat* then due, but it was given up to the date of possession. As to Court Fee, see Ramkrishna Bhikaji *v.* Bhimabhai, 15 B. 416 (1890); Luckhee Kant *v.* Deen Dyal, 14 W. R. 82 (1870).

he will be limited to it where the rate or amount is not stated approximately.(1)

As regards mesne profits before suit, as these have accrued due and the plaintiff has a cause of action in respect thereof, a plaintiff suing for mesne profits is bound to put forward his whole claim. If he does not, a subsequent suit for mesne profits prior to the first suit will not lie.(2)

Mesne profits are demandable from the date upon which they become annually due.(3) But a purchaser for valuable consideration without notice of plaintiff's title has been held not liable for mesne profits from any date earlier than the institution of the suit where the plaintiff has been guilty of laches,(4) and mesne profits were only allowed from the date of suit in other cases.(5) Under Art. 109 of the Limitation Act a defendant is liable for mesne profits received, or which might have been with due diligence received, during the three years before date of suit, and not before. This period has no reference to the time when rents fall due.(6)

Accruing before suit.—The assessment of mesne profits was held to be an essential part of the decree in the suit, and not a proceeding in execution, and therefore something which must be done by the Court trying the case, which was authorized to make a decree in it. It cannot be left to another Court, which, when the final decree is made, may have to execute it.(7) In a suit for recovery of possession, and for mesne profits from the date of suit, it was held that a Munsif could ascertain and award mesne profits even though they were in excess of the pecuniary jurisdiction of the Court.(8) The Court had either to determine the matter itself or direct an inquiry. But it must have done one or the other. Thus a decree awarding immediate mesne profits at the rate admitted by the defendant, and larger mesne profits contingently on a higher rate being proved at the time of execution, was held to be irregular.(9)

(1) Baboojan Jha *v.* Byjnath Dutt Jha, 6 C. 472 (1880); and see Gooroo Doss Roy *v.* Bungshee Dhur, 15 W. R. 61 (1871), where the party was held to be setting up a new and distinct claim.

(2) See O. II. r. 2; Ram Ruttun Ando *v.* Ram Chunder Pal, 25 W. R. 113 (1876). As to whether a claim for possession and for mesne profits are distinct causes of action, see notes to same rule and order, "Meaning of 'cause of action,'" "Tort." In Ramabhadra *v.* Jagannatha, 14 M. 283, the mesne profits accrued since the decree in the former suit.

(3) Maharaj Koer Ramaput *v.* Furlong, 3 W. R. 38 (1865).

(4) Juggurnath Sahoo *v.* Syud Shah Mahomed, 14 B. L R. 386 (1874). Slight delay will be of no account: Kaleenath Doss *v.* Rajah Meah, 22 W. R. 406 (1874).

(5) Thakur Shere Bahadur *v.* Thakurain Duriao, 3 C. 645 (1877); Sri Raghunadha *v.* Sri Brozo Kishoro, 3 I. A. 154, 193, 194 (1876); Sarkies *v.* Prosonnomoyee Dossee, 6 C. 794 (1881); or from notice of claim: Sumbhoo Chunder Surmah *v.* Issur Chunder, 2 Sev. 4.

(6) Abbas *v.* Farsih-ud-din, 24 C. 413 (1897); Kishnanand *v.* Kunwar Partab Narain, 10 C. 785 (1884).

(7) Mt. Bibee Meher Jan *v.* Mt. Bibee Gerda, 25 W. R. 270 (1870).

(8) Rameswar Mahton *v.* Dilu Mahton, 21 C. 550 (1894). In this case no cause of action for mesne profits had arisen on the date of suit; distinguished in Bhupendra *v.* Purna, 15 C. W. N. 506 (1910).

(9) Syud Lotfoolah *v.* Mt. Nuseebun, 10 W. R. 24 (1868). In Hureehur Mookerjee *v.* Mollah Abdulbur, 17 W. R. 209 (1872), it was held that the decree had left the matter to be determined in execution; and see Ishari Pershad *v.* Ram Narain Saha, 6 C. W. N. 672 (1902).

Decree.—A decree declaring the liability for mesne profits, but not determining the amount if worked out after the death of a defendant, did not, it was held, bind the heirs not parties.(1)

Under the Code of 1859, the Court might reserve the inquiry "for the execution of the decree," a phrase which gave rise to difficulty.(2) The Court under the last Code might "*direct an inquiry.*" The proceedings were part of and a continuation of the suit, and no final decree existed to execute or appeal from until they were closed. That part of the decree which denoted possession to be given was final, but the other part was interlocutory, and became final when the amount payable was fixed. An application to ascertain the amount of mesne profits was not an application for execution, but an application by which the decree-holder moved the Court in a pending suit to make a final decree regarding mesne profits.(3) And for this reason an application to ascertain the amount of mesne profits awarded by a decree was not affected by limitation.(4) The Bombay High Court, however, held that a decree under sect. 212 of the last Code was necessarily subject to the limitation laid down in sect. 211 of the same Code, and that mesne profits for more than three years from the date of the decree should not be awarded, even though possession was not delivered during that period.(5) The investigation into mesne profits, directed by the decree, was nothing more than a continuation of the inquiry which was set on foot at the trial into the merits of the plaintiff's case against the defendant, only that it was limited to the matter of damages. It was therefore in the first place incumbent on the plaintiff to give the Court some evidence upon which it could form a reasonable conception of the amount of his loss. And the defendant was not called upon to answer the plaintiff's case until the plaintiff had given some evidence in support of it.(6) The direction as to the inquiry into the amount of mesne profits need not, it was held, necessarily be contained in the decree; (7) as to the form of which, see case cited below.(8) Once the liability of a party was fixed in the Appellate Court, the Lower Court had to confine its inquiry to the assessment of the amount of damages.(9)

The language of the amended section makes the procedure plain. The

(1) Radha Prasad Singh *v.* Lal Sahab Rai, 13 A. 53, at p. 65 (1890); s. c., 17 I. A. 150.

(2) Dildar Hossein *v.* Mujeedunnissa, 4 C. 629 (1878).

(3) Ib.; Mt. Fuzeelun *v.* Keramut Hossein, 21 W. R. 212 (1874); Krishnan *v.* Nilakandan, 8 M. 137 (1884); Anando Kishore *v.* Anando Kishore, 14 C. 50, 53, 54 (1886); Radha Prasad Singh *v.* Lal Saheb Rae, 13 A. 53 at p. 65 (1890); s. c., 17 I. A. 150; Puran Chand *v.* Roy Radha Kishen, 19 C. 132, at pp. 136, 137 (1891), F. B.; Dwarka Nath Misser *v.* Barinda Nath Misser, 22 C. 425, 432, 433 (1895); Pryag Singh *v.* Raju Singh, 25 C. 203, 204, 205 (1897); Gopal Chandra Chakravarti *v.* Preonath Dutt, 32 C. 175 (1904); Vythinada *v.* Vythinada, 33 M. 78 (1909); Midnapur Zemindary Co., Ltd. *v.* Paresh Narain, 39 C. 220 (1911); 16 C. W. N. 109.

(4) Puran Chand *v.* Roy Radha Kishen, 19 C. 132 (1891), F. B.; Pryag Singh *v.* Raju Singh, *supra*; Waliya Bibi *v.* Nazar Hasan, 26 A. 623 (1904).

(5) Narayan Govind Manik *v.* Sono Sadashiv, 24 B. 345 (1899); Uttamram *v.* Kishordas, 24 B. 149 (1899).

(6) Indurjeet Singh *v.* Radhey Singh, 21 W. R. 269 (1874).

(7) Fatima Bibi *v.* Abdul Majid, 14 A. 531 (1892); Muhammad Abdul Majid *v.* Muhammad Abdul Aziz, 19 A. 155 (1896).

(8) Jagatjit *v.* Jarabjit, 19 C. 159, 173; 18 I. A. 165.

(9) Dwarka Lall *v.* Nirunder Narain, 22 W. R. 461 (1874).

Court may either determine the amount in the decree or may give a decree for possession, and then direct an inquiry into mesne profits, etc., and dispose thereof in the final decree. In a recent case where a plaintiff had brought a suit for recovery of possession on declaration of his title, which was granted, and for mesne profits, which were disallowed, it was held that sub-sect. (2) of this rule implies that the decision with regard to possession is a preliminary decree within the meaning of sect. 2.(1)

Accruing after suit.—Sect. 211 of the last Code, which referred to mesne profits accruing subsequent to institution of suit, was held to be an enabling one, and it would, it was said,(2) be neither unreasonable nor illegal to refuse subsequent profits up to date of decree and decree immediate possession; leaving the party in whose favour the decree was made to his remedy by a regular suit if immediate possession was not had. The mere abstention therefore of the Court to award mesne profits after date of suit was held not to be a bar to any suit in respect thereof.(3) A claim for mesne profits was held distinct from a claim for recovery of possession, and it was only under sect. 44, rule A, of the last Code that such claims might be joined in one suit.(4) In order to avoid multiplicity of suits the Court was empowered to assess damages not only so far as they accrued up to the commencement of the suit, but also those accruing after suit and during the continuance of the trespass. But the section was not imperative or obligatory but discretionary.(5) Where the decree was silent touching interest or mesne profits, subsequent to the institution of the suit, they could not be given in execution; but the plaintiff was still at liberty to assert his right to such mesne profits in a separate suit.(6) Apart from the decisions cited, the

(1) Kumud Lal *v.* Ramani Mohon, 19 C. L. J. 346 (1914).

(2) Ramabhadra *v.* Jagannatha, 14 M. 328, 333 (1890).

(3) Mon Mohun Sirkar *v.* Secretary of State, 17 C. 968, 971 (1890).

(4) Ib., 17 C. 968, 970, 971 (1890); for the opposite view holding that the claims are not distinct causes of action, see notes to O II. r. 2.

(5) Ib., at p. 970.

(6) Sadasiva Pillai *v.* Ramalinga Pillai, 21 A. 219, 228 (1875); s. c., 24 W. R. 193; Fakharuddin Mahomed *v.* Official Trustee, 8 I. A. 197, 207 (1881); s. c., 8 C. 178; Chunder Coomar Roy *v.* Gonesh Chunder Doss, 13 C. 283 (1886); Mon Mohun Sirkar *v.* Secretary of State, 17 C. 968 (1890) [neither ss. 13 nor 244 is a bar to a separate suit]; Kalka Singh *v.* Paras Ram, 22 C. 434 (1894); s. c., 22 I. A. 68; Uttamram *v.* Kishordas, 24 B. 149, 152 (1899); s. c., 1 Bom. L. R. 638, 640; Bhivrav *v.* Sitaram, 19 B. 532 (1894); Ishari Porshad *v.* Ram Narain Saha, 6 C. W. N. 672 (1902) [it does not appear for what period these mesne profits were claimed]; and for earlier cases, see Wise *v.* Rajendur Coomar, 11 W. R. 200 (1869) [and the Court must fix the period in respect of which such profits are to be assessed]; Eckowrie Singh *v.* Bijoynath Chatterjee, 13 W. R. 11 (1870); s. c., 4 B. L. R. A. C. 111; Syud Shah Ameer *v.* Syud Shah Zameer, 18 W. R. 122 (1872); Broughton *v.* Perhlad Sen, 19 W. R. 154 (1873); Bhoobunessuree Chowdhrain *v.* Manson, 22 W. R. 160 (1874); Ram Ghulam *v.* Dwarka Rai, 7 A. 170 (1884); Gannu Lal *v.* Ram Sahai, 7 A. 197 (1884); Byjnath Pershad *v.* Badhoo Singh, 10 W. R. 486 (1868); Shaikh Abdool *v.* Mt. Asruffun, 25 W. R. 215 (1876); Ram Roop Singh *v.* Sheo Golam Singh, 25 W. R. 327 (1876); Janokee Nath Mookerjee *v.* Raj Kristo Singh, 15 W. R. 292 (1871) [and if mesne profits are given up to a particular time, Court of Execution cannot give any beyond it]; Ram Lochun *v.* Munsoor Ali, 11 W. R. 339 (1869); Ram Manickya *v.* Jaggunnath Gope, 5 C. 563 (1879); but see Kaleenath Doss *v.* Rajah Meah, 22 W. R. 406 (1873), where, though the decree said nothing about mesne profits, they were allowed.

matter was made clear by para. 2 of sect. 244 of the last Code. (See, however, now *post.*) But it had to be ascertained on a proper construction whether the judgment and decree was silent on the point. *Wasilat* by law is demandable up to possession, and therefore a decree for "possession with *wasilat*" was held to give *wasilat* up to the date of possession and not merely up to the date of suit.(1)

A judgment dismissing an appeal is in reality an informal mode of confirming the decree appealed against. Where, therefore, mesne profits were awarded from the institution of the suit until decree only, and the Appellate Court simply dismissed the appeal without providing for subsequent mesne profits, it was held that these could not be recovered in execution.(2) But where the original Court granted a decree for possession with "future mesne profits," and the Appellate Court approved that decree without expressly mentioning mesne profits, it was held that mesne profits were granted by reference to the original decree.(3) Where a decree was given for certain of the properties claimed and mesne profits, and the suit was dismissed as regards the other properties, and on appeal the Appellate Court reversed the decree of dismissal, it was held that the appellate decree imported an award of mesne profits on all property, the possession of which was decreed to the plaintiffs.(4)

As to Court fees (5) and form of decree under sect. 211 of the last Code,(6) see cases cited below.

Under sect. 244, clauses (*a*) and (*b*) of the last Code, the Court of execution determined questions relating to the execution. This is not so now under sect. 47 of the present Code. The present rule enacts that the Court of trial shall in continuation of the suit inquire into the question (see notes to sect. 47). The penultimate section of sect. 244 of the last Code has not been re-enacted, and probably any claim made and not expressly granted in the decree will be deemed to have been refused within the meaning of Explanation V. of sect. 11.

"**Relinquishment of possession.**"—This clause is new. With a view to the curtailment of delay and expense, it is enacted that the claim for mesne profits should not continue till actual delivery of possession if the defendant prefers to relinquish the land with notice to the plaintiff.

"**Three years.**"—In the Code of 1859 there was no time specified down

(1) Fakharuddin Mahomed *v.* Official Trustee, 8 I. A. 197 (1881); s. c., 8 C. 178; but see Ram Manickya *v.* Jaggunnath Gope, 5 C. 503 (1879); and see for other cases, Bunsee Singh *v.* Mirza Nusuf Ali, 22 W. R. 328 (1874); Raesoonissa Begum *v.* Sharoda Soonduree, 16 W. R. 25 (1871) [decree for possession construed to include mesne profits]; Bijai Bahadur *v.* Bhup Indar, 19 A. 296 (1897).

(2) Syud Shah Ameer *v.* Syud Shah Zameer, 18 W. R. 122 (1872).

(3) Rajah Bhup Indar *v.* Bijai Bahadur, 5 C. W. N. 52 (1900); s. c., 29 I. A. 209.

(4) Waliya Bibi *v.* Nazar Hasan, 26 A. 623, 624 (1904); but see Eckowrie Singh *v.* Bijoynath Chatterjee, 13 W. R. 11 (1870), where "appeal decreed" was held not to give mesne profits.

(5) Ram Krishna Bhikaji *v.* Bhimabhai, 15 B. 416 (1890); Marden *v.* Janakiramayya, 21 M. 371 (1898); Mohini Mohan Das *v.* Satis Chandra Roy, 17 C. 704 (1890); Kewal Kishan Singh *v.* Sookhari, 24 C. 173 (1896); s. c., 1 C. W. N. 243.

(6) Kali Krishna Tagore *v.* Secretary of State, 16 C. 173, at p. 183 (1888); s. c., 15 I. A. 186.

to which mesne profits could be awarded short of that of obtaining possession. The Code of 1877 introduced the further limitation which now exists, and the rule thus restricts the time for which mesne profits can be allowed in a decree to three years from the date of the decree. Consequently where no period is mentioned the decree cannot be construed as giving the plaintiffs profits for a period longer than what the law allows the Court to give.(1) So proceedings for the purpose of ascertaining mesne profits were held to be a continuance of the original suit, and the Court was bound by these provisions. Where, therefore, a decree directed that plaintiffs should get mesne profits from a certain date until delivery of possession, the amount to be fixed in execution: *held* that the decree was necessarily subject to the limitation laid down in sect. 211 of the former Code, and that mesne profits for more than three years could not be awarded even though possession was not delivered during that period.(2) In executing a decree which awards mesne profits, and which is affirmed by a final Court of Appeal, the three years from the date of the decree until the expiration of which alone mesne profits are recoverable must be calculated from the date of the decree of the final Court of Appeal, and not from the date of the decree of the original Court.(3)

Interest.—The Code of 1859 provided that interest might be decreed,(4) but the Code of 1882 first included interest in the definition of mesne profits. There being no rule of law obliging the Court to allow interest upon mesne profits, it is a matter for the discretion of the Court, upon consideration of the facts, whether to allow interest or not.(5) No difference should be made as regards interest between *wasilat* paid in kind and paid in money.(6) A decree for interest on mesne profits from the date they were ascertained was held to mean the date on which they were ascertained by the Court, and not by the *Amin*.(7)

The words "*together with interest on such profits*" in the definition of mesne profits (see sect. 2) do not refer to interest due after the ascertainment of the amount of mesne profits due under the decree, because the Courts have otherwise

(1) Uttamram *v.* Kishordas, 1 Bom. L. R. 638, 641 (1899); s. c., 24 B. 149; and see Grish Chunder Lahiri *v.* Soshi Shikhareshwar, 4 C. W. N. 631 (1900).

(2) Narayan *v.* Sono, 1 Bom. L. R. 846 (1899); s. c., 24 B. 345; Trailokya *v.* Jogendra, 35 C. 1017 (1908).

(3) Bhup Indar *v.* Bijai Bahadur, 2 Bom. L. R. 9 8 (1900); s. c., 23 A. 152; 5 C. W. N. 52.

(4) Though in a suit for mesne profits only, interest on mesne profits could not be recovered, such a suit being not for a debt but for unliquidated damages, and interest not being allowable on such: Chaku *v.* Dullabh Dwarka, 9 B. H. C. R. 7 (1872); Gundo Anandrav *v.* Krishnazav, 4 B. H. C. R. 55 (1867); but in Lucky Narain *v.* Kally Puddo, 4 C. 882 (1879), interest was given; and see Hurrodurga Chowdhrain *v.* Sharrat Soondery, 4 C. 674 (1878); Mobaruk Ali *v.* Boistu Churn, 11 W. R. 25 (1869); Bengal Coal Co. *v.* Darembah, Marsh, 105 (1862); Hurropersaud Roy *v.* Shamapersaud Roy, 3 C. 654 (1878). It was also held that a sum found due for mesne profits was a judgment debt, and carried interest by its own force; Kirkland *v.* Modee Pestonjee, 3 M. I. A. 220 (1843); and interest was decreed in respect of a *tora goras huk*: Sumbhoolall *v.* Collector of Surat, 8 M. I. A. 1 (1859).

(5) Kishnanand *v.* Kunwar Partab, 10 C. 785 (1884); s. c., 11 I. A. 88, 93.

(6) Sm. Raye Kishoree *v.* Bonomally Churn Mytee, 10 W. R. 209 (1868).

(7) Doorga Soonduree Debia *v.* Shibessuree Debia, 10 W. R. 391 (1868).

been given a discretion to award interest separately on the amount so ascertained. The words, therefore, contemplate that interest should form a separate item in the calculation of the amount due as mesne profits, and a decree-holder is entitled to receive interest year by year on the amount found to be due, and not only on the amount actually ascertained and embodied in the decree.(1) The Court has jurisdiction to give or refuse interest on mesne profits as it chooses. But if it does not intend to grant interest it should expressly refuse it, for, having regard to the additional words "*together with interest on such profits,*" a decree which merely grants mesne profits, and is silent as to interest, must be taken to mean that the mesne profits shall carry interest on them.(2) Where a decree granted mesne profits and said nothing about interest, the amount of mesne profits being left for determination in execution of the decree: *held*, that the decree-holder was entitled to interest upon the mesne profits due to him until such mesne profits were actually paid to him by the judgment-debtors.(3)

Decree in **administration-suit.**

13. (1) *Where a* suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before *passing* the final decree, *pass a preliminary decree ordering* such accounts and inquiries to be taken and made, and *giving* such other directions as it thinks fit.

(2) In the administration by the Court of the property of any *deceased* person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being *within the local limits of the Court in which the administration-suit is pending* with respect to the estates of persons adjudged *or declared* insolvent; and all persons, who in any such case would be entitled to be paid out of such property, may come in under the *preliminary* decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

Administration suit.—Sect. 10, 38 & 39 Vict. c. 77. In ordinary cases an administration decree is a matter of course on its being shown that the

(1) Radhad Raman Munshi *v.* Surnamoyi Debi, 7 C. W. N. 437 (1903); s. c., 30 C. 506.

(2) Grish Chunder Lahiri *v.* Soshi Shikhareshwar Roy, 27 C. 951 (1900); s. c., 4 C. W. N. 631, and at 33 C. 329 (1905); 2 Bom. L. R. 709. But see Abdul Ghafur *v.* Raja Ram, 22 A. 262 (1900), relying on Hurro Durga Chowdhrani *v.* Surat Sundari Debi, 8 C. 332 (1881) [foll. in Brojendro Coomar *v.* Madhub Chunder, 8 C. 343 (1882)], which, however, it is to be observed, was [as pointed out in Radha Raman Munshi *v.* Surnomoyi Debi, 30 C. 506, 507 (1903)] before the enactment of the present Code. The old law was different: Becharam Doss *v.* Brojonath Pal, 9 W. R. 369 (1868).

(3) Grish Chunder Lahiri *v.* Soshi Shikhareshwar Roy, 33 C. 329 (1905).

plaintiff has an interest in the estate and that the defendant is an accounting party, and such a decree can only be averted by payment or the admission of assets and submission to a personal decree. But the Court has power to stay or dismiss frivolous or vexatious actions, and will see whether there is *bona fides*, whether real and substantial questions exist for determination, and whether an administration decree is the necessary and proper relief.(1) In such a case it is necessary to pass a preliminary decree, directing all such inquiries to be made and accounts taken which cannot be conveniently done in Court, but which have to be carried out before the Court is in a position to pass its final decree. The first paragraph provides for this. An order under the first paragraph is a decree, and is appealable as such. See sect. 2, *ante*, and notes thereto.

Insolvent estates.—The second paragraph of this rule is taken from sect. 10 of the Judicature Act of 1875 (38 & 39 Vict. c. 77). Before the Judicature Act, in administration in Chancery, a secured creditor, who had not realized his security, could prove against the assets for the whole debt and receive a dividend: he could then realize his security, and if he received in the whole more than 20*s.* in the £, he paid over the excess. In bankruptcy he had to realize his security and prove for the balance. The Act made the rule in bankruptcy applicable to administration actions. It did not (nor does this section) apply all the principles of bankruptcy to insolvent estates, but established uniformity of administration in respect of the four heads which are specifically mentioned in this section.(2) A decree for administration is a decree in favour of all creditors, and as all of them are included in the same decree, it is inequitable that one should be in a better postion than another under that decree, and therefore the Court divides the assets amongst them.(3)

14. (*1*) *Where the Court decrees a claim to* pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall— [s. 214.

Decree in **pre-emption-suit.**

(*a*) specify a day on or before which *the purchase-money* shall be so paid, and

(*b*) *direct* that on payment *into Court* of such purchase-money, together with the costs (if any) decreed against *the plaintiff, on or before the day referred to in clause* (*a*), *the defendant shall deliver* possession of the property *to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment*, but that, if *the purchase-*money and *the* costs (*if any*) are not so paid, the suit shall *be* dismissed with costs.

(1) Sm. Atturmoney Dassee *v.* Bepin Behari Dhur, Suit 875 of 1904 Cal. H. C., 23 Jan. 1906.

(2) See Annual Practice, 1905, vol. ii. p. 487, and cases there collected.

(3) Soobul Chunder Law *v.* Russick Lall Mitter, 15 C. 202, 209 (1888), distinguishing the case where a creditor has obtained judgment before administration decree.

(2) *Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct,—*

(*a*) *if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and,*

(*b*) *if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.*

Pre-emption.—Sect. 214, Code of 1877 and 1889, amended as indicated in italics. The former section, which was frequently criticized as inadequate, has been considerably altered. In sub-clause (1), para. (*b*), the day is fixed. As to the power of the Appellate Court to specify another day,(1) see note. As regards delivery of possession in the same paragraph, the duty of executing and registering any necessary instrument (2) has been held to be upon the defendant. In sub-clause (2) provision has been made for the form of decrees in the case of claims decreed in favour of rival pre-emptors.(3)

The Mahomedan law is the only system prevalent in India which provides substantive rules relating to the right of pre-emption in a systematic form, though local Acts and the Code recognize the existence of the right, and lay down rules belonging to the remedy. In all cases in which the right of pre-emption is claimed, the Courts in administering equity will by analogy follow the rules of Mahomedan law, even in cases where the right is not claimed under that law, but under local usage or custom. The rules of customary pre-emption no doubt depend upon the custom itself, but where such custom is silent upon any particular point, the rule of Mahomedan law must by analogy be taken to be the rule of decision.(4)

Rules in regard to decrees in pre-emption suits were formulated for the first time in the Code of 1877, and it is conceivable that in introducing these new rules the form which they took fell short of comprehending all the various cases that might arise in consequence.(5) Sect. 214 of the last Code thus laid down no rules as to the form of the decree in cases where rival pre-emptors, possessing equal rights of pre-emption, came forward to enforce the right in

(1) See Parshadi Lall *v.* Ram Dial, 2 A. 744 (1880); Kodai Singh *v.* Jaisri Singh, 13 A. 376 (1889).

(2) See Ramasami Pattar *v.* Chinnan Asaric, 24 M. 449, 463 (1901).

(3) See Kashi Nath *v.* Mukta Prasad, 6 A. 370 (1884); Hulasi *v.* Sheo Prasad, 6 A. 455 (1884); Ajaib Nath *v.* Mathura Prasad, 11 A. 164 (1888).

(4) Zamir Husain *v.* Daulat Ram, 5 A. 110, 113 (1882); Rajjo *v.* Lalman, 5 A. 180, 182 (1882). The substantive law not being within the scope of the work, is not further discussed. A few cases will be found in the notes to s. 214 of O'Kinealy's Civ. Pr. Code.

(5) Ishri *v.* Gopal Saran, 6 A. 351, 354 (1884); for an instance of omission, *vide post*, "Purchase-money."

respect of the same sale, or where one of rival pre-emptors possessed superior right of pre-emption to the other. The Court had to deal with such cases upon general principles of equity suited to the exigencies of each case.(1) The section again provided only for cases where costs have been decreed against a plaintiff, but not for cases where costs, instead of being awarded against the pre-emptor, were awarded in his favour by the decree. But it was held that there being no specific provision in the Code to meet this case, the principles of justice, equity, and good conscience were applicable, and that under the general rules of set-off, which are so consonant with these, a plaintiff was entitled, when depositing the purchase-money under the decree, to deduct the sum awarded to him as costs.(2)

The former section, it was held, contemplated cases where the party seeking to enforce a right of pre-emption is out of possession, and was therefore inapplicable to instances in which parties setting up such a right were already in possession.(3)

Payment of purchase-money.—If on the day on which the time for payment expires the Court is closed, the pre-emptive price may be paid on the next day that the Court is open.(4) If the pre-emptive price is not paid within the prescribed time, then as the right decreed is dependent on payment within such period, the decree for pre-emption cannot be enforced.(5) Where the plaintiff paid the money into Court, petitioning that it should be retained until mutation of names had taken place, and the defendant refused to accept the money on the ground that the payment was clogged with a condition, it was held that the payment was not saddled with a condition precluding payment before mutation and the objection was disallowed.(6) In making the payment the plaintiff may deduct his costs.(7) The question whether the plaintiff has paid the purchase-money in time is not a matter relating to the execution of a decree under sect. 244, corresponding with sect. 47, *ante*.(8) A decree in a suit directed that the purchase-money should be paid within a certain period from the date the decree became final. The period of limitation prescribed for an appeal from this decree expired on a day when the Court was closed: held that the appeal could be filed on the first day it opened, and that the decree did not become final till then.(9) A plaintiff who has obtained a decree can appeal within the limitation period, whether or not he has made the payment on or before the day fixed.(10)

(1) Kashi Nath *v.* Mukhta Prasad, 6 A. 370, 373 (1884). See Hulari *v.* Sheo Prasad, 6 A. 455 (1884); Ajaib Nath *v.* Mathura Prasad, 11 A. 164, 167 (1888); Arjun Singh *v.* Sarfaraz Singh, 10 A. 182 (1888).

(2) Ishri *v.* Gopal Saran, 6 A. 351 (1884).

(3) Krishna Menon *v.* Kesaven, 20 M. 305, 310 (1897).

(4) Mt. Muchal Kooer *v.* Lalljee, 2 N. W. P. 112 (1870).

(5) Jai Kishen *v.* Bhola Nath, 14 A. 529 (1892). O'Kinealy's C. P. C. cites Shah Ahmed Ali petitioner, S. D. Sum. Dec., Dec. 26, 1840 (Carran's R. 36), in which the decree-holder having failed to deposit the purchase-money within the time prescribed, a subsequent application with a tender of the money was refused.

(6) Ajhoodhia Shookool *v.* Jewboodh Shookool, 6 A. H. C. R. 46 (1873).

(7) Ishri *v.* Gopal Saran, 6 A. 351 (1884), and *ante*.

(8) Muhammad Ali *v.* Debi Din Rai, 4 A. 420 (1882).

(9) Ram Sahai *v.* Gaya, 7 A. 107 (1884), which also deals with the question of execution by the decree-holder and the transference of a pre-execution decree.

(10) Jaggar Nath Pande *v.* Jokhu Tewari, 18 A. 223, at p. 226 (1896); Kodai Singh *v.* Jaisri Singh, 13 A. 376 (1889); Wazir Khan *v.* Kale Khan, 16 A. 126 (1893).

But the mere appeal by a plaintiff or defendant will not of itself extend the time for payment.(1) The Appellate Court may if it thinks fit extend the time for payment.(2) But if the appellate decree says nothing about extending time, it has not the effect of giving the plaintiff, whether appellant or respondent, the corresponding period of time from the date of the appellate decree for payment to that which he had from the date of the decree of the Court of first instance. For this rule says that if the pre-emptive price is not paid the suit shall stand dismissed, and the decree, on the expiration of the time limited without payment by the plaintiff, becomes a decree in favour of the defendant.(3) (See first paragraph.) If the pre-emptive suit has arisen and been decreed before the vendee has paid the whole or part of the purchase-money to the vendor, the Court in disbursing the purchase-money deposited will make an order directing that the whole or part of the purchase-money (as the case may be) should be paid to the vendor or vendee, both of whom must necessarily be judgment-debtors, and as such be liable alike to payment of the costs awarded to the pre-emptor decree-holder.(4) It has been held that the profits of the property accruing between the date of the sale and the date when the pre-emptor, in accordance with the decree, paid the pre-emptive price, belonged not to the pre-emptor nor to the original vendor, but to the original vendees ; (5) and that a suit could not be successfully maintained by a pre-emptor to recover profits accruing between the date of his decree and the time when he obtained mutation of names.(6)

Decree in **suit for dissolution of partnership.**

15. *Where a* suit is for the dissolution of a partnership, *or the taking of partnership accounts*, the Court, before *passing a final* decree, may pass *a preliminary decree declaring the proportionate shares of the parties*; fixing the day on which the partnership shall stand dissolved *or be deemed to have been dissolved*, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

Suit for dissolution of partnership.—The usual forms of decree in such a suit were given in Nos. 132 and 133, Schedule IV., of the last Code. It was held that in a suit for an account of a dissolved partnership, a decree should be passed under sect. 215 of that Code, in accordance with form No. 132, Schedule IV., and it should direct an account to be taken of the dealings and transactions between the parties, and of the credits, property, and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the

(1) Jaggar Nath Pande *v.* Jokhu Tewari, 18 A. 223, at p. 226 (1896).

(2) Ib. ; Parshadi Lal *v.* Ram Dial, 2 A. 744 (1880).

(3) Jaggar Nath Pande *v.* Jokhu Tewari, 18 A. 223 (1896), apparently dissenting from Rup Chand *v.* Shamsh-ul-Jehan, 11 A. 346 (1889).

(4) Ishri Gopal *v.* Saran, 6 A. 351, 356 (1884)

(5) Deokinandan *v.* Sri Ram, 12 A. 234 (1889), F. B.

(6) Sri Kishen *v.* Atma Ram, 19 A. 261 (1897), F. B.

outstanding debts and effects.(1) The italicized words have been added, as the preliminary decree should always contain a declaration of the rights of the parties.

16. *In* a suit for an account of pecuniary transactions between a principal and *an* agent, and in *any* other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before *passing* its *final* decree, pass *a preliminary decree* directing such accounts to be taken as it thinks fit. [s. 215A.]

Decree in **suit for account between principal and agent.**

Suit for account between principal and agent.—In a suit by a principal against an agent for an account, on the fact of agency being established, it is the duty of the Court to direct an account to be taken of the defendant's dealings as agent. When once the plaintiff has shown that the defendant is an accounting party, it is then for the defendant to prove the amount of his receipts and disbursements.(2) When an appeal is pending in the High Court against a preliminary order made by a Subordinate Court under this section, the High Court having seisin of the appeal can, apart from the question whether the case falls within sect. 545 of that Code, make an order staying the carrying out of such order pending the hearing of the appeal.(3) These suits are not affected by section 10.(4)

17. *The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as* primâ facie *evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.*

Special directions as to accounts.

18. *Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—*

(1) *if and in so far as the decree relates to an estate assessed to the payment of revenue to*

Decree in suit for partition of property or separate possession of a share therein.

(1) Thirukumaresan *v.* Sabbaraya, 20 M. 313 (1897), in which will be found observations on the procedure to be adopted and the burden of proof on the taking of the account.

(2) Rajhunath *v.* Ganpatji, 27 A. 374 (1904). For re-opening of settled accounts, see Kalanand Singh *v.* Sri Prosad, 19 C. L. J. 152 (1914).

(3) Balkishen Sahu *v.* Khugno, 8 C. W. N. 572 (1904), F. B.; s. c., 31 C. 722.

(4) Chandra *v.* Pramatho, 15 C. W. N. 930 (1911).

the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or by any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) *if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.*

Suits for partition.—The former Code contained no provision definitely prescribing the form of a decree for the partition of an estate or the separation of a share, though a somewhat special procedure was rendered applicable in such cases. Sect. 265 of the Code relegated the actual partition or separation of revenue-paying estates entirely to the execution department, and entrusted it to the Collector. On the other hand, sect. 396 of the same Code contemplated in the case of other immoveable property a preliminary order ascertaining the rights of the parties, which was itself a decree, but involved a final decree upon the report of the Commissioners. These sections have been in part modified, and the present rule, which is new, inserted. Any local enactment by which jurisdiction to effect "imperfect partition" of revenue-paying land is reserved exclusively to the Revenue Courts, and which contemplates a procedure inconsistent with this rule, will be saved by the terms of sect. 4, *ante*. The Code contemplates one preliminary decree and no more. Thus, where after the confirmation of a preliminary decree for partition on appeal, the Court of first instance directed that actual partition should be made in accordance with certain directions then given by it, it was held that no appeal would lie against such order; but its propriety could be questioned in an appeal from the final decree.(1)

Decree when set-off is allowed.

19. (*1*) *Where* the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Appeal from decree relating to set-off.

(*2*) *Any* decree *passed in a suit in which a set-off is claimed shall* be subject to the same *provisions* in respect of appeal *to which it would have been subject if no set-off had been claimed.*

(*3*) The provisions of this *rule* shall apply whether the set-off is admissible under *rule 6 of Order VIII* or otherwise.

Decree in case of set-off.—Act VIII. of 1859, sect. 195. The words

(1) Bharat Indu *v.* Yakub, 35 A. 159 (1913).

from "*if*" to "*plaintiff*" in the first paragraph of sect. 216 of the last Code were substituted, and the whole of the last paragraph of that section was added, by Act VII. of 1888, sect. 7.(1) An amendment has been made to give effect to the view that appeals from decrees relating to set-off should lie to the Courts to which appeals in respect of the original claim would lie. In a suit by a principal against his agent for accounts, where the agent does not specifically pray for a decree for the sum alleged to be due to him, the Court can grant a decree to the agent upon the finding that money was in fact due to him.(2)

20. Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense. [s. 217.]

Certified copies of judgment and decree to be furnished.

Certified copies of judgment and decree.—Act VIII. of 1859, sect. 198. The parties are entitled to receive copies of the judgment, and not merely translations of them.(3) The practice of furnishing copies free of cost, on supplying the proper stamp, has been set aside.(4)

(1) See Tiluck Chand *v.* Sowdaminee Dassee, 25 W. R. 275 (1876).

(2) Parmanand *v.* Jagat, 32 A. 525 (1910).

(3) Varjivan *v.* Ali Daji, 1 B. H. C. R. 165 (1864).

(4) See Nil Monee Singh *v.* Chinibash, 20 W. R. 405 (1873).

ORDER XXI.

Execution of Decrees and Orders.

Payment under Decree.

Modes of paying money under decree.

1. (1) All money payable under a decree shall be paid as follows, namely :—

(*a*) into the Court whose duty it is to execute the decree ; or

(*b*) out of Court to the decree-holder ; or

(*c*) otherwise as the Court which made the decree directs.

(2) *Where any payment is made under clause* (*a*) *of sub-rule* (*1*) *notice of such payment shall be given to the decree-holder.*

"**Payable under a decree.**"—Costs ordered to be paid under sect. 218 of the last Code (see now sect. 35), it was held, were not paid under a decree and should be paid under that section.(1) An instalment due under a decree may, under this rule, be paid into Court.(2) When an order has been made for the payment of money in a suit on a certain date and the Court is closed on that date, a payment made on the following day would be a good payment for the purpose of that order.(3) Payment into Court is a valid compliance with a decree, even though the decree directs payment to the decree-holder.(4) On the death of a decree-holder, the debtor should either pay the debt into Court under cl. (*a*) or ask for directions under cl. (*c*).(5)

Payment *out of Court* **to decree-holder.**

2. (*1*) *Where* any money payable under a decree *of any kind* is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, *and the Court shall record the same accordingly.*

(*2*) The judgment-debtor also may inform the Court of such

(1) Shanks *v.* Secretary of State, 12 M. 120 (1889).

(2) Madhav Appa *v.* Ravji Vithu, 1 Bom. L. R. 644 (1899).

(3) Aravamudu *v.* Samiyappa, 21 M. 385 (1897) ; Shooshee Bhusan Rudro *v.* Gobind Chunder Roy, 18 C. 231 (1890) ; Dabee Rawoot *v.* Heraman Mahatoon, 8 W. R. 223 (1867).

(4) Wana *v.* Natu, 35 B. 35 (1910).

(5) Narendra *v.* Charu, 14 C. W. N. 146 (1908).

payment for adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, *which* has *not* been certified *or recorded* as aforesaid, shall not be recognized by any Court *executing the decree.*

Applicability.—As to the principle upon which the rule proceeds and the cases to which the prohibition contained in it is applicable, see notes, *post*, "Remedies of judgment-debtor." The rule applies only to the case of parties who stand in the relation of judgment-debtor and judgment-creditor at the date of the transaction.(1) It applies only to a question of payment or adjustment of a decree, and does not recognize an application by the decree-holder.(2) The former section was held not to govern payments made in execution of decrees passed under Act X. of 1859 in the Revenue Courts.(3)

"**Under a decree.**"—In Madras it was at one time held that the former section applied only to the execution of money decrees,(4) and it was doubted whether the section applied to decrees for restitution of conjugal rights.(5) In Calcutta, and latterly in Madras also, it was held that the section dealt with the adjustment of any decree and not merely with the adjustment of a money decree.(6) The amendment by the addition of the words "*of any kind*" adapts this latter view. The decree may be of any kind, but money must be payable under it. As to instalment decrees, see O. XX. r. 11. The rule presupposes that there is a decree in existence. So where A sued B and obtained a decree which was reversed in the first Appellate Court; and B was about to file a special appeal when A compromised the case and gave up the property; it was held that the compromise having been effected after the decree in favour of B had been reversed, it need not have been certified to the Court.(7) And if payment is made under a decree which is set aside on appeal, the decree-holder must make

(1) Rama Ayyan *v.* Sreenivasa Pattar, 19 M. 230 (1895); doubted in Ponnuswamy *v.* Letchmanan, 35 M. 659 (1911); 22 M. L. J. 170, by Rahim, J., but see judgment of Sundara Aiyar, J., p. 178.

(2) Lodd Govindoss *v.* Ramdoss, 24 M. L. J. 88 (1912); and see Babar Ali *v.* Shisir, 16 C. W. N. 951 (1912).

(3) Rajah Protab Chunder *v.* Kanayo Lal Doss, 3 W. R. Act X. 7 (1865); Ram Chunder Roy *v.* Ram Churn Bakshee, 9 W. R. 372 (1868).

(4) Sankaran Nambiar *v.* Kanara Kurup, 22 M. 183 (1898); Mallikarjuna Sastri *v.* Narasimha Rao, 24 M. 412 (1901); but now see Vaidhinadasamy *v.* Somasundram, 28 M. 473, 477 (1904).

(5) Keshavlall Girdharlall *v.* Bai Parvati, 18 B. 327, at p. 331 (1893).

(6) Baba Mohamed *v.* Webb, 6 C. 786 (1881); Rajah Padmanund Singh *v.* Madhu Singh, 3 C. W. N. clxxxvii. (1899); Vaidhinadasamy *v.* Somasundram, 28 M. 473, 477 (1904); Subburaya *v.* Kuppusawmy, 34 M. 442 (1911).

(7) Hari Sadashiv *v.* Bapu Balvant, 5 B. H. C. R., A. C. J. 78 (1868).

restitution even though the payment has not been certified.(1) Where rent was payable for a *mirasi* tenure and not under a decree, the provisions of the section were held inapplicable.(2) The rule does not apply to the case of a surety who, having paid the amount due under the decree, afterwards sues the principal.(3)

"**Out of Court.**"—The rule relates to voluntary adjustments of a decree made between parties to a suit out of Court; and not to a case where a debtor pays to the officer of the Court under the authority and pressure of the Court's process.(4) When money is paid into Court the latter must pay it out immediately to the decree-holder (5) or his ordinary legal heirs; (6) though if the payment is made by the debtor to prevent his arrest, it is not a voluntary payment, and he is entitled to be heard before the money is paid out.(7)

"**Adjusted.**"—See as to the meaning of this term cases cited.(8) It only applies to matters occurring during the course of execution.(9)

"**The decree-holder shall certify.**"—One joint decree-holder is not bound by the acts of another who has compromised or received payment out of Court;(10) and a joint decree-holder has ordinarily no power to give a discharge out of Court to a judgment-debtor for more than his own share of the decree.(11) The debtor should therefore not pay unless jointly or to the extent of the admitted shares.(12)

The word "decree-holder" therefore must be read as decree-holder or decree-holders. The Court will not recognize a payment to one decree-holder only in excess of that to which he is himself entitled. One of two or more joint decree-holders is not competent without being authorized by the other or others to certify satisfaction by payment out of Court of the entire decree; though he may certify satisfaction in respect of his own interest therein.(13)

(1) Vasudev Govind *v.* Vishnu Vithal, 11 B. 724 (1887).

(2) Kedari *v.* Gajai, 18 B. 690 (1893).

(3) Balaji Lakshman *v.* Dada Joti, 12 B. 235 (1887).

(4) Bidhoo Beebee *v.* Keshub Chunder, 9 W. R. 462 (1868).

(5) Luchmun Pershad *v.* Sreeram, 21 W. R. 271 (1874).

(6) See *In re* Piaramanee, S.D. Sum. Dec. Sept. 27 (1836), cited in O'Kinealy's notes to sect. 258.

(7) Prosannonath Mookerjee *v.* Benode Ram Sein, 13 W. R. 29 (1870); s. c., 4 B. L. R. App. 25.

(8) Fatch Muhammad *v.* Gopal Das, 7 A. 424 (1885); Erusappa Mudaliar *v.* Commercial Bank, 23 M. 377 (1899); Ram Doyal Bannerjee *v.* Ram Hari Pal, 20 C. 32, at p. 35 (1892); Sham Lal *v.* Hazarimal, 15 C. L. J. 451 (1911) [arrangement as to defaults].

(9) Pranatha Chandra Roy *v.* Khera Mohan Ghose, 29 C. 651 (1902) [and therefore on this ground the section was held to be no bar to an inquiry into a plea of payment raised by mortgagor: but see on this point the cases there cited]; Hatem Ali Khundkar *v.* Abdul Guffar Khan, 8 C. W. N. 102 (1903); Mahomed Khan *v.* Mahomed Munawar, 31 M. 467 (1908).

(10) Balgobind *v.* Bhawanee Deen, 1 Agra Misc. 16.

(11) Mt. Bibee Budhun *v.* Mt. Hafezah, 4 C. L. R. (1879); Tarruck Chunder Bhuttacharjee *v.* Dinendro Nath Sanyal, 9 C. 831 (1883).

(12) Mahima Chandra Roy *v.* Pyari Mohan Chowdhry, 2 B. L. R. App. 43 (1869).

(13) Moti Ram *v.* Hannu Prasad, 26 A. 334 (1904); Tarruck Chunder Bhuttacharjee *v.* Dinendro Nath Sanyal, 9 C. 831 (1883); Sultan Moideen *v.* Savalayammal, 15 M. 343 (1891); Tamman Singh *v.* Lachhmin Kunwari, 26 A. 318 (1904). On the other hand one joint decree-holder cannot by foregoing his right to execute defeat the right of another to do so: Inderjeet *v.* Sewaram, 5 A. H. C. R. 16 (1873).

The ordinary way of certifying a payment or adjustment is by petition (1) made by the decree-holder or judgment-debtor to the Court whose duty is to execute the decree; (2) but it can also be certified under O. XXI. r. 11, clause (*e*), on an application to execute the decree. It is for the party applying for execution to state any adjustment after decree.(3) If, however, one of the parties is a minor, his guardian must first obtain leave to compromise under O. XXXII. r. 7.(4) Application may be made for a certificate of part satisfaction.(5) To certify a payment or adjustment within the meaning of the section, it is insufficient for the decree-holder to certify that money has been paid or that an adjustment has been arrived at without specifying the amount of the payment or mentioning the terms of the adjustment.(6) Under this rule, as there is no time fixed within which the decree-holder is bound to certify a payment made out of Court, such payment may be certified at any time.(7) Intimation to a Collector in charge of the execution, under the provisions of the Third Schedule, amounts to a due certifying of the adjustment under this rule.(8)

It has been held that an application in 1905 for certifying payments in satisfaction of a decree sufficed to give a fresh start for limitation, either as an acknowledgment within the meaning of Sect. 19 of the Limitation Act (IX. of 1908) or as a step in aid of execution.(9)

"**Judgment-debtor.**"—This term includes persons claiming through the judgment-debtor or in his right, *e.g.* an assignee from the judgment-debtor of the equity of redemption after decree.(10)

Remedies of debtor.—Under the second paragraph of the rule the judgment-debtor may apply to the Court executing the decree,(11) if the decree-holder does not certify that the adjustment be recorded,(12) and he is allowed ninety days within which to take that step.(13) Notice must issue to the decree-holder to show cause. This does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to

(1) Saadoollah Shaikh *v.* Kalee Churn, 12 W. R. 358 (1869); but not a letter from a decree-holder to his vakil, Thakoor Lall Misree *v.* Kanye Lall Tewaree, 7 W. R. 510 (1867); directing him to certify: Bhoobun Mohun Banerjee *v.* Sadhoo Churn Sircar, 15 W. R. 5 (1871), O.C. See notes to clause (3).

(2) As to these words, see Muhammad Said Khan *v.* Payag Sahu, 16 A. 228 (1894).

(3) Paupayya *v.* Narasannah, 2 M. 216 (1880).

(4) Arunachellam *v.* Ramanadhan, 29 M. 309 (1905).

(5) Rajendronath Roy Bahadoor *v.* Chunnoomal, 5 C. 448 (1879).

(6) Tulsigurappa Mudiraddi *v.* Fakirayya Angdi, 2 Bom. L. R. 901 (1900).

(7) Tukaram *v.* Babaji, 21 B. 122 (1895); Bhubaneswari Debi *v.* Dinonath Sandyal, 2 B. L. R. A. C. J. 320, at p. 322 (1869).

(8) Khushalchand *v.* Nandram, 35 B. 516 (1911).

(9) Bacharaj Nyahalchand *v* Babaji Tukaram, 38 B. 47 (1913).

(10) Panduranga Mudaliar *v.* Vythilinga Reddi, 17 M. L. J. 417 (1907); s. c., 30 M. 537.

(11) Rajendronath Roy *v.* Chunnoomal, 5 C. 448 (1879).

(12) See ib.; Munmohandas Jaikissondas *v.* Vizlai, 13 B. 171, 176 (1888); Pareechut *v.* Ragho Goordeo, 2 A. H. C. R. 48 (1870); Chango *v.* Kaluram, 4 B. H. C. R., A. C. J. 120, 124 (1867).

(13) Alathoor *v.* Gulam Moideen, 24 M. L. J. 541 (1911), in Biroo Gorain *v.* Jaimurat, 16 C. W. N. 923 (1911), it was doubted whether delay will take away the right to apply.

the satisfaction of the Court.(1) If the judgment-debtor applies to certify and the application is refused, then an order under this rule being appealable (2) under sect. 47 (formerly 244), he should appeal and not bring a separate suit. An application, whether by a plaintiff or defendant, for a certificate, though decided under this rule, is none the less a question relating to the execution and satisfaction of the decree, and an appeal being available, no separate suit lies. If, however, neither the creditor nor debtor apply to certify and the decree has in fact been satisfied in whole or in part, and yet the creditor sues out execution, the debtor has a remedy by suit. As already observed, this rule prohibits recognition of an uncertified adjustment only by any Court executing the decree. But the right of suit is controlled by the provisions of sect. 47, as the operation of the latter section is not restricted by this.(3) The subject has nowhere been more lucidly treated than by Pigot, J.(4) In considering whether a suit is prohibited by sect. 47, regard must be had to two points, viz., the cause of action and the relief claimed. Numerous cases establish (5) that a Court other than a Court executing the decree can recognize an uncertified payment or adjustment of a decree in a suit based upon such payment or adjustment. This goes to the cause of action. The principle upon which such cases are allowed has been that there is a cause of action arising from negligence, fraud,(6) agreement, or trust.(7) So suits have lain to recover the money paid or property delivered.(8) or for damages.(9) Where, however, the relief sought comes within the prohibition contained in sect. 47, then a suit is barred. That section is framed to prohibit in a separate suit between the parties to the decree, any relief being granted which shall interfere with the conduct of the execution proceedings by the Court executing the decree.(10) As a general rule, questions relating to the satisfaction of the decree must be settled by an order made in the course of execution and not by a regular suit, but no Court can settle a question of satisfaction by an order made in execution unless such satisfaction shall have been duly certified.(11)

(1) Rung Lall *v.* Hem Narain Gir, 11 C. 166 (1885).

(2) Ranji *v.* Bhaiji Harjivan, 11 B. 57 (1886); Lingayya *v.* Narasimha, 14 M. 99 (1890); Garnvayya *v.* Virdayappa, 18 M. 26 (1894); Jamna Prasad *v.* Mathura Prasad, 16 A. 129 (1893).

(3) Deno Bundhu Nundy *v.* Hari Mati Dassee, 31 C. 480 (1904).

(4) Azizan *v.* Matuk Lal Sahu, 21 C. 437 (1893).

(5) Azizan *v.* Matuk Lal Sahu, 21 C. 456 (1893).

(6) Viraraghava Reddi *v.* Subbakka, 5 M. 397, F. B. (1881).

(7) Gunamani Dasi *v.* Prankishori Dasi, 5 B. L. R. 223, at p. 232, F. B. (1870); Hormasji Dorabji *v.* Burjorji Jamsetji, 10 B. 155, at pp. 163, 164 (1886).

(8) Shadi *v.* Ganga Sahai, 3 A. 538 (1881); Penatambi Udayan *v.* Vellaya Goundan, 21 M. 409 (1897); Iswar Chandra Dutt *v.* Haris Chandra Dutt, 25 C. 718 (1898); s. c., 2 C. W. N. 247; *In re* Medai Kaliani Anni, 30 M. 545 (1907); Gendo *v.* Nihal Kumar, 30 A. 464 (1908).

(9) Guni Khan *v.* Koonja Behary Sein. 3 C. L. R. 414 (1878); Mallamma *v.* Venkamma, 8 M. 277 (1883); Poromanand Khasnabish *v.* Khepoo Paramanick, 10 C. 354 (1884); Krishnasami Ayyangar *v.* Ranga Ayyangar, 20 M. 369 (1896).

(10) Azizan *v.* Matuk Lal Sahu, 21 C. 437, at p. 458 (1893).

(11) Viraraghava *v.* Subbakka, 5 M. 397, at p. 398, F. B. (1881); see Sellamayyan *v.* Muthan, 12 M. 61 (1888), at p. 62. "The principle on which those decisions proceeded (*i.e.* those limiting the prohibition to Courts of execution) was that sect. 258 introduced but a rule of procedure: that the probable intention was that the adjustment of a decree

Thus a suit which interferes with the execution, such as a suit seeking a declaration that the defendant is not entitled to execute a decree and an injunction restraining execution,(1) or for a declaration that the decree has been satisfied,(2) or a suit which seeks to set aside an execution sale, whether the purchaser be the judgment creditor (3) or a stranger,(4) will not lie, being prohibited by the terms of sect. 47; as also, it has been held, a suit to secure sums paid in execution in excess of what was due under the decree.(5)

If the creditor fraudulently executes a satisfied decree and does not enter the satisfaction in his application to execute, he may be proceeded against criminally, the provision as regards uncertified adjustments not affecting the substantive Criminal Law.(6) In a recent case it was held that an application which did not recite the terms of an alleged adjustment could not be deemed to be an application of the kind contemplated by the second clause of this rule.(7)

Clause (3).—This clause corresponds, with amendments (*vide post*), with the last paragraph of sect. 258 of the former Code (see sect. 206 of Code of 1859), which was inserted by sect. 27 of Act VII. of 1888. The effect of this insertion was that uncertified adjustments could be recognized by other Courts than the Court executing the decree, the prohibition only extending to Courts executing decrees,(8) and to no others.(9) So the rule does not debar a Criminal

should, like the decree itself, be a matter of record, and that unless it is made a matter of record no Court having to determine whether the decree has been executed shall recognize it as evidence of a valid adjustment." But see Ramayyar *v.* Ramayyar, 21 M. 356 (1897), where the Court went into the question of adjustment, though not certified, there having been a fraud committed.

(1) Azizan *v.* Matuk Lal Sahu, 21 C. 437 (1893); dist. in Iswar Chandra Dutt *v.* Haris Chandra Dutt, 25 C. 718 (1898); foll. Deno Bundhu Nundy *v.* Hari Mati Dassee, 31 C. 480 (1904); s. c., 8 C. W. N. 395.

(2) Bairagulu *v.* Bapanna, 15 M. 302 (1892).

(3) Jaikaran Bharto *v.* Raghunath Singh, 20 A. 254 256 (1898); Prosunno Kumar Sanyal *v.* Kali Das Sanyal, 19 C. 683 (1892); s. c., 19 I. A. 166: Azizan *v.* Matuk Lal Sahu, 21 C. 437 459 (1893); *contra* Ishan Chunder Bandopadhya *v.* Indro Narain Gossami, 9 C. 788 (1883), which has been held in the previous cases to be no longer law.

(4) Jaikaran Bharto *v.* Raghunath Singh, *supra*; Vellappa *v* Ramchandra, 21 B. 463 (1896); Mothura Mohun Ghose *v.* Akhoy Kumar Mitter, 15 C. 557 (1888); *contra* Pat Dasi *v.* Sharup Chand Mala, 14 C. 376 (1887), which is no longer law. See last note.

(5) Kashee Kishore Roy *v.* Kishen Chunder Sandyal, 15 W. R. 160 (1871).

(6) R. *v.* Bapuji Dayaram, 10 B. 288 (1886); Madhub Chunder Mozamdar *v.* Novodeep Chunder Pundit, 16 C. 126 (1888); and it was also held that even though the application might be barred, and action could not be taken under this section, that did not vitiate the order of a Munsif sending a case for inquiry under the section corresponding with sect. 643 of the last Code: R. *v.* Muthuraman Chetti, 4 M. 325 (1881).

(7) Jogendra Nath Sarkar *v.* Provath Nath Chatterjee, 19 C. L. J. 126 (1914).

(8) See Ram Doyal Bannerjee *v.* Ram Hari Pal, 20 C. 32 (1892); Fateh Muhammed *v.* Gopal Das, 7 A. 424 (1885); Bharut Chunder Roy *v.* Nawab Nuzer Ali, 10 W. R. 354 (1868); Chedumbara *v.* Ratna Ammal, 3 M. 113 (1881). In Chango *v.* Kalaram, 4 B. H. C. R. 120 (1867) [ref. Bakshu *v.* Lakshman, 4 B. 594, at p. 601], the decree-holder had removed the attachment and discharged the debtor from prison, and this was considered sufficient.

(9) Swamirao Narayan *v.* Kashinath Krishna, 15 B. 419 (1890); Ghanasham Lakshmandas *v.* Kashiram Nairoba, 16 B. 589 (1891); Bal Krishna Pandharinath *v.* Bapu Yesaji, 19 B. 204 (1894); the same view had been taken prior to the amendment: Kalyan Singh *v.* Kamta Prasad, 13 A. 339

Court (1) from recognizing an uncertified payment, or a Civil Court which is not executing the decree (*vide ante*). An adjustment not certified cannot, however, be taken cognizance of under sect. 47 by a Court of execution, and the decree must be executed notwithstanding the adjustment.(2) Prior to the addition of the last clause it was held that if the decree-holder had been induced to compromise by fraud, this was a matter which can be dealt with under the same section.(3) It was subsequently held that the proviso did not stand in the way of the judgment-debtor proving fraud.(4) But this decision has been doubted,(5) and it has recently been held by the Calcutta High Court that the executing Court cannot enquire even when the conduct of the decree-holder has been alleged to be fraudulent.(6) An objection that the provisions of the former section had no application to any payment made in pursuance of an invalid agreement not sanctioned by the Court was overruled, the section making no reference to validity. Therefore, a sum paid under an agreement void under the former section, 257A, cannot be recognized unless certified.(7) It has been held that though uncertified payments could not be recognized as adjustments of the decree, yet a creditor might give evidence of uncertified payments in order to defeat the plea of limitation.(8) The former section ran: "It shall not be recognized *as a payment or adjustment of the decree*." These words have been omitted in order to make it clear that the Court cannot recognize a payment or adjustment which has not been certified for any purpose whatsoever. It follows that an uncertified payment or adjustment cannot now operate to prolong the period of limitation for applying for execution under the Limitation

(1891); Pat Dasi *v.* Sharup Chand Mala, 14 C. 376 (1887); Kunhi Moideen Kutti *v.* Ramenhunni, 1 M. 203 (1876); Shadi *v.* Gunga Sahai, 3 A. 538 (1881); Ishan Chunder Bandopadhya *v.* Indro Narain Gossami, 9 C. 788, 790 (1883); Sellamayyan *v.* Muthan, 12 M. 61 (1888). In other cases, mostly on account of the amending Act XII. of 1879, a suit was held entirely prohibited: Patankar *v.* Devji, 6 B. 146 (1882); Haji Abdul Rahiman *v.* Khoja Khaki Aruth, 11 B. 6 (1886); Hormasji Dorabji *v.* Burjorji Jamsetji, 10 B. 155 (1886); Thirumallai *v.* Sundara, 11 M. 469 (1888). In consequence of the conflict of rulings the last paragraph of sect. 258 was altered by sect. 27, Act VII. of 1888: Ram Doyal Bannerjee *v.* Ram Hari Pal, 20 C. 32 at p. 36 (1892).

(1) R. *v.* Pillala, 9 M. 101 (1895).

(2) Ram Doyal Bannerjee *v.* Ram Hari Pal, 20 C. 32 (1892); Budrudeen *v.* Gulam Moideen, 36 M. 357 (1911); Gadadhar Panda *v.* Shyam Churn Naik, 12 C. W. N. 485 (1908); Trimbak *v.* Hari Laxman, 34 B. 575 (1910); Kamini Debi *v.* Aghore, 14 C. W. N. 357 (1909).

(3) Paranjpe *v.* Kanade, 6 B. 148 (1882); Asaban Banu *v.* Ananda, 14 C. W. N. 823 (1909).

(4) Ramayyar *v.* Ramayyar, 21 M. 356 (1897).

(5) Ganapathy Ayyar *v.* Chenga Reddi, 29 M. 312 (1905); Veerappa Chettiar *v.* Ponnayya, 17 M. L. J. 527 (1907); and see Asaban Banu *v.* Ananda, 14 C. W. N. 823 (1909); Subbaraya *v.* Ramasawmy, 22 M. L. J. 166 (1911).

(6) Budrudeen *v.* Gulam Moideen, 36 M. 357 (1911); Biroo Gorain *v.* Jaimurat, 16 C. W. N. 923, 928 (1911).

(7) Durga Prasad Bannerjee *v.* Lalit Mohun Singh Roy, 25 C. 86 (1897).

(8) Roshan Singh *v.* Mata Din, 26 A. 36 (1903); Sham Lal *v.* Kanahia Lal, 4 A. 316 (1882); Zahur Khan *v.* Bakhtawar, 7 A. 32. (1884); Kishan Singh *v.* Aman Singh, 17 A. 42 (1894); Hurri Pershad Chowdhry *v.* Nasib Singh, 21 C. 542 (1894); Tukaram *v.* Balaji, 21 B. 122 (1895); Rajeswara Rau *v.* Hari Babandhu, 19 M. 162 (1895); *contra* Muthu Lal *v.* Khauate Lal, 12 A. 569 (1890); Badri Narain *v.* Kimj Behari, 35 A. 178 (1913).

Act,(1) neither can it give rise to an estoppel, for the doctrine of estoppel cannot be invoked to nullify an express statutory provision.(2)

Courts executing Decrees.

Lands situate in more than one jurisdiction.

3. *Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.*

"Forms one estate."—See notes to sect. 36, *et seq.*, *ante*.

[s. 223, fifth para.]

Transfer to Court of Small Causes.

4. *Where a* decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificate mentioned in *rule* 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

Small Cause Court.—This is the fifth or penultimate paragraph of sect. 223 of the former Code, the last paragraph being the following rule, and the remaining portion of the section being incorporated in sects. 38, 39, and 41, *ante*.

A Small Cause Court in executing the decree of another Court transferred to it, has the same powers as it possesses in regard to its own decrees.(3)

It was held that a Judge of a Small Cause Court, when duly invested with the powers of a Subordinate Judge, had in the exercise of such powers general jurisdiction.(4) But a doubt was expressed whether, under sect. 223 (*d*) of the former Code (corresponding with sect. 39, clause (*d*), *ante*), a Subordinate Judge could transfer a decree from his Court to that of a Small Cause Court when the property attached was within the limits of his local jurisdiction.(5) And a Mofussil Small Cause Court was required to adopt the machinery of the

(1) Monmohan *v.* Dwarka, 12 C. L. J. 312 (1910); Kutubullah *v.* Durga Charan, 16 C. W. N. 396 (1912); Bajrang *v.* Lachmi, 15 C. L. J. 88 (1909); Tulochan *v.* Bakeswar, 15 C. L. J. 423 (1910).

(2) Jogendra Nath Sarkar *v.* Provath Nath Chatterjee, 19 C. L. J. 126 (1914).

(3) Gunaputty Roy Agarwallah *v.* Thakurdye Thakurani, 34 C. 823, 827 (1907).

(4) Gopal *v.* Nanku, 1 A. 624 (1878). See Bhagban Dayalji *v.* Balu, 8 B. 230 (1883) [ref. to Ramchandra *v.* Ganesh, 23 B. 382 (1898)]; Dharamdas Santidas *v.* Vaman Govind, 9 B. 237 (1884); Kahanarama *v.* Ranga, 8 M. 8 (1884).

(5) Krishna Velji *v.* Bhau Mansaram, 18 B. 61, 64 (1893).

former sect. 223 in all cases where execution was sought against persons or property outside its local jurisdiction.(1)

Mode of transfer.

5. *Where* the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, *where* the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

"**Directly.**"—Where both Courts are in the same District one Court may send to the other direct.(2) A District Court on receiving a decree transferred for execution can, under r. 8, direct any Subordinate Court to execute it. When, and in whatsoever manner, the decree has been transferred for execution to another Court, the holder of the decree must, under r. 10, make due application for execution to the latter Court.

Procedure *where* Court desires that its own decree shall be executed by another Court.

6. The Court sending a decree for execution shall send—

(*a*) a copy of the decree;

(*b*) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted; and

(*c*) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

"**Shall send.**"—Upon the maxim "*omnia præsumuntur rite esse acta*," an attachment will in the absence of evidence be deemed in this respect to have been correctly made.(3) The omission, however, to transmit to the Court executing the decree the certificate required by this rule is a mere irregularity which does not vitiate the sale.(4) If any order is passed on receipt of the report of service

(1) Parbati Charan *v.* Panchanand, 6 A. 243 (1884), F. B.; foll. Abdul Gafur *v.* Albyn, 30 C. 713 (1903); Sayadkhan *v.* Davies, 28 B. 198 (1903) [attachment of salary].

(2) See Kelu *v.* Vikrishna, 15 M. 345 (1891).

(3) Saroda Prosaud Mullick *v.* Lutchmeeput Sing Doogur, 10 B. L. R. 214, 230 (1872). As regards Provincial Small Cause Courts, see s. 34, Act IX. of 1887, which modifies the rule.

(4) Abbubaker Saheb *v.* Mohidin Saheb, 20 M. 10 (1896).

under r. 22 a copy of it should be sent.(1) The words in clause (*c*), "a copy of any order," etc., mean a copy of any subsisting order.(2) It has been held that the Court in sending the certificate is not called upon to consider whether the decree is still capable of execution; it has only to certify that a specified part of the decree remains unexecuted.(3)

Court receiving copies of decree, etc., to file same without proof.

7. The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof. [s. 225.]

"**Filed.**"—The filing of the copies and certificate is quite distinct from executing the decree, for which an application should be regularly made.

Inquiry into jurisdiction.—The former sect. 225 contained after the words "copies thereof" the following, "*or of the jurisdiction of the Court which passed it,*" thus recognizing the right of the executing Court to inquire into the jurisdiction of the Court which passed the decree.(4) These words, however, have now been omitted, as it was considered that another Court ought not to go into any question as to the jurisdiction of the Court which passed it.(5)

Sect. 38 enacts that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisions contained in the Code. Sect. 39 provides that the Court which passed a decree (6) may, on certain conditions, send it, on the application of the decree-holder, for execution to another Court, and may of its own motion send it for execution to any Subordinate Court. There is no express provision as to whether the Court to which a decree may be so sent must be a Court having jurisdiction over the amount of the suit in which the decree was passed or whether the mere sending of the decree will confer jurisdiction on a Court for all the proceedings to be taken in its execution. On the ground, however, that sect. 6 limits jurisdiction and that the word "suits" in that section include proceedings taken to execute the decree, the Calcutta and Bombay High Courts hold that a Court which has no jurisdiction to try a suit can have no jurisdiction to execute a decree made in that suit.(7) So a Court has no jurisdiction to execute a decree

(1) Srihary Mundul *v.* Murari Chowdhry, 13 C. 257, 362 (1886).

(2) Hathibhai Nahansa *v* Patel Bechar Pragji, 13 B. 371 (1888).

(3) Sripati *v.* Belchambers, 15 C. W. N. 661 (1910).

(4) See Bhagwantappa *v.* Vishwanath, 28 B. 378 (1904); Haji Musa *v.* Purmanand, 15 B. 216 219 (1890); Mohan Ishwar *v.* Haku Rupa, 4 B. 638 (1880).

(5) Hari Govind Kalkundri *v.* Narsingrao Konherrao Desphande, 38 B. 194 (1913).

(6) As to execution of decrees passed on appeal, see ss. 36, 37.

(7) Gokul Kristo Chunder *v.* Aukhil Chunder Chatterjee, 16 C. 457 (1889); Durga Charan Mojumdar *v.* Umatara Gupta, 16 C. 465 (1889); Shri Sidheswar Pandit *v.* Shri Harihar Pandit, 12 B. 155 (1887); dist., Vajiram *v.* Ranchordji, 16 B. 731 (1892) [execution against pension]

sent to it for that purpose under sects. 38, 39, when the decree has been passed in a suit the value or subject-matter of which is in excess of the pecuniary limits of its ordinary jurisdiction.(1) The Madras,(2) and apparently the Punjab Chief Court,(3) held that the former sect. 223 gave an extraordinary jurisdiction to a Court to execute a decree in a suit beyond its jurisdiction sent to it for execution. This is on the ground that the pecuniary and other limitations in regard to regular suits are altogether absent in the sections relating to execution proceedings. See, however, notes to sects. 38, 39, *et seq.*, *ante*. Where the subject-matter of a suit is within the jurisdiction of the Court, its jurisdiction continues, whatever may be the result of the suit, in all such matters in the suit as are within its cognizance, amongst which are matters in execution. The mere circumstance that the amount actually due under the decree by process of accumulation exceeds the pecuniary limits of the Court's jurisdiction does not oust it from the jurisdiction it has hitherto had over the suit.(4) An application for the transfer of a decree for execution is a matter within sect. 47, *ante*.(5)

Execution of decree or order by Court to which it is sent.

8. *Where* such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or *be transferred for execution to* any subordinate Court *of competent jurisdiction.*

"**Transferred for execution.**"—Sect. 226 of the former Code, with which this rule corresponds, had after the words "subordinate Court" the words "which it directs to execute the same." Under that section it was held desirable that the District Judge's signature should appear on the order, but this is not required by the rule; and if the order is issued under his authority, the absence of his signature does not vitiate the proceeding.(6) It is only by an order passed by the District Court that any subordinate Court in that district is empowered to proceed.(7) Presumably an order for transfer is still to be made by the District Court. Where a decree was sent for execution to the Judge of G., who referred it to his Subordinate Judge; and that officer, finding that the land in dispute had been annexed to the district of S., transferred the same direct to the Judge of that district, who in turn referred it to his Subordinate Judge: *held* that the proceedings were regular.(8)

"**Any subordinate Court.**"—See sect. 3, *ante*.

(1) Gokul *v.* Aukhil, 16 C. 457 (1889).

(2) Narasayya *v.* Venkatakrishnayya, 7 M. 397 (1884); Shanmuga Pillai *v.* Ramanathan Chetti, 17 M. 309 (1893); and see Kelu *v.* Vikrishna, 15 M. 345 (1891).

(3) Ganga Ram *v.* Gur Saran Das, F. B., 1887, P. R. No. 31, cited in Hukm Chand, Res Judicata, 316.

(4) Shamrav Pandoji *v.* Niloji Ramagi, 10 B. 200 (1885). As to transfer of jurisdiction, see Panduranga *v.* Vythilinga Reddy, 17 M. L. J. 417 (1907).

(5) Bhabani Charan Dutt *v.* Pratap Chandra Ghosh, 8 C. W. N. 575 (1904).

(6) Jogendra Chandra Ghose *v.* Mohesh Chandra Dutta, 23 C. 480 (1896).

(7) Debi-Dial Sahu *v.* Moharaj Singh, 22 C. 764, 766 (1895).

(8) Pulukdhari Roy *v.* Radha Pershad Singh, 8 I. A. 165, 170, 171 (1881).

9. *Where* the Court to which the decree is sent for execution *is* a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction. [s. 227.]

Execution by High Court of decree transferred by other Court.

"**Is a High Court.**"—Ordinarily a decree would be sent for execution to a High Court only when it had been passed in a case not cognizable by a Small Cause Court, for in such a case it would be sent to the local Court of Small Causes. See r. 1, *ante*.

Application for Execution.

10. *Where* the holder of a decree desires to *execute* it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof. [s. 230, first para.]

Application for execution.

"**Desires to execute it.**"—See notes to sect. 36, *ante*. Where the decree can be executed in its entirety, it should be, though in some cases this is not possible, as where an immediate decree is given for possession and an order for the assessment of mesne profits.(1) The effect of a compromise is to extinguish the decree, which can only be enforced by a fresh suit, and not by an application for execution of the former decree.(2) O. II. r. 2 does not apply to an application under this rule.(3) It is not open to the Court to refuse to execute a decree against which no appeal has been preferred and the time for appealing against which has expired.(4) The second paragraph of sect. 230 of the last Code is now O. XXI. r. 20. A decree once passed cannot be questioned by any of the parties thereto when the decree is being executed.(5)

"**He shall apply.**"—As to who may apply for execution and against whom it can be had, see notes to sect. 36, *ante*.(6) As to form of application, see

(1) Sadho Saran *v.* Hawal Pande, 19 A. 98 (1893); Haro Sanker Sandyal *v.* Tarak Chandra Bhuttacharjee, 3 B. L. R. 114 (1869); Fulchand *v.* Bai Ichha, 12 B. 98 (1887); as to the Land Acquisition Act, see Nilkanth *v.* Collector of Thana, 22 B. 802 (1897).

(2) Hari Raghunath Joshi *v.* Krishnaji Anant, 19 B. 546 (1894).

(3) Radha Kishen Lall *v.* Radha Pershad Singh, 18 C. 515 (1891); Sadho Saran *v.* Hawal Pande, 19 A. 98 (1893); Thakur Prasad *v.* Fakir Ullah, 17 A. 106 (1894) [which as well as Bunko Behary Gangopadhya *v.* Nil Madhab Chuttopadhya, 18 C. 635 (1891), deal with sect. 373 of the last Code, in respect of execution proceedings].

(4) Ishan Chunder Roy *v.* Ashanoollah Khan, 10 C. 817 (1884); see as to the right to execute against the person, Seton *v.* Bijohn, 8 B L. R. 255 (1872).

(5) Ram Sahai *v.* Gaya, 7 A. 107, 111 (1884).

(6) And see *In re* Ishur Kant Bhadooree, 24 W. R. 233 (1875); Antoo Misree *v.* Bidhoomookhee Dabee, 4 C. 605 (1878) [application by Mooktear]; Dinonath Chuckerbutty *v.* Lallit Coomar Gangopadhya, 9 C. 633 (1883); Gour Sundar Lahiri *v.* Hem Chunder Chowdhury, 16 C. 355 (1889); Manikkam *v.* Talayya, 21 M. 388 (1897) [by Benamidar]; Hari *v.* Narayan, 12 B. 427 (1887) [minor].

O. XXI. rr. 11–14. It must be in writing except in the case provided for by O. XXI. r. 11 (1). A person not a party to a suit is not entitled to object to the issue of an order for execution of the decree.(1)

Oral application.

11. (*1*) *Where* a decree is for *the payment* of money the Court may, on the oral application of the decree-holder *at the time of the* passing *of* the decree, order immediate execution thereof by the *arrest* of the judgment-debtor, *prior to the preparation of a warrant* if he is within the *precincts* of the Court.

Written **application.**

(2) *Save as otherwise provided by sub-rule* (*1*), *every* application for *the* execution of a decree shall be in writing, *signed and* verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely :—

(*a*) the number of the suit ;

(*b*) the names of the parties ;

(*c*) the date of the decree ;

(*d*) whether any appeal has been preferred from the decree ;

(*e*) whether any, and (*if any*) what, *payment or other* adjustment of the matter in *controversy* has been made between the parties subsequently to the decree ;

(*f*) whether any, and (*if any*) what, previous applications have been made for *the* execution of the decree, *the dates of such applications* and *their* results ;

(*g*) the amount with interest (if any) due upon the decree, or other relief granted thereby, *together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;*

(*h*) the amount of *the* costs (if any) awarded ;

(*i*) the name of the person against whom *execution* of the decree is sought ; and

(*j*) the mode in which the assistance of the Court is required, whether—

(*i*) by the delivery of *any* property specifically decreed ;

(*ii*) by the attachment *and sale, or by the sale without attachment,* of *any* property ;

(*iii*) by the arrest and *detention in prison* of *any* person ;

(*iv*) *by the appointment of a receiver ;*

(*v*) otherwise, as the nature of the relief *granted* may require.

(3) *The Court to which an application is made under sub-rule*

(1) Nathubhai Mulchand *v.* Nana Babu, 91 B. 544 (1894).

(2) may require the applicant to produce a certified copy of the decree.

Application for execution.—An application to execute a decree in part is informal.(1) Separate and successive applications for execution giving relief of different character may be made.(2) The Court is bound to allow execution at the instance of the recorded decree-holder.(3) The application must state the person against whom execution is sought.(4) The fact of a decree-holder giving a release to one or more of the judgment-debtors who were jointly and severally liable cannot prevent his proceeding against the others for the balance due.(5) The relief sought must be specified. A bare request that the decree may be realized without specification of the mode is insufficient.(6) If the application is in form, the Court proceeds to execution. If not, the Court should follow the course indicated by r. 17 (see notes to that rule).(7) The effect of defective and irregular applications has generally come into question, where it is alleged that execution of the decree is barred; a subject beyond the scope of this work.(8) Formerly it was held unnecessary to furnish a copy of the decree where application was made for execution to the Court which passed it.(9) If, however, a decree-holder obtained permission to execute the decree through another Court a copy of it was sent to that Court by the Court which passed it, and this was always supplied by the decree-holder, having been prepared at his expense. Now under sub-clause (3) the Court may require the production of a certified copy of the decree. An application for execution of a decree which is verified by the general attorney of the decree-holder, who has satisfied the execution Court that he is acquainted with the facts of the case, is properly verified within the meaning of this rule, notwithstanding that his principal may be residing within the jurisdiction of the Court.(10) As to adjustment, see r. 2, *ante*.

(1) Jugjeebun Gupto *v.* Goluck Monee Debia, 22 W. R. 354 (1874); Ponnampilath *v.* Ponnampilath, 3 M. 79 (1880); Juddoonath Roy *v.* Ram Buksh Chuttangee, 7 W. R. 535 (1867), a decree cannot be executed nor can it be seized and sold in portions; Haro Sankar Sandyal *v.* Tarak Chandra Bhattacharjee, 3 B. L. R. 114 (1869). But see as to joint decree-holders, r. 15.

(2) Radha Kishen Lall *v.* Radha Pershad Singh, 18 C. 515 (1891); Sadho Saran *v.* Hawal Pande, 19 A. 98 (1893).

(3) Jasoda Deye *v.* Kirtibash Das, 18 C. 639, 641 (1891).

(4) See Shaikh Abdool *v.* Syad Jaun Ali, 18 W. R. 55 (1872).

(5) Sheo Churn Lall *v.* Ram Sarun Sahoo, 16 W. R. 49 (1871); and see as to joint decree against two debtors, Mt. Purresh *v.* Kissoree Misser, 1 W. R. 14, Misc. (1846); Chowdhry Sheikh Wahed *v.* Mullick Enayet, 12 B. L. R. 500 (1873); Krishto Kishore *v.* Ram Lochun, 2 W. R. 49 (1865).

(6) Franks *v.* Nuneh Mal, 1 A. H. C. R. 79 (1875); and cf. Protap Chunder Doss *v.* Peary Chowdhrain, 8 C. 174 (1881); Shakaram Chand *v.* Ghelabhai, 19 B. 34 (1893).

(7) See Asgar Ali *v.* Troilokya Nath Ghose, 17 C. 631, 635 (1890); Fuzloor Ruhman *v.* Altaf Hossein, 10 C. 541 (1884).

(8) See Mitra's Limitation, 4th ed., 1152 *et seq.* and cases there cited.

(9) Gunga Gobind Gooptoo *v.* Makhun Lall Hattee, 9 W. R. 362 (1868); Modhoo Dossia *v.* Nobin Chunder, 16 W. R. 25 (1871); Ramdhun Rukhit *v.* Punchanun Chuckerbutty, 10 W. R. 144 (1868); Khetter Mohon *v.* Ishur Chunder, 11 W. R. 271 (1869); Dhanpat Sing *v.* Leelanund Sing, 2 B. L. R. app. 18 (1869).

(10) Bakar Sajjad *v.* Udit Narain Singh 26 A. 154 (1903).

Immediate execution.—Ordinarily the application for execution is in writing. It is to be noted that under the former sect. 256 application for immediate execution could not issue simultaneously against both the person and property or against any property except moveable property (1) within the local limits of the jurisdiction of the particular Court. In the case of a warrant of arrest, this would only issue if the debtor was within the same limits. Moreover, the section only related to decrees not exceeding Rs. 1,000. The Legislature has now omitted this limitation imposed under the former Code on oral applications for immediate execution. As to exemption from arrest, see sect. 135.

Application for attachment of moveable property *not in judgment-debtor's possession.*

12. *Where* an application is made for the attachment of any moveable property belonging to *a* judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Not in judgment-debtor's possession.—This rule refers only to an application for the enforcement of a decree by attachment of moveable property belonging to the judgment-debtor (2) but not in his possession. Rules 12, 46, 51, prescribe the mode of attachment in such cases. Rules 43—45 deal with cases where the property is in the judgment-debtor's possession. The inventory must be delivered into Court along with the application for execution.(3) Under O. 39, r. 7, the Court has jurisdiction to make an order for preparation of an inventory.(4)

Application for attachment of immoveable property *to contain certain particulars.*

13. *Where* an application is made for the attachment of any immoveable property belonging to *a* judgment-debtor, it shall contain at the foot—

(*a*) a description of *such* property sufficient to identify *the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers ;* and

(1) As to what is, see notes to sect. 2, and Nazir Khan *v.* Karamat Khan, 3 A. 168 (1880) [fruit upon trees]; Naru Pira *v.* Naro Shidheswar, 3 B. 28 (1878) [baluta]; Nathu Meah *v.* Nand Ram, 8 B. L. R. 508 (1872); Deno Nath Batabyal *v.* Nuffer Chunder Nundy, 26 C. 778 (1899); s. c., in appeal, 4 C. W. N. 470 (1900); Act X. of 197, s. 3, clause 34 [tiled huts].

(2) As to the liability of the execution-creditor, Sheriff or Nazir, in respect of seizure of property belonging to third party, see Goma Mahad Patil *v.* Gokaldas Khimji, 3 B. 74 (1878); Kishori Mohun Rai *v.* Hursook Das, 12 C. 696 (1886); Framji Besanji *v.* Hormasji Pestanji, 2 B. 258, 271 (1877); Kalee Coomar Chatterjee *v.* Siddhessur Mundal, 11 B. L. R. 256 (1873).

(3) Sreenath Gooha *v.* Yusoof Khan, 7 C. 556, at p. 559 (1881); and see Dhonkal Singh *v.* Phakkar Singh, 15 A. 84, at p. 86 (1893).

(4) Amjad Ali *v.* Ali Hussain, 15 C. W. N. 353 (1910).

(*b*) a specification of the judgment-debtor's share or interest *in such property* to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

Description.—Clause (*a*) has now been amended to expressly require boundaries and numbers to be given where such boundaries exist in a record of settlement or survey.(1) The Code has been passed to be observed and not to be treated as a dead letter as regards this or any other provision.(2) Still the Court will not press against a party a mere formal defect when the property which is sought to be attached can be identified (3) and in any case a defect of description can be remedied.(4)

Specification.—In case of a joint family the application should state whether it is the judgment-debtor's share or the joint family property which is sought to be attached. It should also specify the family property.(5) The former section which this rule replaces required that the description and specification should be verified in the manner of a plaint. This has, however, been omitted, as it was considered that a verification separate from that prescribed by r. 11, second sub-section, was not necessary. An omission to verify the inventory of property sought to be attached was held to be an irregularity only, not vitiating the application.(6)

14. *Where an* application *is made* for *the* attachment *of any* land *which is* registered in the office *of the* Collector, *the Court may require the applicant to produce* a *certified* extract from the register of such office, specifying the persons registered as proprietors of, or as possessing, any transferable interest in, the land or its revenue, or as liable to pay revenue for *the* land, and the shares of the registered proprietors. [s. 238.]

Power to require certified **extract from collector's register** *in certain cases.*

Extract from Collector's Register.—The sections which this and the last rule replace, as also sect. 213 of the Code of 1859, made it compulsory that the application should be accompanied by an extract. The rule has now been amended so as to give the Courts an option in requiring extracts, since these did not in all cases appear to be required but had the effect of adding to the expenses of legal proceedings. The rule is not restricted to land registered in

(1) As to identification by boundaries, see Lack Ram *v.* Mohesh Dass, 12 W. R. 488 (1869); Maharaj Dhiraj Mahtub Chund *v.* Burodanath Mundul, 18 W. R. 411 (1872); and as to Estates in the Collector's Rent Roll, Ajoodhiya Dass *v.* Sheo Pershun Singh, 11 W. R. 175 (1869); Zerkalee Kooer *v.* Lalla Doorga Pershad, 16 W. R. 149 (1871).

(2) Dhonkal Singh *v.* Phakkar Singh, 15 A. 84, 86 (1893).

(3) Hurry Charan Bose *v.* Subaydar Sheikh, 12 C. 161 (1885).

(4) Macgregor *v.* Tarini Churn Sircar, 14 C. 124 (1886).

(5) Muhammad Husain *v.* Dip Chand, 14 A. 190 (1892).

(6) Nasir-un-nissa *v.* Ghafur-ud-din, 28 A. 244 (1905).

the Collector's Office in the name of the judgment-debtor, for it frequently happens that the actual proprietors are not so registered.(1)

Application *for execution* by joint decree-holder.

15. (*1*) *Where* a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, *unless the decree imposes any condition to the contrary*, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the *legal* representatives of the deceased.

(*2*) *Where* the Court sees sufficient cause for allowing the decree to be executed on an application made *under this rule* it shall *make* such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

Joint decree-holders.—The decree-holders must be joint.(2) Ordinarily all the decree-holders in a joint decree must join in an application for execution.(3) This section in the last Code (4) allowed one or more to apply for execution of the *whole* decree unless execution is by the terms of the decree dependent upon a joint application.(5) The ruling of the Privy Council (6) negatives decisions to the effect that a joint decree-holder cannot apply for execution of a decree to the extent of his fractional interest.(7) This can be done, provided that the interest is one determined by the decree itself. This is, of course, a different thing from applying separately for execution limited to what the applicant considers his interest in it.(8) The words "or his or their representatives" have been omitted as this will be covered by the general clause. An order refusing to allow the decree to be executed by one joint decree-holder

(1) O'Kinealy, C. P. C., notes to section.

(2) Cf. Ramasami *v.* Anda Pillai, 13 M. 347; 14 M. 252 (1890).

(3) Ponnampilath *v.* Ponnampilath, 3 M. 79, 81 (1880): cf. Roy Goodni Roy *v.* Dhunneshur Kooer, 7 C. L. R. 117 (1880).

(4) See cases *passim* and Teja Singh *v.* Rajnarayan Singh, 1 B. L. R. A. C. 62 (1868); Azizunnissa Khatun *v.* Shashi Bhusan Bose, 2 B. L. R., App. 47 (1869); Harogobind Das Koirburto *v.* Issuri Dasi, 15 C. 187 (1887); Kamlapat *v.* Baldeo, 22 A. 222 (1900); and as to minor joint decree-holder and limitation, Surja Kumar Dutt *v.* Arun Chunder Roy, 28 C. 465 (1901); Periasami *v.* Krishna Ayyan, 25 M. 431 (1901).

(5) Farzand *v.* Abdullah, 6 A. 69 (1883).

(6) Hurrish Chunder Chowdhry *v.* Kali Sunderi Debi, 9 C. 482 (1882); 10 I. A. 4; and see Brojeswari Chowdhranee *v.* Tripoora Soonderee, 3 C. L. R. 513 (1878).

(7) Banarsi Das *v.* Maharani Kuar, 5 A. 27 (1882); Collector of Shahjahanpur *v.* Surjan Singh, 4 A. 72 (1881); Dalichand Bhudar *v.* Bar Shivkor, 15 B. 242, at p. 244 (1890); Thakoor Dass Sing *v.* Luchmeeput Doogur, 7 W. R. 10 (1867); Haro Sanker Sandyal *v.* Tarak Chandra Bhuttacharjee, 3 B. L. R. A. C. J. 114, at p. 117 (1869); Purna Chandra Mookerjee *v.* Sarada Charan Roy, 3 B. L. R. App. 21 (1869); Ponnampilath *v.* Ponnampilath, 3 M. 79 (1880); Prannath Mitter *v.* Mothooranath Chuckerbutty, 6 W. R. Misc. 64 (1866).

(8) So in Muthusami Ayyan *v.* Natesa Ayyar, 18 M. 464 (1894), the decree did not award any specific sum as so due to the particular defendants, and, therefore, the decree had to be executed as a joint decree or not at all.

alone is not appealable.(1) In this case the contest was between two joint decree-holders, and it was sought to distinguish it on this ground from the Madras decision cited in which it was held an appeal would lie.(2)

"**It shall make such order.**"—One of several decree-holders has no right to claim execution. Sufficient cause must be shown. The Court has a discretion, and before executing it should give notice to the other decree-holders and hear what they have to say; (3) notice, however, is not obligatory.(4) If made, the order ought in express terms to reserve the rights of the other decree-holders to share in the proceeds of execution, and, meanwhile, the interests of the non-applicants should be protected (5) either by taking security or otherwise as the Court thinks fit. The judgment-debtor may be compelled to pay into Court the whole amount due under the decree upon which the share of each decree-holder will be determined. The judgment-debtor cannot object to the share which one or more decree-holders may claim.(6) Under the Code of 1859, where the Court did not reserve the rights of the other decree-holders to share in the proceeds of execution, an appeal was entertained as to the distribution of the assets realized.(7) See *ante*.

16. *Where* a decree *or, if a decree has been passed jointly* [s. 232.]
in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution *of the decree* to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Application *for execution* **by transferee of decree.**

Provided *that*, where the decree, *or such interest as aforesaid*, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to *its* execution:

Provided also that, where a decree for *the payment of* money against *two or more* persons has been transferred to one of them, it shall not be executed against the others.

(1) Ratanlal Rangildas *v.* Bai Gulab, 1 Bom. L. R. 87 (1899); s. c., 23 B. 623. See also Odhoya Pershad *v.* Mohadeo Dutt, 17 W. R. 415 (1872).

(2) Lakshmi Ammah *v.* Poonassa Menon, 17 M. 394 (1894).

(3) Sheikh Ahmed Chowdhry *v.* Shadzada Khatoon, 7 C. L. R. 537, 538 (1880); Umrith Nath Chowdhry *v.* Chunder Kishore Singh, 21 W. R. 31 (1874).

(4) Durga Das *v.* Dewraj, 33 C. 306 (1905).

(5) Tarasundari Burmoni *v.* Beharilol Roy, 1 B. L. R. A. C. 28 (1868); Budrudeen *v.* Gulam Moidun, 36 M. 357 (1911).

(6) Maharajah Satish Chunder Roy *v.* Saroda Pershad Mookerjee, 5 W. R. Misc. 58 (1866).

(7) Tarasundari Burmoni *v.* Beharilal Roy, 1 B. L. R. 28 (1868); in Gyamonee *v.* Radha Romon, 5 C. 592 (1879), no appeal was held to lie under sect. 244 of the Code of 1877, as the question was one between co-decree-holders only; and in Haragobind Das Koiburto *v.* Issuri Dasi, 15 C. 187 (1887), a suit was held to lie.

"**The interest of any decree-holder.**"—The additions are intended to remove any doubt (1) in regard to the power of the transferee of the interest of one out of several joint decree-holders to apply for execution. One of several decree-holders may assign his interest under the decree; and as regards joint decree-holders, see last rule. The transferee of a portion of a decree is a transferee of the decree within the meaning of this section.(2)

"**Is transferred.**"—This excludes the owners of any interest in existence before decree. The section does not apply where the person seeking to execute is not a transferee from the original decree-holder; or to cases where the right to an equitable interest in a decree is contested; and was not intended to enable the Court to try such a question as the legitimacy of an heir.(3) And apparently if the decree-holder's interest in the property itself and not the decree be assigned the decree should be executed by the decree-holder.(4) The transferee of a decree stands in the same position for getting execution as the transferor.(5) If a decree is sold the purchaser as assignee of the decree is entitled to any mesne profits thereunder.(6) A decree for the payment of a sum of money and for costs of the suit is one and indivisible, and the decree so far as it may be only for costs cannot be separated from the rest of the decree and transferred.(7) As for transfer of rent decrees in Bengal (8) and of village Munsiffs in Madras,(9) see below.

"**In writing.**"—An oral transfer is not recognized for the purposes of the rule.(10) Where S. obtained a decree against D, the owner in possession, and subsequently in a suit brought by J. against S. a decree was passed by consent that J. should execute S.'s decree, it was held that J. was a transferee within the section.(11)

"**Operation of law.**"—The words "*by operation of law*" must be understood to mean the operation of law as administered in Indian Courts.(12) Where

(1) See Seetaput Roy *v.* Syud Ali Hossein, 24 W. R. 11 (1875); diss. from in Kishore Chand Bhakat *v.* Gisborne & Co., 17 C. 341 (1889); Muthu Narayana Reddi *v.* Balakrishna Reddi, 19 M. 306 (1896); and as to effect of transfer of part, Banarsi Das *v.* Maharani Kuar, 5 A. 27 (1882); Pogose *v.* Fukurooddeen, 25 W. R. 343 (1876); Kudhai *v.* Sheo Dayal, 10 A. 570 (1888); Pasupathy *v.* Kothanda, 28 M. 64 (1904).

(2) Endoori *v.* Venkatachainulu, 33 M. 80 (1909).

(3) Abedoonnissa Khatoon *v.* Ameeroonnissa Khatoon, 2 C. 327 (1876); s. c., 4 I. A. 66, 73.

(4) Ram Sahai *v.* Gaya, 7 A. 107 (1884).

(5) Khushrobhai Nasarvanji *v.* Hormazsha Phirozsha, 11 B. 727 (1887). As to the necessity for registration, see Gous Mahomed *v.* Khawas Ali Khan, 23 C. 450 (1896); Koob Lall Chowdhry *v.* Nittyanund Singh, 9 C. 839 (1883); Abdul Majid *v.* Muhammad Faizullah, 13 A. 89 (1890); Hansraj *v.* Mukhraji Kunwar, 30 A. 28 (1907).

(6) Gonesh Lal Tewari *v.* Sham Narain, 6 C. L. R. 533, 536 (1880).

(7) Ram Chandra *v.* Abdul Hakim, 35 A. 204 (1913).

(8) Koilash Chunder Roy *v.* Jodu Nath Roy, 14 C. 380 (1887); Karuna Moyi Bannerjee *v.* Surendra Nath Mookerjee, 26 C. 176 (1898).

(9) Kalandan *v.* Pakrichi, 9 M. 378 (1886).

(10) Parvata *v.* Digambar, 15 B. 307 (1890); Javermal Hirachand *v.* Umaji Hayabati, 9 B. 179 (1884).

(11) Doorga Pershad *v.* Lallah Juggunnath, S. D. N. W. (1869), 34.

(12) Purmanandas Jiwandas *v.* Vallabhdas Wallji, 11 B. 506, at p. 512 (1881) [assignment of decree in equity].

a minor succeeded to an estate, which up to the date it fell into his hands had been in possession of the executrix, it was held that there was a transfer by operation of law ; (1) as also where an order setting aside an adjudication passed the benefit under a decree from the Official Assignee to the applicant.(2) The holder of a certificate of administration under Reg. VIII. of 1827 is a transferee by law of a decree obtained by the deceased.(3)

"**May apply.**"—Unless an application is made to it, all that the Court has to do is to look to the record. Unless, therefore, a decree-holder applies to the Court to certify a transfer of his interest, the Court can take no notice of such alleged transfer.(4) An application for the transmission of a decree has been treated as an application for execution under the former section, under which notice has issued to the assignee and judgment-debtor.(5) Mere notice and nothing else has been held not to operate as a revivor of the decree.(6) A decree is not a debt within the meaning of sect. 131 of the Transfer of Property Act, and the notice required by this rule is, on assignment, sufficient.(7)

"**To the Court which passed it.**"—An application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree.(8)

"**May be executed.**"—It was formerly held that the transferee was not entitled to have execution as of right like the original decree-holder, for the matter was one within the Court's discretion ; (9) but that the discretion must be exercised reasonably. The mere fact of the existence of a cross-claim against the assignor of a decree by his judgment-debtor was no reason for refusing issue of execution on the application of the assignee.(10) Nor was the probability that the decree might be executed against some particular judgment-debtor sufficient ground for refusing a transfer.(11) If there was no

(1) Umasoondury Dassy *v.* Brojonath Bhuttacharjee, 16 C. 347, 349 (1889) ; see Sethurayar *v.* Shanmugam Pillai, 21 M. 353, 356 (1897).

(2) Miller *v.* Abinash Chunder Dutt, 4 C. W. N. 785 (1900).

(3) Khanderav Rayajirav *v.* Ganesh Shastri, 11 B. 368 (1887).

(4) Khettur Mohun Chuttopadhya *v.* Ishur Chunder Surma, 11 W. R. 271 (1869).

(5) Nando Lal *v.* Chutterput Sing, 29 C. 235 (1902).

(6) Monohar Das *v.* Futteh Chand, 30 C. 979 (1903) ; s. c., 7 C. W. N. 793.

(7) Dagdu *v.* Vanji, 24 B. 502 (1900).

(8) Amar Chundra Bannerjee *v.* Guru Prosunno Mukerjee, 27 C. 488 (1900) ; Jameshar Prasad *v.* Thakur Prasad, 25 A. 433, 444 (1903) ; Sheo Narayan Sing *v.* Harbans Lal, 5 B. L. R. 497 (1870).

(9) Parvata *v.* Digambar, 15 B. 307 (1890) ; Javermal Hirachand *v.* Umaji Hyabati, 9 B. 179 (1884) ; Balkishen Das *v.* Bedmati Koer, 20 C. 388 (1892) ; Amar Chandra Bannerjee *v.* Guru Prosunno Mukerjee, 27 C. 488, 491 (1900) ; Shama Puddo Dutt *v.* Nobin Chunder Bose, 15 W. R. 283 (1871) ; Vakulabharana *v.* Rangaiayan, 28 M. 357 [right of transferee *sub judice*]. But see Asad *v.* Haidar, 38 C. 13 (1910), *post*.

(10) Krishna Mohun Dossee *v.* Kedarnath Chuckerbutty, 15 C. 446 (1888) ; but see Jodoonath Roy *v.* Ram Buksh Chulungee, 8 W. R. 202 (1867) ; the decrees must be such as are capable of being dealt with as cross decrees : Kuseemoonissa Bibee *v.* Hill, 15 W. R. 127 (1871).

(11) Bishtoo Churn Bhoosun *v.* Kishen Gopal Misser, 13 W. R. 207 (1870) ; see Rughoo Nundun Ram *v.* Somessur Panday, 22 W. R. 235 (1874).

dispute it might admit him, or if the dispute was one which it could decide it might try it, and upon the result of that trial admit the assignee to carry on the decree.(1) In this country an assignment can always be impeached by third parties who can show that it is not a real transaction.(2) A Court may refuse to recognize a benamidar as transferee, but it may allow execution to proceed at the instance of a person who is in fact such, if it thinks fit, and such proceeding, if in proper time, keeps the decree alive. The legality of the proceedings depends, not on the reality of the transfer, but on the sanction accorded.(3) If a decree is transferred to one as benamidar for the actual purchaser the latter is entitled to execute the decree, and his right course is to apply under this section.(4) If the application is sanctioned, then the transferee is placed in the same position as regards execution as the original decree-holder.(5) Under the present Code it has been held that this rule does not specifically lay down any restriction upon the assignment of a decree, and that the assignee's right of execution does not depend upon the discretion of the Court.(6) The rule makes no provision for the transferee's name being placed on the record, and though the actual substitution of the name of the assignee may not be necessary for the validity of the execution proceedings, yet ordinarily the assignee's name should be brought on the record.(7) Where the decree was transferred and the transfer admitted by the decree-holder in Court, the debtor could not, it was held, contest the right of the transferee to execute it, except on plea of payment to the original decree-holder.(8) Decisions under this rule are only summary for purposes of procedure, and are not decisive of the rights of persons claiming to be transferees, and where there is no appeal, a suit lies.(9) A transferee whose application to execute has been rejected can, if no appeal lies, bring a separate suit for a declaration that he is the person entitled to execute the decree,(10) or rather for a declaration as to the validity of the assignment, a declaration that the assignee is entitled to execute being, under this rule, a

(1) Agra Bank *v.* Cripps, 8 M. 455 (1885); as to exclusive execution against one owner of the equity of redemption, see Moro Raghunath *v.* Balaji Trimbak, 13 B. 45 (1888); and as to objection to execution by co-sharer, see Kally Doss Bhadury *v.* Golam Ally Chowdhry, 3 C. L. R. 237 (1878).

(2) Mulji Govindji *v.* Nathulai Hirachand, 15 B. 1 (1890).

(3) Balkishen Das *v.* Bedmati Koer, 20 C. 388 (1892), in which the earlier cases are cited, and see Halodhar Shaha *v.* Haragobind Das Koiburto, 12 C. 105 (1885).

(4) Manikkam *v.* Tatayya, 21 M. 388 (1897).

(5) Shamanund Surmah *v.* Shumboo Chunder Doss, 7 W. R. 205 (1867); Rughoo Nundun Ram *v.* Somessur Panday, 22 W. R. 235 (1874); as to execution of mortgage decree by holder who has also purchased part of the mortgaged property, see Nafer Chunder Mundul *v.* Baikanto Nath Roy, 4 C. L. R. 156 (1879).

(6) Asad *v.* Haidar, 38 C. 13, 21 (1910).

(7) Balkishore *v.* Mahomed Tazam Allee, 4 A. H. C. R. 90 (1872) [when he becomes a party to the suit]; Khetter Mohun Chuttopadhya *v.* Ishur Chunder Surma, 11 W. R. 271 (1869).

(8) Sunnooburnessa Khanum *v.* Meher Chund, 1864 W. R. 313.

(9) Abedoonnissa Khatoon *v.* Ameeroonnissa Khatoon, 2 C. 327 (1876); as to injunction to restrain execution by assignee, see Dhuronidhur Sen *v.* Agra Bank, 4 C. 380 (1878).

(10) Sheoraj Singh *v.* Amin-ud-din Khan, 20 A. 539 (1898); Ram Baksh *v.* Panna Lal 7 A. 457 (1885) [though he cannot directly attempt to execute the decree by suit]; Raman *v.* Muppil Nayar, 14 M. 478 (1891).

natter for the Court of execution,(1) or it may be (as where there is an invalid assignment), a party may sue for refund of money paid by him.(2)

Notice.—The penalty imposed by the proviso is that there should be no power to execute if the proviso is not complied with.(3) Where there are more transferors than one, all should be cited.(4) If a decree is transferred by assignment after the death of the judgment-debtor, notice may be served on his legal representative. The death of the judgment-debtor does not render the transferred decree incapable of execution.(5) As to the procedure in such a case, see case cited.(6) If a transfer is made after notice to transferor and debtor, and the decree partly executed, the representative of the judgment-debtor cannot subsequently object.(7) It is illegal (and not merely irregular) to execute the decree before hearing the objections.(8)

Money decrees.—This proviso applies only to decrees for money personally due by two or more persons; (9) and in cases coming within the proviso the assignee is left to a regular suit.(10)

Appeal.—Disputes as to share transferred arising between a judgment-debtor and decree-holder must be determined under sect. 47 by order of the Court executing the decree.(11) There is no express appeal given from an order on an application made under this section, but if the Court in disposing of the transferee's application is acting under and determines a question of the nature referred to in sect. 47, then an appeal lies. Upon this there is a conflict of decision. In some cases it has been held that no appeal lies against an order dismissing an application for execution by a transferee, either on the ground that as the Court had not recognized him and accepted him on the record as a representative, either such transferee did not become a representative within the meaning of sect. 47, or that the question as to whether such transferee should

(1) Bommanapati Veerappa *v.* Chinta Kunta Srinivasa, 26 M. 264 (1902).

(2) Ramasami *v.* Basayappa, 16 M. 325 (1893); and the transferor may be liable to pay compensation if the assignee is prevented from recovering under the decree by an attachment of it in execution proceedings against the transferor: Puthiandi Mammed *v.* Avalil Moidin, 20 M. 157 (1896). In Ram Gobind Singh *v.* Gheenoo Singh, 20 W. R. 406 (1873), a suit for a refund failed on the facts.

(3) Gulzari Lal *v.* Daya Ram, 9 A. 46, 49 (1886) [where, however, the order appealed from was not an order for execution but merely for transfer].

(4) Ib., at p. 50.

(5) Khushrobhai Nasarvanji *v.* Hormazsha Phirozsha, 11 B. 727 (1887).

(6) Mahalinga Moopanar *v.* Kuppanachariar, 30 M. 541 (1907).

(7) Mulchand Ranchoddas *v.* Chhagan Naran, 10 B. 74 (1885).

(8) Kassam Goolam *v.* Dayabhai, 36 B. 58 (1911).

(9) Lalla Bhagun Pershad *v.* Holloway, 11 C. 393 (1885); Laldhari *v.* Manager of Bhabatpura Estate, 14 C. L. J. 639, 642 (1911).

(10) Yakoob Ali Chowdhry *v.* Ram Doolal, 13 C. L. R. 272 (1883); see Soroop Chunder Hazrah *v.* Troylokhonath Roy, 9 W. R. 230 (1866); Laldhari Singh *v.* Manager, Court of Wards, Bhabutpura Estate, 16 C. W. N. 132 (1911).

(11) Kudhai *v.* Sheo Dayal, 10 A. 570 (1888); see Lalla Bhagan Pershad *v.* Holloway, 11 C. 393, at p. 395 (1885). As to questions between co-decree-holders only, see Gyamonee *v.* Radha Romon, 5 C. 592 (1879), and plaintiff and stranger to suit, Mohabir Singh *v.* Ram Bhagowan Chowbey, 11 C. 150, 152 (1884).

have execution was one to be decided under this section and not sect. 47, *ante*. Most of these cases were decided prior to the amendment of sect. 244 (now 4 by Act VII. of 1888, according to which the Court determined who was t representative of a party. According to the contrary and more recent vie the order is made under sect. 47, *ante*,(2) though this rule may afford the *ra decidendi*,(3) and is therefore appealable,(4) and this appears to be the law no And though an appeal may lie, the Madras High Court has held that the rig of suit has not been taken away, as the words "and not by separate suit" sect. 244 (now 47) did not, it was said, apply.(5) *Sed qu.* now after the amen ment of clause 3 in that section.

245.] **17.** (1) On receiving an application for the execution a decree *as provided by rule 11, sub-rule* (: the Court shall ascertain whether such of t requirements of *rules 11 to 14* as may applicable to the case have been complied with; and, if th have not been complied with, the Court may reject the applicatio or may allow *the defect to be remedied* then and there or with a time *to be* fixed by *it*.

Procedure on receiving application for execution of decree.

(2) *Where an application is amended under the provisions sub-rule (1), it shall be deemed to have been an application accordance with law and presented on the date when it was fi presented.*

(3) Every amendment made under this *rule* shall be *sign or initialled* by the Judge.

(4) When the application is admitted, the Court shall ent in the *proper* register a note of the application and the date which it was made, and shall, *subject to the provisions hereinaf contained*, order execution of the decree according to the natu of the application:

Provided that, in the case of a decree for *the payment* money, the value of the property attached shall, as nearly may be, correspond with the amount *due under* the decree.

Amendment.—An application, if perfect in form, is admitted, and

(1) See remarks in Badri Narain *v.* Jai Kishen Das, 16 A. 483, at pp. 486, 490 (1894), on the cases there cited, and Sobha Bibee *v.* Mirza Sakhamut, 3 C. 371 (1878); Sambasiba *v.* Srinivasa, 12 M. 511 (1889); Sheoraj Singh *v.* Amin-ud-din Khan, 20 A. 539, 542 (1898); or substituting the assignee, Megh Narayan Sing *v.* Radha Prasad Sing, 4 B. L. R. A. C. 200 (1870).

(2) Badri Narain *v.* Jai Kishen Das, 16 A. 483, at p. 490 (1894).

(3) Lalla Bhagun Pershad *v.* Holloway, C. 386, at p. 395 (1885).

(4) Badri Narain *v.* Jai Kishen Das, *sup* Ganga Das Seal *v.* Yakub Ali Dobashi, 2 670 (1900); Krishnama Chariar *v.* Appas Mudaliar, 25 M. 545 (1901); Bomm Veerappa *v.* Chintakunta Srinivasa, (1902); Hridoy Kant *v.* Behari L C. W. N. 239 (1906).

(5) Bommanapati Veerappa *v.* Chi kunta Srinivasa, 26 M. 264 (1902).

order is immediately granted to execute the decree. Sect. 245 of the last Code, which the rule replaces, provided that the Court should reject such applications or allow their amendment. This might be done then and there, or the application might be returned for amendment within a time fixed. If the application was not amended it was to be rejected, but if it was not rejected there was nothing to prevent the Court from extending the time for amendment.(1) If amended, the application was admitted, and the Court proceeded to order execution according to the nature of the application. The rule, in the first place, substitutes for the term "*amended*" the phrase the "*defect to be remedied*," because the first term does not cover the remedying of a defect, such as the omission to produce a copy as required by r. 11, third sub-section. As regards the subject-matter of the second sub-section of this rule it was originally (in order to meet various difficulties which were raised regarding defective applications) proposed to enact that until an application returned under this rule was presented with such amendments as the Court might have required, it should not be deemed to be in accordance with law. This was proposed in view of a decision of the Calcutta High Court.(2) The Select Committee, however, rejected this proposal and have relaxed the stringency of this rule, and have allowed the application to date back to the time of its original presentation on the lines followed in connection with plaints. It was proposed to enact that when once an application had been admitted it was to be deemed to be in accordance with law for the purpose of limitation, even though it was eventually dismissed after hearing the parties. On the other hand, to prevent dismissals for defect of form not affecting the merits, it was proposed to allow the Court, even after admission, to allow any amendment not converting an application into one of another and inconsistent character. The suggested additions, however, have not been made. Though under the previous Code, applications for execution were often allowed to be amended without objection as to the Court's competency to allow it,(3) it was a matter of doubt whether the Court had any power to amend after admission and registration.(4) In a recent case where, within a short time of the expiration of the period of limitation, a decree-holder applied under this rule for leave to file a list of immoveable properties, and his application was granted, but the list was not filed till after the period had expired, it was held that the proceedings in execution were barred by limitation.(5)

"**Value of the property attached.**"—As a rule, the Court has in *ex parte* applications little material on which to determine how much of the debtor's property should be attached. If more is attached than ought to be attached,

(1) Kaminy Mohun Somoddar *v.* Gopal, 8 C. 479 (1882).

(2) Gopal Sah *v.* Janki Koer, 23 C. 217 (1895); distinguished in Mathura *v.* Musst. Anurago, 14 C. W. N. 481 (1910); and see Musaraf *v.* Amir, 15 C. W. N. 71 (1910).

(3) Hukm Chand, C. P. C. 643.

(4) See Asgar Ali *v.* Troilokya Nath Ghosh, 17 C. 631, 636, 641 (1890); Macgregor *v.* Tarini Churn Sircar, 14 C. 124 (1887); Sattappa Chetti *v.* Jogi Soorappa, 17 M. 67, 68 (1893), which deals also with the principle on which amendment should be made; Jiwat Dube *v.* Kali Charan Ram, 20 A. 478 (1898), where it was also ruled that an application having once been admitted the date of a subsequent amendment would not, by reason of such amendment, become the date of the application.

(5) Salimullah *v.* Sainaddi Sarkar, 18 C. L. J. 538 (1913).

the judgment-debtor can and ought to come in and ask that the attachment should be withdrawn from some particular portion of the property. Even if the order for attachment is wrong and excessive under this rule, the attachment as actually put is not without jurisdiction or null and void.(1)

Execution in case of cross-decrees.

18. (*1*) *Where applications are made to a Court for the execution of* cross-decrees *in separate suits* for the payment of *two sums of* money *passed* between the same parties *and* capable of execution at the same time by *such* Court, *then*—

(*a*) if the two sums *are* equal, satisfaction shall be entered upon both decrees; *and*

(*b*) *the two sums are unequal,* execution *may* be taken out only by the *holder of the* decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This *rule shall be deemed to* apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(*3*) This *rule shall* not *be deemed to* apply unless—

(*a*) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(*b*) the sums due under the decree are definite.

(*4*) *The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.*

Illustrations.

(*a*) A holds a decree against B for Rs.1,000. B holds a decree against A for the payment of Rs.1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this *rule.*

(*b*) A and B, co-plaintiffs, obtain a decree for Rs.1,000 against C, and C obtains a decree for Rs.1,000 against B. C cannot treat his decree as a cross-decree under this *rule.*

(*c*) A obtains a decree against B for Rs.1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs.1,000. B cannot treat C's decree as a cross-decree under this *rule.*

(*d*) *A, B, C, D and E are jointly and severally liable for Rs.*1,000 *under a*

(1) Sorabji Edulji *v.* Govind Ramji, 16 B. 91 (1891), at pp. 114 and 115.

*decree obtained by F. A obtains a decree for Rs.*100 *against F singly and applies for execution to the Court in which the joint-decree is being executed. F may treat his joint decree as a cross-decree under this rule.*

Applicability.—The rule contemplates that where a decree is sought to be set off against another, the decree against which the set-off is asked for must be before the Court for execution.(1) A judgment-debtor is entitled to set off a decree whether the judgment-creditor may or may not intend to object on appeal to the judgment-debtor's decree, for a decree is a decree till it is reversed whether it be appealed or not.(2) Should either decree be reversed in appeal the decree of the Appellate Court can then be executed.(3) The rule does not preclude a claim of set-off of a sum due on a decree which is not under execution, the rule being inapplicable to such a case.(4) The transferee of a decree holds subject to equities enforceable against original holder (sect. 49). The purchaser of a decree against which a cross-decree may be set off, takes his decree subject to the set-off.(5) Where there were cross-decrees and one of the decree-holders was, by an order of Court, made with the consent of both parties, bound in executing his decree to set off the amount of the decree against him: *held* that it would be inequitable to allow the other decree-holder to obtain execution in full without setting off the amount decreed against him.(6) In the under-mentioned case a course was adopted which, if not strictly in accordance with the letter, was in accordance with the spirit of this and the next rule, and at all events should be allowed on principles of natural equity.(7)

"To a Court."—That is the Court to which the application is made for execution and which is dealing with the case as to whether execution shall be issued or not.(8) The former section contained the words, "*produced to the Court.*" This would seem still to be necessary, as if all the decrees are not produced to the Court it will not have jurisdiction over them all.

"In separate suits."—The insertion of these words is intended to show that for the purposes of execution a counterclaim is not a separate action.(9) This rule deals with cross-decrees and not with cross-claims under one decree. That is provided for by the next rule.(10)

(1) Chajmal Das *v.* Lal Dharam Singh, 24 A 481 (1902); followed in Ponnusamy *v.* Doraisamy, 32 M. 336 (1909).

(2) Huro Pershad Roy *v.* Shama Pershad Roy, 5 W. R. Misc. 52 (1866); Sheo Prosunno Singh *v* Shib Lal Jha, 1864, W. R. Misc. 1.

(3) Sheo Prosunno Singh *v.* Shib Lal Jha, *supra*; but where there has been consent, see Gupinath Roy *v.* Dinabandhu Nandi, 3 B. L. R. app. 62 (1869).

(4) Bharath Prosad *v.* Rameshwar Koer, 8 C. W. N. 118 (1903).

(5) Nundo Coomar Bukshee *v.* Koonjo Kishore Roy, 6 W. R. Misc. 73 (1866); and see Kristo Ramani Dassee *v.* Kedar Nath Chakravarti, 16 C. 619 (1883) [Equity held to operate against assignee with notice of existence of pending suit]; and cf. Mt. Peeloo *v.* Court of Wards, 7 W. R. 219 (1867).

(6) Haro Sankar Sandyal *v.* Tarak Chandra Bhuttacharjee, 3 B. L. R. 114 (1869).

(7) Matadin *v.* Chandi Din, 10 A. 188 (1888).

(8) Rewa Mahton *v.* Ram Kishen Singh, 13 I. A. 106, 110 (1886).

(9) *Per* Esher, M.R., Stumore *v.* Campbell & Co. (1892), 1 Q. B. 317.

(10) Kalka Prasad *v.* Ramdin, 5 A. 272 (1883); as to cross-decrees on same day against same parties in different suits, see Sumu Pandaram *v.* Santhoji Row, 26 M. 428 (1902).

"**For the payment of two sums of money.**"—A decree directing recovery of a certain sum of money by sale of land but not directing payment by the defendant was held to be for the payment of money.(1)

"**Capable of execution.**"—So where a decree declared that it should not be executed until *wasilat* had been ascertained, and this had not yet been done, it was held that the decree was not in a position to be executed, and as it could not be executed it could not be set off against the other decree.(2) The Code of 1859 only applied to decrees of the same Court or decrees sent to one Court for execution.(3)

"**Execution may be taken out.**"—Process should only issue for the difference. Where, however, process was allowed to issue for the smaller sum it was held that the irregularity did not render subsequent proceedings null and void, nor was it sufficient to justify the setting aside of a sale in execution.(4)

Assignee.—It was for some time a subject of controversy, whether in the case of decrees, both of which were in existence but not yet set off one against the other, upon the assignment of one of them the right to set off still subsisted as against the assignee. That question was finally decided in favour of the right to set off.(5)

Parties must be the same and the sum definite.—See as an illustration of this cases cited.(6) A strict adherence to the language of the section in the last Code was held to tend to simplify the rule, although it would contract its operation.(7) The fourth sub-clause, however, now makes it clear that the holder of a decree passed jointly and severally against several judgment-debtors, one of whom holds a decree passed against such decree-holder singly, may treat his joint decree as a cross-decree.(8)

Execution in case of cross-claims under same decree.

19. *Where application is made to a Court for the execution of a decree under which* two parties are entitled to recover sums of *money* from each other, *then,*—

(*a*) *if* the *two sums* are equal, satisfaction for *both* shall be entered *upon* the decree; *and,*

(*b*) *if the two sums are unequal,* execution *may be taken out only by* the party entitled to the *larger sum and for*

(1) Krishnan *v.* Venkatapathi, 29 M. 318 (1905).

(2) Juddoo Nath Roy *v.* Ram Buksh Chuttangee, 7 W. R. 535 (1867).

(3) Girish Chandra Lahiri *v.* Fakir Chand, B. L. R., F. B. 503 (1866).

(4) Rewa Mahton *v.* Ram Kishen Singh, 13 I. A. 106; 14 C. 18 (1886).

(5) Kristo Ramani Dassee *v.* Kedar Nath Chakravarty, 16 C. 619, 621 (1889).

(6) Moulvie Rezaooddeen *v.* Fuzloonissa, 5 W. R. 12 (1866); and see Girish Chundra Lahoory *v.* Koomaree Dabea, 1 W. R. Misc. 23 (1864); Bhagawani Kunwar *v.* Lala Baij Nath, 2 B. L. R. 94 (1868); Tara Chand Ghosh *v.* Anand Chandra Chowdhry, 2 B. L. R. 110 (1868).

(7) Hury Doyal Guho *v.* Din Doyal Guho, 9 C. 479 (1883); see Murli Dhar *v.* Parsotam Das, 5 A. 91 (1878).

(8) See Ram Sukh Das *v.* Tata Ram, 14 A. 339 (1892).

so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered *upon* the decree.

Cross-claims.—This rule proceeds on the same principle as the last, applying not where there are several decrees but one decree only. All that the decree-holder is entitled to enforce execution of is the difference between the amount found recoverable by him and the amount which the judgment-debtor is entitled to recover against him.(1) The rule is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature.(2) This rule does not apply to a case of pre-emption but only to counter-claims in suits for money; but the principle on which it is based is applicable, and under an order to deposit the purchase-money costs may be deducted.(3)

20. *The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.*

Cross-decrees and cross-claims in mortgage suits.

Mortgage suits.—This rule is new. It is inserted in order to make it clear that the provisions as to cross-decrees and cross-claims apply to the case of mortgage decrees.(4) The rule also incidentally makes it clear that the expression "decree for the payment of money" and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge.

21. The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor. [s. 230, 2nd para.]

Simultaneous execution.

Execution against person and property.—It is discretionary with the Court either to grant or to refuse execution at the same time against the person and property of the judgment-debtor. An appeal, however, has been held (5) to lie on the question whether this discretion was properly exercised.

22. (1) *Where an application for execution is made—* [s. 248.]

(*a*) more than one year *after* the date of the decree, or

(*b*) against the legal representative of a party to the decree,

Notice to show cause against execution in certain cases.

(1) Sm. Giribala Debia *v.* Sm. Rani Mina, 5 C. W. N. 497 (1900); Jugo Mohun Bukshee *v.* Soorendronath Roy Chowdhry, 13 W. R. 106 (1870); Amjad Ali Khan *v.* Syad Fazal Hossein, 19 W. R. 187 (1873).

(2) Bhagwan Singh *v.* Ratan, 16 A. 395 (1894); Sankara Menon *v.* Gopala Pattar, 23 M. 121 (1891); diss. from Kalka Prasad *v.* Ramdin, 5 A. 272 (1883).

(3) Ishri *v.* Gopal Saran, 6 A. 351 (1884).

(4) See Nagar Lal *v.* Ram Chand, 33 A. 240 (1910), in which it was held that a Court may set off a simple decree for recovery of money against a decree for recovery of money by enforcement of a charge.

(5) Chena Pemaji *v.* Ghelabhai Narandas, 7 B. 301 (1883).

the Court *executing the decree* shall issue a notice to the *person* against whom execution is applied for requiring him to show cause, *on* a *date* to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application *is* made within one year from the date of the last order against the party against whom execution is applied for, *made* on any previous application for execution, or in consequence of the application being *made* against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) *Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.*

Notice.—This rule is materially altered. Clauses (*a*) and (*b*) are the same as in the last Code. The Explanation to the corresponding section (248) of the last Code has been omitted and the second sub-section inserted, as it was represented that even in the cases referred to in clauses (*a*) and (*b*) issue of the notice may involve an unreasonable delay or defeat the ends of justice. The Courts have thus been given a discretion in the matter. Where a judgment-debtor appears and contests the decree-holder's right to execute his decree he cannot object that no notice was served on him.(1) The notice should be addressed to the widow of a deceased Hindu who held joint undivided property along with his brothers; for it must be as *quasi* separate property that the attaching creditor had a claim to it.(2) As to proof of service of notice, see below.(3) As to whether the issuing of notice acts as a revivor within the meaning of art. 180 of the Limitation Act,(4) and as to the time provided for by art. 179,(5) see cases cited. The judgment-creditor should ask for the execution of the decree and not for the issue of a notice, it being the duty of the Court to issue the notice.(6)

(1) Grish Chandra Bannerjee *v.* Bhanoo Motee, 11 W. R. 329 (1869). As to where the objection can be taken, see Srihary Mundal *v.* Murari Chowdhry, 13 C. 257 (1886); but see Sripati *v.* Belchambers, 15 C. W. N. 661 (1910), and cases there cited.

(2) Nanabhai *v.* Janardhan, 16 B. 637 (1892).

(3) Bimola Soondaree *v.* Kalee Kishen, 22 W. R. 5 (1874); Meer Lootf Ali *v.* Aboo Bibee, 15 W. R. 203 (1871).

(4) Lalla Monohur Dass *v.* Futteh Chand, 7 C. W. N. 793; 30 C. 979 (1903); Rameshwar *v.* Ratishwar, 17 C. L. J. 125 (1912); Khosal *v.* Ukiladdi, 14 C. W. N. 117 (1909); Sreepati *v.* Shamaldone, 15 C. L. J. 123 (1910).

(5) Damodar *v.* Sonaji, 27 B. 622 (1903); Kadaressur Sen *v.* Mohim Chandra, 6 C. W. N. 556 (1902); Govind *v.* Dada, 28 B. 416 (1904); Ratan Chand *v.* Deb Nath, 10 C. W. N. 303 (1906); Cheruvath Thalangal *v.* Nerath Thalangan, 30 M. 30 (1906).

(6) Gooroo Dass *v.* Modhoo, 6 W. R. Misc. 98 (1866).

If neither party appears on the day on which the notice under this rule is made returnable the application for execution can be dismissed.(1) Under the last Code it was held that the issuing of notice was a condition precedent to the valid execution of a decree in cases falling within clauses (*a*) (2) and (*b*).(3) More recently, however, the Privy Council held that where the debtor and his estate were made properly subject to the decree, the fact that notice was given to the wrong person and sale took place without notice to the legal representative, though constituting a material irregularity, did not render the judicial sale a nullity.(4) Where a defendant-respondent dies before judgment in appeal is pronounced, it may be entered *nunc pro tunc*, and the decree may be executed under this and cognate sections against the heirs of the deceased without placing them on the record.(5) An application to set aside a decree on the ground that the notice had not been served under this rule must be made under sect. 47, and not under r. 90 of this order, and can only succeed on proof that the omission to serve the notice caused substantial injury to the owner of the property sold.(6)

"**Court executing the decree.**"—It was held under the last Code that though the notice under sect. 248, corresponding with this rule, must be issued by the Court to which the decree was transferred for execution, the application to execute against a legal representative should be made to the Court which passed the decree.(7) But an omission to apply to the latter Court was held to be a mere irregularity.(8) It has been held under the present Code that a notice under this rule is not required to be issued upon an application for transfer of a decree, and that such notice must be issued by the Court which has seizin of the application for execution, whether it be the original Court which made the decree or the Court to which the decree has been transferred for execution.(9)

Procedure after issue of notice.

23. (1) *Where* the person to whom notice is issued under the last preceding *rule* does not appear or does not show cause to the satisfaction of the [s. 249.]

(1) Tukaram *v.* Bhavani, 20 B. 541 (1895); dissented from in Kumed *v.* Prasanna, 40 C. 45 (1912).

(2) Sahdeo Pandey *v.* Ghasoram Gyawal, 21 C. 19 (1893) [neglect to issue a notice under clause (*a*) vitiates the sale; and it makes no difference that the auction-purchaser is a third party and not the decree-holder].

(3) Gopal Chunder *v.* Gunamoni Dassee, 20 C. 370 (1892); Imam-un-nissa *v.* Leakat Husain, 3 A. 424 (1881); Ramessuri Dassee *v.* Doorgadas Chatterjee, 6 C. 103 (1880); Erava *v.* Sidramappa, 21 B. 424 (1895), where, however, Farran, C.J., considered the proceedings voidable and not void. In Sheo Prasad *v.* Hira Lal, 12 A. 440 (1889), the case was distinguishable, because death took place after attachment and before sale and the attachment did not abate.

(4) Malkarjun *v.* Narhari, 25 B. 337; s. c., 2 Bom. L. R. 927 (1900); Levina Ashton *v.* Madhabmoni, 14 C. W. N. 560 (1910); Lakshmi *v.* Sris, 13 C. L. J. 162 (1910); Bepin Behary *v.* Sosi Bhusan, 18 C. L. J. 628 (1913).

(5) Ramacharya *v.* Anantacharya, 21 B. 314 (1895).

(6) Kumed Bewa *v.* Prasanna, 40 C. 45 (1912); Lakshmi *v.* Sris, 13 C. L. J. 162 (1910).

(7) Hira Chand Harjivan Das *v.* Kastur Chand Kasidas, 18 B. 224 (1893); Swaminatha *v.* Vaidyanatha, 28 M. 466 (1905).

(8) Sham Lal Pal *v.* Modhu Sudan Sircar, 22 C. 558 (1895).

(9) Sreepati *v.* Shamaldone, 15 C. L. J. 122 (1910).

Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) *Where such person* offers any objection to the *execution* of the decree, the Court shall consider such objection and *make* such order as it thinks fit.

"**Does not appear.**"—The person against whom a notice is issued under the last rule should appear and show cause if he has any valid ground of objection to execution against himself. For th Court may refuse relief where the applicant has contributed by his own conduct to his being placed in the position in which he finds himself.(1)

"**Offers any objection.**"—When a petition of objection (which, it has been held, need not be verified (2)) is presented under this rule the Judge is bound, whether a day for hearing has been fixed or not, to fix a day for consideration of it; and (even if the petitioner is not present either personally or by a pleader) to consider those objections, and to pass such orders as may be just and proper: for it might be that the grounds of objection raised would be of such a nature as that the Judge might *primâ facie*, and without going further into the case, see reason for not proceeding with the execution.(3)

Process for execution.

Process for execution.

24. (*1*) When the preliminary measures (if any) required by the foregoing *rules* have been taken, the Court shall, unless it sees cause to the contrary, issue its *process* for the execution of the decree.

(*2*) *Every* such *process* shall *bear* date the day on which it is issued, *and shall be* signed by the Judge or such officer as the Court *may* appoint in this behalf, *and shall be* sealed with the seal of the Court and delivered to the proper officer to be executed.

(*3*) In *every* such *process* a day shall be specified on or before which it *shall* be executed.

Issue of Process.—This rule amalgamates with some alterations sects. 250 and 251 of the last Code, the first of which sections was amended by sect. 3 of Act VI. of 1886 by the introduction of the words "*subject to the provisions of sect. 245 A and 245* B," which have been now omitted. Sects. 245 A and 245 B are now sect. 56 and r. 37 of this order respectively. Probably the words "*subject*," etc., were omitted as unnecessary, as this or any other provision of the Code must be subject to other provisions contained in it. For the word "*warrant*," the word "*process*" has been substituted, as being more exhaustive and familiar. It was pointed out under the last Code (4) that though in cases

(1) *In re* Samuel Cochrane, 14 B. L. R. 330 (1875).

(2) Sunt Gopal Chunder *v.* Jugut Indur Bunwaree, 8 *W. R. 200 (1867).*

(3) Rajbullub Saha *v.* Ramsudoy Ghose, 5 B. L. R., App. 65, 66 (1870).

(4) Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893), at *p.* 94.

of the decree-holder's default the Court might, under sect. 250, suspend the issue of its warrant, that course, if adopted, would not have disposed of the application for execution which would still remain undisposed of in the register of pending cases. A distress warrant issued under the Public Demands Recovery Act, which has been extended beyond the original date of return, but does not bear on the face of it the altered date, is not a legal warrant under this rule.(1) See now as to default, r. 57, *post*.

It was held under the preceding section that a day had to be specified on or before which it was to be executed, and after that date no lawful order was in force.(2) If the process is not signed by the Judge or other officer it is bad.(3) The execution of the process may be delegated to another by the officer to whom it is addressed: the words "*to be executed*," seeming to imply that it was not intended that the "*proper officer*" should himself execute all warrants sent to him.(4) An officer cannot arrest without having the warrant in his possession.(5) As to proof of execution,(6) see below.

25. (1) The officer entrusted with the execution of the *process* shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the *process* for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the *process* with such endorsement to the Court. [s. 343, includes latter pa of 251.

Endorsement on *process*.

(2) *Where* the endorsement is to the effect that such officer is unable to execute the *process*, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result.

Endorsement on process.—Act VIII. of 1859, sect. 272. The Nazir can delegate the execution to a subordinate officer by endorsing his name on the warrant. If the endorsement is irregular it does not invalidate the arrest.(7) In a recent case in the Calcutta High Court it has been held that "the officer entrusted with the execution" within the meaning of this rule is not the Nazir

(1) Sheikh Nasur *v.* Emperor, 37 C. 122 (1909).

(2) Ananda Lall Bera *v.* R., 10 C. 18 (1883); and see Abinash Chandra Aditya *v.* Ananda Chandra Pal, 31 C. 424 (1904); and see Sheikh Nasur *v.* Emperor, 37 C. 122 (1909).

(3) Ram Dayal *v.* Mahtub Chand, 7 A. 506 (1885). It cannot, however, be said that because a signature was confined to initials it was not the duty of the officer to execute the warrant: R. *v.* Janki Prasad, 8 A. 293 (1886).

(4) Abdul Karim *v.* Bullen, 6 A. 385 (1884); Dharam Chand Lal *v.* R., 22 C. 596 (1895); Sheo Progash Tewari *v.* Bhoop Narain Prosad, 22 C. 759 (1895).

(5) R. *v.* Amar Nath, 5 A. 318 (1883).

(6) Mohunt Megh Lall *v.* Shib Pershad Madi, 7 C. 34 (1881), and cases there cited.

(7) Abdul Karim *v.* Bullen, 6 A. 385 (1884); Dharam Chand Lal *v.* R., 22 C. 596 (1895); Sheo Progash Tewari *v.* Bhoop Narain Prosad, 22 C. 759 (1895).

but the peon.(1) In this case the peon had been directed by the Nazir to attach certain property within a certain time and had executed the warrant after the time had expired; and it was held that he had power to do this because his authority was derived from the Court.

Stay of execution.

26. (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was *passed*, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

When Court may stay execution.

(2) *Where* the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or *the* discharge *of such* person pending the result of the application.

(3) Before *making* an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

Power to require security from, or impose conditions upon, judgment-debtor.

Stay of execution.—Ordinarily a debtor once discharged after arrest cannot be re-arrested in execution of the same decree.(2) Under the former (as under the present) Code, execution was stayed on the application or objection of the judgment-debtor, to enable the latter to apply to the Court which passed the decree, or to a Court having appellate jurisdiction in respect of the decree or its execution. This is necessary both to prevent precipitate execution when the decree itself or some order passed in execution is still under appeal, and also because the Court to which the decree has been transferred for execution had no jurisdiction to decide certain matters. It has been held that an applicant can exclude the period of stay (even if the order only relates to a part of the decree, as, for instance, recovery of costs) in computing the period of limitation.(3)

Security and conditions.—Where a condition precedent is infringed, execution must continue as a matter of course, whereas conditions subsequent may be enforced like decrees. It has been held that an order for security in

(1) Subed Ali *v.* R., 40 C. 849 (1913); distinguishing Dharam Chand Lal *v.* R., 22 C. 596 (1895).

(2) Secretary of State *v.* Judah, 12 C. 652, 657 (1886); *In re* Bolye Chund Dutt, 20 C. 874 (1893).

(3) Bai Uyam *v.* Bai Ruxmani, 38 B. 153 (1913).

stay of execution is not appealable ; for it is not an order determining the rights of the parties, and is neither an order within meaning of sect. 47 nor a decree within meaning of sect. 2.(1)

27. No *order of restitution or* discharge under *rule 26* shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution. [s. 24

Liability of judgment-debtor discharged.

"**Shall prevent.**"—The words "*order of restitution*" have been added to bring the rule in conformity with the wording of the second clause of r. 26. Ordinarily a debtor once discharged after arrest cannot be re-arrested in execution of the same decree.(2) It has, however, also been held, distinguishing the first, and dissenting from the second, of the cases cited, that though the Code specifically provides for retaking of the person under certain defined circumstances, it does not follow from this that a second arrest is in all circumstances forbidden.(3) In any case this rule creates a specific exception.

28. Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution. [s. 242

Order of Court which passed decree or of Appellate Court to be binding upon Court applied to.

"**Binding.**"—The transfer of a decree to another Court for execution amounts to a *qualified* delegation of the powers possessed by the Court that passed the decree, in discharging its functions relating to the execution of that decree. Such delegation is, however, not complete, nor does it entirely divest the Court which transfers the decree of its powers and functions "in relation to the execution of such decree," for under r. 26 and the present rule the highest authority in some matters still rests with that Court notwithstanding the transfer ; (4) and the ordinary Court of appeal would still exercise its jurisdiction in respect of any order passed by the Court to which a decree was sent for execution. See sect. 42, *ante*.

29. *Where* a suit *is* pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as *to security or otherwise*, as it thinks fit, stay execution *of* the decree until the pending suit has been decided. [s. 243.

Stay of execution pending suit between decree-holder and judgment-debtor.

(1) Saraswati Barmania *v.* Golap Das Barman, 41 C. 160 (1913) ; Deoki Nandan Singh *v.* Bansi Singh, 14 C. L. J. 35 (1911).

(2) Secretary of State *v.* Judah, 12 C. 653 (1886) ; *In re* Boyle Chand Dutt, 20 C. 874 (1893), dist. in Rajendro Narain Roy *v.* Chunder Mohan Misser, 23 C. 128 (1895) [the rule is conditional not only on arrest but also on imprisonment under arrest].

(3) Shamji *v.* Poona, 26 B. 652, 659 (1902).

(4) Ghazidin *v.* Fakir Bakah, 7 A. 73, 76, 77 (1884).

Stay pending suit.—The provisions of this rule are limited to staying execution, and have no reference to a case in which execution has already been carried out and the decree-holder placed in possession of the property decreed to him.(1) It was held under the last Code that the section was not limited to a Court executing its own decree.(2) An appeal lies from an order staying execution.(3) The rule refers to the parties to the suits pending or about to be executed. Execution cannot be stayed on the ground that a stranger to the decree impeaches it on the ground of fraud. He should file a suit and obtain an injunction for the purpose.(4) An award filed in Court under sect. 11 of the Indian Arbitration Act is nothing more than an award, although it is enforceable as a decree, and execution of an award cannot be stayed under this rule.(5)

Mode of execution.

Decree for *payment of* **money.**

30. Every decree *for the payment of* money, *including a decree for the payment of money* as the alternative to some other relief, may be *executed* by the *detention in the civil prison* of the judgment-debtor or by the attachment and sale of his property, or by both.

Imprisonment.—This rule, as it appeared in sect. 254 of the Code of 1882, was a repetition of that in Act X. of 1877; the latter being the same as sect. 201 of Act VIII. of 1859, though differently expressed and amplifying the expression "*decree be for money*" in the earlier Code. In the Code of 1882 it commenced "*Every decree or order directing a party to pay money as compensation, or costs, or as the alternative,*" and included the terms "*enforced*" and "*imprisonment*" for the present "*executed*" and "*detention in the civil prison.*"

"**For the payment.**"—A decree for rent, without charging any property, against a *putnidar* may be executed as a decree for money; (6) while a decree for maintenance payable monthly stands on the same footing as a decree by instalments and may be executed from time to time as the instalments fall due.(7)

"**Alternative.**"—A decree for the delivery of moveable property shall state the amount of money to be paid as an alternative if delivery be not made.(8)

"**Some other relief.**"—An order directing refund of money, awarded as compensation under the Land Acquisition Act and wrongly paid out, can be

(1) Ghazidin *v.* Fakir Baksh, 7 A. at pp. 73, 78 (1884).

(2) Ib., at p. 77; Kassa Mal *v.* Gopi, 10 A. 389 (1888).

(3) Ib.; Steel *v.* Itchamoyi Chowdhrain, 13 C. 111 (1886); Lingum Krishnabhupati *v.* Kandula Swaramayya, 20 M. 366 (1896); Kristomohiny Dossee *v.* Bama Churn Nag, 7 C. W. N. 733, 735 (1881) [stay of sale pending administration suit].

(4) Purshottam Vithal *v.* Purshottam Ishwar, 8 B. 532 (1884).

(5) Tribhuwandas *v.* Jivanchand, 35 B. 196 (1910).

(6) Tariniprosad *v.* Narayan, 17 C. 301 (1889).

(7) Pearcenath Brohmo *v.* Juggessuree, 15 W. R. 128 (1871).

(8) O. XX. r. 10.

executed under this rule.(1) The Court executing a decree has no power to direct payment of interest on costs where the decree of the Privy Council is silent as to interest.(2)

"**May be executed.**"—A Court should execute the decree in the manner applied for by the decree-holder,(3) but it has discretion to refuse execution at the same time against the person and property of the judgment-debtor,(4) and may in a suit for money call upon the latter to show cause why he should not be imprisoned.(5) A woman, however, cannot be arrested on a money decree.(6) As to costs of applications under this rule, see sect. 35.

"**Detention in the civil prison.**"—The High Court's power to commit for contempt is unaffected by this Code.(7) An insolvent obtaining a protection order is not liable to imprisonment for arrears of maintenance included in his schedule.(8) A suit to recover damages on account of injuries caused by wrongful arrest can only be maintained if the original suit has been finally decided in favour of the plaintiff, if the arrest was made without reasonable or probable cause, and the injuries cannot be compensated by costs.(9)

31. (*1*) *Where* the decree *is* for any specific moveable, or for any share in a specific moveable, it may be *executed* by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the *detention in the civil prison* of the judgment-debtor, or by the attach*ment of* his property or by both. [s. 258.

Decree for specific moveable *property.*

(*2*) *Where* any attachment under *sub-rule* (*1*) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed *by the decree to be paid as an alternative to delivery of moveable property*, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(*3*) *Where* the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or *where*, at the end of six months from the date of the

(1) Nobin Kali Debi *v.* Banalata Debi, 32 C. 921 (1905); 2 C. L. J. 595.

(2) Baron Forester *v.* Secretary of State, 4 I. A. 137 (1877).

(3) O. XXI. r. 17.

(4) O. XXI. r. 21.

(5) O. XXI. r. 37.

(6) S. 56.

(7) Martin *v.* Lawrence, 4 C. 655 (1879); Hassonbhoy *v.* Cowasji, 7 B. 1 (1881); Navivahoo *v.* Narotamdas, 7 B. 5 (1882); *In re* Bai Amrit, 8 B. 387 (1884).

(8) Tokee Bibee *v.* Abdul Khan, 5 C. 536 (1879).

(9) Raj Chunder *v.* Shama Soondari, 4 C. 583 (1879).

attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

Decree for specific moveable.—In the Code of 1859, sect. 200 included sects. 259 and 260 of Act XIV. of 1882. The words "*or for any share in a specific moveable or for the recovery of a wife*" and the second clause were added by Act X. of 1877. This clause was altered by Act XIV., and the words "*and the decree-holder has applied to have the attached property sold*" and "*in cases where any amount has been fixed under sect.* 208 *such amount and in other cases,*" were also added and the last clause appended. In the present rule the italicized words "*executed,*" "*detention in the civil prison,*" and "*by the decree to be paid as an alternative to delivery of moveable property,*" have been substituted for "*enforced,*" "*imprisonment,*" and "*under sect.* 208," appearing in sect. 259 of the Code of 1882, and the words "*for the recovery of a wife,*" have been omitted, as there can be no such decree, a wife not being a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him, which may be enforced in case of disobedience either by the imprisonment of the defendant, or by the attachment of his property, or by both. This rule is not applicable where the property sought to be attached is not in the possession of the judgment-debtor.(1) A decree being given for specific immoveable and moveable properties and the Ameen directed to ascertain the extent of the moveables, an order was made in execution for the Ameen to give possession of such moveables as he could find, and to inquire into the nature, amount, and value of such as he could not find. On appeal it was held that this order was not one for alternative damages, but to enable the Court, if necessary, to make a sufficient and not excessive order for imprisonment or attachment of property in case of non-delivery.(2) A writ of attachment against the person of the judgment-debtor will not be granted without notice to him.(3)

Decree for specific performance, for restitution of conjugal rights, or for an injunction.

32. (*1*) *Where* the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for *an injunction*, has been *passed*, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his *detention in the civil prison*, or by the attachment of his property, or by both.

(*2*) *Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.*

(1) Pudmanund Singh *v.* Chundi Dat Jha, 1 C. W. N. 170 (1896).

(2) Bhoobun Mohinee *v.* Gobind Chunder, 19 W. R. 82 (1873).

(3) Troylukho Nath Dutt *v.* Radharam, 3 C. W. N. xxxix.

(*3*) Where any attachment under *sub-rule* (*1*) *or sub-rule* (*2*) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and *shall* pay the balance (if any) to the judgment-debtor on his application.

(*4*) *Where* the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or *where*, at the end of one year from the date of the attachment, no application to have the property sold has been made, *or if made has been refused*, the attachment shall cease.

(*5*) *Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.*

Illustration.

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution-proceedings.

Decree for specific performance.—Sect. 200 of Act VIII. of 1859 was divided up by Act X. of 1877 into two sections, 259 and 260. To the latter section the Code of 1877 added "*or for restitution of conjugal rights;*" altered "*it shall be enforced*" to "*has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it the decree may be enforced;*" deleted from the earlier section the words "*and keeping the same under attachment until further order of the Court;*" and added the second clause. By the Code of 1882 were added the words "*or abstention from*" to the first clause, the words "*and the decree-holder has applied to have the attached property sold*" to the second clause, and the whole of the last clause. The portions in italics, as also the Illustration, were added by the present Code, which also substituted "*an injunction has been passed*" for "*the performance of or abstention from any other particular act, has been made;*" and "*detention in the civil prison*" for "*imprisonment;*" and in clause 3 "*shall*" for "*may;*" and in clause 4 "*or if made has been refused*"

for "*and granted.*" This section is inapplicable to Parsees as far as restitution of conjugal rights are concerned.(1)

"**Restitution of conjugal rights.**"—These words were added to meet the objection raised in the case of Gatha Ram *v.* Moohita Kochin; (2) though sect. 200 of Act VIII. of 1859, as it stood, was held to cover such a case.(3) .A person directed by a decree to refrain from preventing her daughter returning to her husband, and who permitted her daughter to reside in her house, is not thereby guilty of such interference as would justify execution under that section.(4) The Court has now a discretion, under O. XXI. r. 33, in executing decrees for the restitution of conjugal rights. No provision is made for executing a decree for the recovery of a wife in this or the preceding rule, as no such decree can be made. Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him which may be enforced in the manner provided by this rule.

"**For an injunction.**"—A decree directing the removal of certain obstructions in a pathway can only be enforced as directed by this rule and not by directing the Court Ameen to remove the obstructions; (5) similarly in regard to a decree directing the removal of a building; (6) or one for removal of obstruction to light and air,(7) but see sub-clause (4) and the Illustration to this rule. Each breach of a perpetual injunction may be enforced under this rule.(8) A decree settling a scheme for the future management of a temple should be executed in accordance with this rule; (9) so where the decree directed certain property to be jointly managed by the plaintiff and defendant and both their names to appear in all papers connected with the same, on the defendant disobeying, the Court can direct attachment of his property.(10) A decree ordering delivery of certain moveables and declaring title to certain rights is not incapable of being executed under this rule as being merely a declaratory decree,(11) but a decree ordering that payment in kind accruing after the decree be from time to time given is too indefinite for execution.(12) An order for the refund of money, awarded under the Land Acquisition Act and wrongly paid out, should be executed under sect. 145 rather than under this rule.(13)

"**An opportunity of obeying.**"—All a Court has to see is whether the party bound by the decree has had an opportunity of obeying the decree or

(1) Ardesar Jahangir *v.* Avabai, 9 B. H. C. 290 (1872). This was decided under sect. 200 of Act VIII. of 1859.

(2) 23 W. R. 179 (1875); 14 B. L. R. 298.

(3) Yamunabai *v.* Narayan, 1 B. 164 (1876); see also Chotun Bibee *v.* Ameer Chund, 6 W. R. 105 (1866).

(4) Ajnasi Kuar *v.* Suraj Prasad, 1 A. 501 (1877).

(5) Bhoobun Mohun *v.* Nobin Chunder, 18 W. R. 282 (1872).

(6) Protap Chunder *v.* Peary Chowdhrain, 8 C. 174 (1881); 9 C. L. R. 453.

(7) Sakarlal *v.* Bai Parvatibai, 26 B. 283 (1901).

(8) Venkatachallam *v.* Veerappa, 29 M. 314 (1905).

(9) Shakaram *v.* Ghelabhai, 19 B. 34 (1893); Damodarbhat *v.* Bhogilal, 24 B. 45 (1899).

(10) Gouri Prosad *v.* Bholanath, 8 C. L. R. 487 (1881).

(11) Kishore Bun *v.* Dwarkanath, 21 B. 784 (1894 P. C.).

(12) Tata Chariar *v.* Singara, 4 M. 219 (1881).

(13) Nobin Kali *v.* Banalata, 32 C. 921 (1905); 2 C. L. J. 595.

injunction and has wilfully failed to obey it.(1) The proper course when an application is made to execute a decree for the removal of a building, is to serve notice upon the judgment-debtor calling upon him to comply within a time to be fixed by such notice, with the order in the decree, and on his failure to do so to make an order in terms of this rule ; (2) but that is not a general rule ; the rule does not require notice to issue, and it is discretionary with the Court.(1)

"**May be enforced.**"—When an application was dismissed on the ground that the defendant had not been afforded an opportunity of obeying, a second application after such opportunity was not barred as *res judicata*.(3)

Limitation.—Failure to enforce prior breaches of a perpetual injunction will not bar the enforcement within three years of a subsequent breach. Art. 178, Sched. II., of the Limitation Act applies to such a case ; (4) Art. 179 is inapplicable.(5)

Discretion of Court in executing decrees for restitution of conjugal rights.

33. (1) *Notwithstanding anything in rule* 32, *the Court, either at the time of passing a decree for the restitution of conjugal rights or at any time afterwards, may order that the decree shall not be executed by detention in prison.*

(2) *Where the Court has made an order under sub-rule* (*1*), *and the decree-holder is the wife, it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.*

(3) *The Court may from time to time vary or modify any order made under sub-rule* (*2*) *for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.*

(4) *Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.*

Decrees for restitution of conjugal rights.—Under the last Code a Court could not refuse to execute a decree for the restitution of conjugal rights by the

(1) Durga Das *v.* Dewraj, 33 C. 306 1905) ; 3 C. L. J. 112 ; 10 C. W. N. 297 ; Bhagwan Das *v.* Sukhdei, 28 A. 300 (1905) ; 2 A. L. J. 836.

(2) Protap Chunder *v.* Peary Chowdhrain, 8 C. 174 (1881).

(3) Kishore Bun *v.* Dwarkanath, 21 C. 784 (1894 P. C.) ; 21 I. A. 89.

(4) Venkatachallam *v.* Veerappa, 29 M. 314 (1905).

(5) Bhagwan Das *v.* Sukhdei, 28 A. 300 (1905) ; 2 A. L. J. 836.

attachment of the person or property of a recalcitrant judgment-debtor; but in England this mode of execution has been put an end to by the enactment of the Matrimonial Clauses Act, 1884, 47 & 48 Vict. c. 68 (cf. sects. 2–4). It has been considered that some relaxation of the provision in force in India is desirable, but that it was doubtful whether it should go as far as this. For the present Courts have been given a discretion in the matter, and they have been enabled to follow a procedure slightly adapted from the English practice in cases in which attachment and imprisonment appear inappropriate.

Decree for execution of *document*, or endorsement of negotiable instrument.

34. (*1*) *Where a* decree *is* for the execution of a *document* or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to *obey* the decree, the decree-holder may prepare *a* draft of *the document* or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(*2*) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice *requiring* his objections (if any) *to* be made within such time as the Court fixes in this behalf.

(*3*) *Where the judgment-debtor* objects to the draft, his objections shall be stated in writing within *such* time, and the Court shall *make* such order *approving or altering the draft*, as it thinks fit.

(*4*) The decree-holder *shall deliver* to the Court *a copy* of the draft *with such alterations* (*if any*) *as the Court may have directed* upon the proper stamp-paper if a stamp *is* required by *the* law *for the time being in force; and* the *Judge* or such officer as *may be* appointed in this behalf shall execute the *document so delivered*.

(*5*) The execution of a *document* or the endorsement of a negotiable instrument under *this rule* may be in the following form, *namely*:—

"C. D., Judge of the Court of (*or as the case may be*), for A. B., in a suit by E. F. against A. B.,"

and shall have the same effect as the execution of the *document* or *the* endorsement of the *negotiable* instrument by the party ordered to execute or endorse the same.

(6) *The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.*

Execution of instrument and endorsement.—Sub-rule (6) has been

extended to cover optional as well as compulsory (1) registration, and an order for the payment of expenses of either kind may presumably be summarily enforced in the execution-department. The Registrar of the High Court can, if directed by that Court, execute a conveyance on behalf of a party refusing so to do, so as to pass his estate, but he cannot enter into a covenant on his behalf.(2) Objections to draft conveyances or draft endorsements can be made the subject of appeal under O. XLIII. r. 1 (*e*).

Decree for immoveable property.

35. (1) *Where a* decree *is* for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he *may* appoint to receive delivery on his behalf, and, if *necessary*, by removing any person bound by the decree who refuses to vacate the property. [s

(2) *Where a decree is for the joint possession of immoveable property such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.*

(3) *Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.*

"**Decree.**"—The decree should describe the land accurately so as to avoid any objection (3) in execution as regards the lands covered by it. Possession should not be given unless it is so ordered by the decree.(4) If the plaintiff is entitled to possession it should be given him. He cannot be compelled to accept compensation against his will.(5) When a decree is obtained for possession that decree should be executed and a second suit will not lie for the purpose.(6) Where an adverse title is unsuccessfully set up the plaintiff is entitled to a decree for *khas* possession under this rule ; (7) and having set up only an adverse title

(1) See Kanahia Lal *v.* Kali Din, 2 A. 392 (1879) ; as regards however, the ground of Spankie, J.'s, judgment, see Prokash Chunder Dass *v.* Tara Chand Dass, 9 C. 82 (1882), F. B.

(2) Ram Chunder Dutt *v.* Dwarkadnath Bysack, 16 C. 330 (1889).

(3) See Dwarka Nath Haldar *v.* Kumola Kant, 12 W. R. 99 (1869) ; Zeenut Ali *v.* Ram Doyal Poddar, 18 W. R. 25 (1872) ; Kalee Debee *v.* Modhoo Soodun, 16 W. R. 171 (1871) ; Radha Gobind Shaha *v.* Brojendro Coomar Roy, 18 W. R. 527 (1873) ; Annoda Pershad *v.* Troyluckonath, 13 W. R. 123 (1870).

(4) Ameeroonissa Khatoon *v.* Abedoonissa Khatoon, 16 W. R 307 (1871).

(5) Govind Venkaji *v.* Sadashiv Bharma, 17 B. 721 (1892).

(6) Ramsurn Mahton *v.* Jinonauth Bhuggut, 10 W. R. 396 (1868).

(7) Raj Mungal Roy *v.* Sm. Anundmoyee 11 W. R. 63 (1869).

in the suit, the defendant cannot be allowed for the first time when the decree is being executed to plead his occupancy as a tenant.(1) As to growing crop, see below.(2) It was held that if the decree was silent as to a building situated on the land, it was not within the province of the executing Court to direct that the building be pulled down.(3)

Possession.—Possession may be actual or formal or, as it is often called, symbolical possession. The delivery of possession which is directed to be given by this rule is the placing of the decree-holder in actual possession, which act may involve the dispossession of some other. Whilst this rule relates to the delivery of what is known as *khas*, or immediate or direct possession, the following rule provides for the case where the immoveable property is in the occupancy of a tenant or of some other person entitled to occupy the same. Formal delivery of possession consists in the reading by the officers on the land of the order for putting the decree-holder in possession and taking a receipt from him. Whether what occurs on the occasion of giving delivery has the effect of dispossession is a question which must be decided on the evidence.(4) It has been held that the delivery of formal possession in execution of a decree for possession gives a cause of action against a defendant who remains in occupation of the possession which may be enforced in a regular suit.(5) Rules 97 and 98 provide for any resistance or obstruction to the delivery of possession complained of by the decree-holder, and r. 100 to any complaint on the part of a third party as to his being dispossessed in execution of the decree. Where in execution of a decree a person not a party to the suit is dispossessed, his dispossession does not give him a cause of action within the jurisdiction of the Mamlatdar. Rule 100 (formerly sect. 332) applies.(6)

Joint possession.—A plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint-possession, whether he had been originally in joint-possession or not.(7)

"Bound by the decree."—This includes not only the judgment-debtor but persons taking from him and affected by the *lis pendens*. A person who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title. So one who takes title or possession from a defendant in ejectment pending the suit is bound by the judgment, and can be evicted by the process which shall issue therein, although he is not a party thereto.(8) *Lis pendens* continues during the pendency of

(1) Banee Mahton *v.* Gopee Bhuggut, 12 W. R. 285 (1869).

(2) Udit Narain Singh *v.* Shib Rai, 20 A. 198 (1898).

(3) Radha Gobind Shaha *v.* Brojendro Chowdhry, 18 W. R. 527 (1873).

(4) Ramchandra Subrao *v.* Ravji, 20 B. 351 (1895); and for meaning of dispossession in Bengal Tenacy Act, Sch. III, Art. 3, see Rudra Narain Maiti *v.* Natobar Jana, 41 C. 52 (1913).

(5) Shama Charan Chatterji *v.* Madhub Chandra Mookerjee, 11 C. 93 (1884); see Hari Mohun Shaha *v.* Baburali, 27 C. 715 (1897); for effect of formal possession on limitation, see *post*, notes to O. XXI., r. 97, and Mahadeo *v.* Janu, 36 B. 376, 14 Bom. L. R. 115 (1912).

(6) Ramchandra Subrao *v.* Ravji, 20 B. 351 (1895).

(7) Jagarnath *v.* Ram Phal, 34 A. 150 (1911).

(8) Hukm Chand, Res. Jud. 686, where the subject will be found fully discussed.

an appeal.(1) There has been some conflict whether the rule of *lis pendens* applies to a sale in execution. But the weight of authority appears to be in favour of the view that a purchaser at a sale in execution pending a suit is bound by the result in that suit.(2) Where sons living with their father had no independent juridical possession, the possession which was obtained through the Court against their father was held to operate as well against his dependents as against himself.(3) Decree-holders seeking to obtain *khas* possession of property which is already in possession of a *surburakar* under order of Court, should apply for his removal to the Court which appointed him in the matter of the suit in which he was appointed.(4)

Undivided share.—Difficulty was often felt (5) in executing a decree obtained by the proprietors of an undivided share in immoveable property for *khas* possession. The second sub-clause of this rule now regulates this matter. Thus where a decree-holder in execution of her decree purchased an undivided share in a house which the judgment-debtor owned jointly with a third person, and the judgment-debtor resisted her attempt to get possession, it was held that on the construction of this rule with r. 95 of this Order the decree-holder was entitled to have him removed from the premises.(6)

"**Break open.**"—See cases cited below.(7)

Decree for **delivery of immoveable property when in occupancy of tenant.**

36. *Where a* decree *is* for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to

The doctrine of *lis pendens* first received statutory recognition in sect. 223 of the Code of 1859. The rule, however, is now contained in sect 52 of the Transfer of Property Act.

(1) Gobind Chunder Roy *v.* Guru Churn Kurmokar, 15 C. 94 (1882); Radhika *v.* Radhamani, 7 M. 96 (1883).

(2) Hukm Chand, Res. Jud. 713, 714; Raj Kishen Mookerjee *v.* Radha Madhub Holdar, 21 W. R. 349 (1874); Lala Kali Prosad *v.* Buli Singh, 4 C. 789 (1878); Jharoo *v.* Raj Chunder Dass, 12 C. 299 (1885); Gobind Chunder Roy *v.* Guru Churn Kurmokar, 15 C. 94 (1887); Dinonath Ghose *v.* Shama Bibi, 28 C. 23 (1900); Parvati *v.* Kisansing, 6 B. 567 (1882). In Nilakant Bannerje *v.* Suresh Chandra Mullick, 12 C. 414 (1885), the P. C. expressed a doubt as to the correctness of the judgment of the High Court on the question of *lis pendens*.

(3) Pandharinath *v.* Mahabub Khan, 21 B. 98 (1895); dist. Lakshman *v.* Moru, 16 B. 722 (1890), where the son who was a Hindu was in actual and apparently in juridical possession of the land of which he took the crop.

(4) Hurrish Kishto *v.* Motee Chand, 10 W. R. 445 (1868).

(5) See O'Kinealy's notes to sect. 263; citing Brohmo Moyee Debia *v.* Raj Chunder, 5 W. R. Misc. 15 (1866); Ranee Shama Soondoree *v.* Jardine, Skinner & Co., 7 W. R. 376 (1867); Koonwur Bijoy Keshub *v.* Shama Soondaree, B. L. R. Sup. Vol. 172; 2 W. R. Misc. 31 (1865); Rajani Kanth *v.* Ramnath Neogy, 10 C. 244 (1883); Ram Chandra *v.* Damodhar Trimbak, 20 B. 467 (1895); Krishnaji *v.* Vithu, 18 B. 505 (1893); Bhau *v.* Dade Krishnaji, 21 B. 777 (1896); Watson & Co. *v.* Ram Chand Dutt, 18 C. 10 (1890); Luchmeswar Singh *v.* Manowar Hossein, 19 C. 253 (1891); and generally as to the position of co-sharers, see Woodroffe's Injunctions, 2nd ed. p. 400 *et seq.*

(6) Sarvi Begam *v.* Taj Begam, 33 A. 181 (1914).

(7) Gunesh Chunder Shah *v.* Ram Dhunee

be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Occupancy of tenant.—In order to a legal possession being given under this rule it is essential that all its requirements should be carried out.(1) But if the party in possession when the decree is being executed admits to the Court that the decree-holder has formally obtained possession, he cannot afterwards plead a title by adverse possession, denying that the decree-holder ever received possession.(2) "*The substance of th. decree in regard to the property*" which must be proclaimed to the occupant may or may not be a declaration that the decree-holder is the immediate landlord of the occupant, and as such entitled to receive rent directly from him, as there may be an intermediate holder. Probably both the intermediate tenant as well as the cultivating tenant or actual occupant would come within the terms of the rule.(3) In executing a decree under this rule the Court should confine its action strictly to the terms of the law, and should not add to the decree an order directing the ryots to pay rent to the decree-holder.(4)

Arrest and detention in the civil prison.

[s. 245B.] **37.** (1) Notwithstanding anything in *these rules, where* an application is for the execution of a decree for *the payment of* money by the arrest and *detention in the civil prison* of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to *the civil prison.*

Discretionary power to permit judgment-debtor to show cause against *detention in prison.*

(2) *Where* appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

Discretionary power.—This rule was introduced into the Code by Act VI. of 1888. By the present Code the words "*the payment of*" have been added, and the words "*detention in the civil prison*" and "*the civil prison*" have been substituted for "*imprisonment*" and "*jail in execution of the decree*" respectively. This rule applies to cases under O. XXI. r. 11,(5) where, in respect of decrees for the payment of money, the Court may order immediate execution against the judgment-debtor on the oral application of the decree-holder.

Dassee, 22 W. R. 283 (1874); Radha Gobind v. Brojendro Chowdhry, 18 W. R. 527 (1873).

(1) Court of Wards v. Oopendronath Deo, 15 W. R. 99 (1871).

(2) Bindobashinee Dossee v. Renney, 15 W. R. 307 (1871).

(3) O'Kinealy, C. P. C., notes to sect. 264.

(4) Gibbon v. Sheo Purshun Misser, 17 W. R. 236 (1872).

(5) O. XXI. r. 21.

"**The Court may.**"—It has discretion to refuse execution at the same time against the person and property of the judgment-debtor.(1) It is the practice of the Calcutta High Court to issue notice to the party whose arrest is sought in execution in all cases. Even after a vesting order has been made the Court may under this rule direct execution by arrest and imprisonment where protection has been refused by the Insolvent Court.(2)

"**Issue a notice.**"—Notice may issue against a judgment-debtor who in other execution proceedings has made an application to be declared an insolvent.(3)

Warrant for arrest to direct judgment-debtor to be brought up.

38. Every warrant for the arrest of *a* judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

Warrant for arrest of judgment-debtor.—Act VIII. of 1859, sect. 222. For form of warrant, see Schedule IV. No. 154, of former Code. The executing officer is only empowered to arrest the defendant and detain him for such a reasonable time as is sufficient to allow of his being brought before the Court, and having an opportunity of applying for his discharge; the detention of a defendant after such reasonable time and without further authority of law is illegal.(4) So where a sheriff's officer of his own motion took a prisoner, in custody under a warrant directed to the Superintendent of the Presidency Jail, to the Alipore Jail and delivered her there, it was held that the imprisonment was unlawful and that she was entitled to her discharge.(5)

Subsistence-*allowance.*

39. (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) *Where* a judgment-debtor is committed to *the civil prison* in execution of a decree the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales *fixed under section 57* or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be

(1) O. XXI. r. 21.

(2) Bhasker *v.* Shudhar, 9 Bom. L. R. 898 (1904).

(3) Ganpat *v.* Mahadev, 22 B. 731 (1897).

(4) *In re* Shambhoo Chunder Haldar, Bourke, 59 (1865).

(5) Shamshonessa Begum *v.* Anne Love, 11 C. 527 (1885).

supplied by the party on whose application the *judgment-debtor* has been *arrested* by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to *the civil prison*, and the subsequent payments (if any) shall be made to the officer in charge of the *civil prison*.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in *the civil prison* shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in *the civil prison* or arrested on account of any sum so disbursed.

Subsistence money.—This rule amalgamates sects. 339 and 340 of the last Code, which correspond with sects. 276 and 279 of the Code of 1859, which, with the exception of the first paragraph of sect. 339, were somewhat similar.(1) An order by the Court for subsistence-allowance is necessary under the second clause, and the sum so fixed must be paid in advance (2) under the third clause. It is, of course, for the officer of the Court and not for the prisoner to see that the money is paid.(3) The judgment-debtor must be released on the omission by the person on whose application he has been detained to pay the subsistence-allowance. See sect. 58, clause (iv), *ante*.

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

40. (1) *Where* a judgment-debtor appears before the Court in obedience to a notice issued under *rule 37*, or is brought before the Court after being arrested in execution of a decree for *the payment of* money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and *detention*, or directing his release, as the case may be.

(2) Before making an order under sub-*rule* (*1*), the Court may take into consideration any allegation of the decree-holder touching any of the following matters namely:—

(1) See Aga Ali Khan *v.* Joydoyal Persaud, Bourke, 52 (1865); Speyer *v.* Janssen, Bourke, 28 (1865); *In re* Shamboo Chunder Haldar, Bourke, 59 (1865); *In re* Thomson, Bourke, 421 (1865).

(2) See Dutt *v.* Cornelius, 5 B. L. R. App. 79 (1870); Haladhar Dey *v.* Ambika Charan Bose, 5 B. L. R. App. 80 (1870); *In re* Konoy Lall Doss, Bourke, 51 (1865).

(3) *In re* Thomson, Bourke, 421 (1865).

(*a*) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account;

(*b*) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was *passed*, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;

(*c*) any undue preference given by the judgment-debtor to any of his other creditors;

(*d*) refusal or neglect *on the part of the judgment-debtor* to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;

(*e*) the likelihood of *the judgment-debtor* absconding or leaving the jurisdiction of the Court with the object or effect *of obstructing or delaying the decree-holder in the execution of the decree.*

(3) While any of the matters mentioned in sub-*rule* (*2*) are being considered, the Court may, in its discretion, order the judgment-debtor to be *detained in the civil prison*, or leave him in the custody of an officer of the Court, or release him on his furnishing security, *to the satisfaction of the Court*, for his appearance *when required by* the Court.

(4) A judgment-debtor released under this *rule* may be re-arrested.

(5) *Where* the Court does not make an order *under* sub-*rule* (*1*), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to *the civil prison.*

Proceedings on appearance of judgment-debtor.—Act VI. of 1888, sect. 4. The power to order the judgment-debtor's arrest is discretionary. The lunacy of a judgment-debtor is a good cause for disallowing an application for his arrest (1) If no cause is shown why the decree should not be executed, under this rule a Court is bound to cause the arrest of the judgment-debtor at once.(2) A judgment-debtor who had been arrested in execution of a decree of a District Munsif, made an application for his release under the former section, and his application was granted: held that an appeal lay against the order granting the application.(3)

(1) Bhanabhai *v.* Chotubhai, 22 B. 961 (1897).

(2) Gubboy *v.* Ramdoyal Chowbay, 2 C. W. N. 588 (1897).

(3) Abdul Rahiman *v.* Mahomed Kassim, 21 Mad. 29 (1897).

"**Moveable property.**"—Standing crops are not moveable property,(1) nor trees,(2) nor mango trees; (3) but fruit upon trees is moveable; (4) but as to the attachment of agricultural produce, see O. XXI. rr. 44 and 45. Tiled huts are immoveable,(5) so are machinery fixtures,(6) but stone sugar mills are not.(7) Thatch, especially when severed from a house, is moveable.(8)

"**Actual seizure.**"—This, it has been held, may include such constructive seizure as is provided by O. XXI. r. 46,(9) or the affixing of the Court seal to the outer door of the warehouse containing the goods to be attached, without breaking open the door and gaining physical possession.(10) Under sect. 269 of the Code of 1882 the Local Government had power to make rules for the maintenance of attached live stock.

Under the corresponding section of the previous Code, rules were made for Bengal,(11) Assam,(12) Burma,(13) Central Provinces,(14) Bombay,(15) Madras,(16) Punjab,(17) and the N.W.P. and Oudh (18) in regard to the maintenance of attached live stock. This provision has now been omitted, presumably because the High Courts have now power under Part X. to make rules. The effect of this omission was recently considered by a Full Bench of the Madras High Court, and though it was said that the point is not free from doubt, it was held that until rules were framed under this Code the rules made under sect. 269 of the last Code were in force, even though they might be inconsistent with this rule.(19) The new rules framed by the High Courts under this Code are collected in the Appendix.

Attachment of agricultural produce.

44. *Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—*

(1) Tofail Ahmud *v.* Banee Madhub, 24 W. R. 394 (1875); Sadu *v.* Sambhu, 6 B. 592 (1882); Madayya *v.* Venkata, 11 M. 193 (1887); Cheda Lal *v.* Mulchand, 14 A. 30 (1891).

(2) Umed Ram *v.* Daulet, 5 A. 564 (1883); Sakharam *v.* Vishram, 19 B. 207 (1894).

(3) Krishnarao *v.* Babaji, 24 B. 31 (1899).

(4) Nasir Khan *v.* Karamat, 3 A. 168 (1880).

(5) Raj Chunder *v.* Dhurmo Chunder, 10 W. R. 416 (1868); 2 B. L. R., A. J. 77; Nattoo Meah *v.* Nund Ranee, 17 W. R. 309 (1872); s. c., 8 B. L. R., F. B., 508; Deno Nath Adhor *v.* Chunder, 4 C. W. N. 470 (1900); Amrita Lal *v.* Nibaran, 31 C. 340 (1904).

(6) Millar *v.* Brindabun, 4 C. 948 (1879).

(7) Hurmungal *v.* Athul, 4 N. W. P. H. C. R. 15 (1872).

(8) Raj Coomar *v.* Pran Nath, 15 W. R. 199 (1871); 7 B. L. R. App. 41.

(9) Toolsa Goolal *v.* Antone, 11 B. 448 (1887).

(10) Multan Chand *v.* Bank of Madras, 27 M. 346 (1903).

(11) *Calcutta Gazette*, 16th April, 1879, Part I., p. 356; 18th July, 1883, Part I., p. 621.

(12) Assam Manual of Local Rules and Orders, Ed. 1893, pp. 192–4.

(13) Lower Burma Court Manual, Ed. 1905, para. 558.

(14) No. 3470, dated 8th Sept., 1877, Judicial Commissioner's Civil Circular, 1–34.

(15) Bombay Manual of Local Rules and Orders, Ed. 1896, Vol. I., p. 397.

(16) Madras List of Local Rules and Orders, Ed. 1898, Vol. I., p. 195.

(17) Rules and Orders of the Civil Courts, Punjab, 2nd Ed., Vol. I., p. 2.

(18) N. W. P. and Oudh List of Local Rules and Orders, Ed. 1894, rules 121 and 122.

(19) *In re* District Munsif of Tiruvallur, F. B. (1914), 37 M. 17.

(*a*) *where such produce is a growing crop, on the land on which such crop has grown, or*

(*b*) *where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited.*

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

Provisions as to agricultural produce under attachment.

45. (*1*) *Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.*

(*2*) *Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court, and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.*

(*3*) *Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.*

(*4*) *Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.*

(*5*) *A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.*

Agricultural produce.—See notes to sect. 61, *ante*.

46. (1) In the case of—

Attachment of debt, share and other property not in possession of judgment-debtor.

(*a*) a debt not secured by a negotiable instrument,

(*b*) a share in the capital of a corporation,

(*c*) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court.

the attachment shall be made by a written order prohibiting,—

(*i*) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;

(*ii*) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(*iii*) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be *affixed* on some conspicuous part of the court-house, and another copy shall be sent, in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (*i*) of *sub-rule* (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

Debts, shares and other property not in possession.—This rule enacts in different language the provisions contained in sect. 236 and partly in sect. 239 of Act VIII. of 1859. The clause commencing "*A debtor prohibited*" was added by sect. 268 of Act X. of 1877. That Act also provided:—"*No attachment under this section shall remain in force for more than six months; at the end of which time, if the judgment-debtor has not obeyed the decree, the property attached may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and pay the balance, if any, to the judgment-debtor on his application.*" This provision was repealed by Act XIV. of 1882, which Act also added three clauses affecting the salary of a public officer or the servant of a Railway Company, and which matter is now dealt with by O. XXI. r. 48. The only other alteration made by the present Code is to substitute "*a*" for "*any public Company or*" and "*affixed*" for "*fixed.*" The term "debt" has been used in this rule in its legal sense of a debt either due or accruing due; (1) that is, a sum

(1) Padmanund *v.* Ramaprasad, 14 C. L. J. 127 (1911).

of money which is either now payable or will become payable in the future by reason of a present obligation.(1) A sum payable upon a contingency does not become a debt till the contingency has happened.(2) An allowance payable as an annuity is not a debt, and cannot be attached under this rule until it has fallen due.(3)

A Provincial Small Cause Court cannot directly attach a debt due to the judgment-debtor payable outside its local jurisdiction.(4)

"**Debt not secured by a negotiable instrument.**"—Includes a decree of a Revenue Court.(5) If a debt under a deed of hypothecation is intended to be sold alone or jointly with immoveable property in order to recover it by personal remedy, it should be attached under this rule; but where the interest under such a deed was attached under O. XXI. r. 54, the absence of an attachment under this rule did not affect the right of the purchaser to realize the amount due under it.(6) The rights and interests under his mortgage of a mortgagee out of possession should be attached under this rule and not under sect. 274 of the former Code and O. XXI. r. 54 of the present Code.(7) In a recent case in the Madras High Court, the effect of the words "debt not secured by a negotiable instrument" was considered, and it was held that they are undoubtedly wide enough to cover a debt secured by an hypothecation bond or a simple mortgage, and that r. 54 of this order is not applicable to such cases, though the General Clauses Act and Transfer of Property Act speak of such a debt as an interest in immoveable property.(8) The form of prohibitory order is given in the First Sched. App. E. No. 10. If such a debt be attached a claim may be preferred by a third party and investigated under O. XXI. r. 58.(9) The corresponding section in the Code of 1877 provided that an attachment under this rule could not remain in force more than six months, but the property could then be sold. Under such section it was held that bonds which would be barred in the mean time could not be made available for satisfaction of a decree in execution by the Small Cause Court.(10)

"**Share in the capital.**"—The form of prohibitory order is given in the First Sched. App. E. No. 11.

"**Other moveable property.**"—The form of prohibitory order is given in the First Sched. App. E. No. 5. Money deposited as security for performance of duties of servant may be attached under this rule, subject to the employer's

(1) Bancharan *v.* Adyanath, 36 C. 936 (1909); 13 C. W. N. 966.

(2) Padmanund *v.* Ramaprasad, 14 C. L. J. 127 (1911).

(3) Padmanund *v.* Ramaprasad, *supra.*

(4) Hossein Ally *v.* Ashotosh Gangoolly, 3 C. L. R. 30 (1878); Begg Dunlop and Co. *v.* Jagannath Marwari, 39 C. 104 (1911).

(5) Aulia Bibi *v.* Abu Jafar, 21 A. 405 (1899).

(6) Sami Ayyar *v.* Krishnasami, 10 B. 169 (1886).

(7) Karim-un-nessa *v.* Phul Chand, 15 A. 134 (1893); Tarvadi *v.* Bai Kashi, 26 B. 305 (1901).

(8) Natarya Iyer *v.* South Indian Bank of Tinnevelly, 37 M. 51 (1914); following Tarvadi Bholanath *v.* Bai Kashi, 26 B. 305 (1902); not following Sami Ayyar *v.* Krishnaswami, 10 M. 169 (1887).

(9) Chidambara *v.* Ramasamy, 27 M. 67 (1903).

(10) Nursingdas *v.* Tulsiram, 2 B. 558 (1878).

lien, but cannot be sold or realized until the deposit is at the disposal of the judgment-debtor freed from the lien.(1)

"**Not in the possession.**"—When the moveable property of the judgment-debtor is in the hands of a third party, the decree-holder must proceed under this rule. He cannot sue the third party,(2) but it would be otherwise if the decree declared the decree-holder entitled to the immoveable property.(3)

"**The creditor from recovering.**"—An attachment under this rule does not prevent the debtor suing for the debt,(4) but he cannot realize it.(5)

"**Copy of such order shall be affixed.**"—Non-compliance with this provision vitiates the attachment and makes it invalid as against a subsequent assignment.(6)

"**May pay the amount of his debt into Court.**"—He cannot be ordered to pay or to show cause why he should not pay,(7) nor can he be ordered to pay into Court a debt he denies is due.(8) In Bombay, however, it has been held that clause (i) of this rule implies that the Court may make an order for payment of the debt which the garnishee is to obey, including an order for payment to the judgment-creditor.(9) Where, instead of paying into Court, the debtor paid the money to the only person who, had it been paid into Court, would have been entitled to withdraw it, and the payment was certified by the Court, it was held the payment amounted to a sufficient compliance with the former section.(10) Money paid into Court under the former section was held to be assets realized in execution under sect. 295 corresponding with sect. 73.(11) In the Calcutta High Court, after the attachment of a debt, an order can be made giving liberty to the debtor to pay the amount attached into Court, and appointing a Receiver to sue for and realize the debt if it be not paid in within a time to be fixed by the order. A voluntary payment by a debtor of his own choice and at his own risk made in a Court of inferior jurisdiction, with full knowledge of an attachment by a higher Court, was held not to discharge him.(12)

Effect of attachment.—An attaching creditor is not in the same position as an assignee for value without notice of a prior assignment, but stands in respect of prior assignments in no better position than his judgment-debtor.(13) An order for attachment gives the judgment-creditor certain rights in execution.

(1) Karuthan *v.* Subramanya, 9 M. 203 (1885).

(2) Mirza Mahomed *v.* Widow of Balmakund, 3 I. A. 241 (1876).

(3) Padmanund Singh *v.* Chundi Dat Jha, 1 C. W. N. 170 (1896).

(4) Shib Singh *v.* Sita Ram, 13 A. 76 (1890).

(5) Collector of Etawah *v.* Beti Maharani, 14 A. 162 (1892); s. c., 17 A. 198 (P. C. 1894); 22 I. A. 31.

(6) Satya Charan *v.* Madhub Chunder, 9 C. W. N. 693 (1905).

(7) Siriah *v.* Muckanachary, 10 M. 194 (1887).

(8) Kishen Pertaub *v.* Bhowya Debya, 18 W. R. 40 (1872).

(9) Toolsa Goolal *v.* Antone, 11 B. 448 (1887).

(10) Fida Husain *v.* Maula Bakhsh, 21 A. 145 (1897).

(11) Sorabji Edulji *v.* Govind Ramji, 16 B. 91, p. 98 (1891); Jettha Bhima *v.* Lady Janbai, 14 Bom. L. R. 904 (1912).

(12) Ramasamy Udayar *v.* Chakrapany, 17 M. L. J. 488 (1907).

(13) Megi Hansraj *v.* Ramji Joita, 8 B. H. C. 169 (1871).

If such rights are not exercised before the presentation of a petition in insolvency they will not create a title so as to prevail against that of the Official Assignee under the vesting order.(1) Until a debtor receives a notice under this rule he is bound to pay his judgment-creditor, and it is no part of his duty to inquire whether his creditor is or is not entitled to receive the money.(2) The payment of a cheque given before notice of attachment cannot be stopped.(3) In England an order for attachment does not give the judgment-creditor a charge until it is served,(4) and there is no difference between the service of an order *nisi* and of an order absolute.(5)

Attachment of share in moveables.

47. *Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.*

Attachment of salary or allowances of public officer or servant of railway company or local authority.

48. (*1*) *Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section* 60, *be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.*

(*2*) *Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.*

(*3*) *Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule* (*2*), *shall, without further notice or other process, bind the Government or the railway*

(1) Kristnasawmy *v.* Official Assignee of Madras, 26 M. 673 (1903).

(2) Thakoor Dass *v.* Luchmeeput, 7 W. R. 10 (1867).

(3) Bhagvandas *v.* Abdul Husein, 3 B 49 (1878).

(4) *In re* Stanhope Silkstone Collieries Co., 11 C. D. 160 (1879).

(5) *Ex parte* Joselyne, L. R. 8 C. D. 333.

company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

Attachment of salary, etc.—In the Report upon the Bill it was pointed out that the provisions here enacted are not altogether a novelty in the history of execution. Officers of the Army serving in this country, whether they do or do not belong to the Indian forces, are public officers within the meaning of the Code. Under sect. 151 (3) of the Army Act (44 & 45 Vict. c. 58) such officers were liable to stoppage of one-half of their pay in execution of decrees, and such orders remained in force wherever the judgment-debtor was in India. When this provision was repealed as a sequel to the abolition of the Courts of Request, an addition was made to sect. 136 by the Army (Annual) Act, 1895, to legalize deductions authorized by any law passed by the Governor General of India in Council. This provision, in view of the definition of "public officer," placed military and civil officers on the same footing for the purposes of attachment under the Code of Civil Procedure. Owing to the comparatively more frequent and rapid transfers of military officers to places at a considerable distance, attention has been directed somewhat more pointedly to an inconvenience which, to a greater or smaller extent, is experienced in connection with the various branches of the public services in India. A public officer, whatever the amount of his indebtedness, remains, by virtue of statutory exemption, in enjoyment of one moiety of his salary, while his creditor, by reason of the application of the provisions relating to local jurisdiction, must follow him from Court to Court all over the country with troublesome and expensive applications for transfer and attachment. It has, moreover, been represented that a tradesman at a distance ought not to be burdened with responsibility for tracing out the actual officer disbursing the salary; and it is possible in practice for a public servant acting as his own paymaster to place the most serious obstructions in the way of execution. In these circumstances a reversion has been made, in substance, to the provisions of sect. 151, sub-sect. (3), of the Army Act, which have been extended to all public officers, railway servants, and servants of local authorities; and the responsibility is cast on the Government, or the company or authority concerned, for making its arrangements for receiving notice and for effecting the proper deduction. As a corollary to these provisions it is believed that the order may reasonably be declared effective, not merely while the judgment-debtor is in India, but while he is in receipt of emoluments from the Indian revenues, or from the funds of an Indian local authority, or of a Railway Company carrying on business in British India.

Salary or allowances.—This rule is new, though it partly includes the

provisions in the last three clauses of sect. 268 of Act XIV. of 1882. There is no inconsistency between it and the explanation to sect. 64.(1)

"**Within the local limits of the Court's jurisdiction.**"—Under the earlier Codes, which contained no such provision as this, it was held that a Provincial Small Cause Court could not directly attach the salary of a public officer disbursed outside its jurisdiction; (2) nor that of a railway servant when not actually due disbursed outside such jurisdiction.(3) This rule provides a special rule in the case of certain judgment-debtors because r. 46 does not entitle the execution Court to attach a debt payable by a non-resident outside the jurisdiction.(4)

"**May order that the amount shall . . . be withheld.**"—The order should also prohibit the public officer or servant from receiving the amount of the salary attached.(5)

Attachment of partnership property.

49. (*1*) *Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.*

(*2*) *The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.*

(*3*) *The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.*

(*4*) *Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.*

(*5*) *Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.*

(1) Valchand *v.* Musson, 14 Bom. L. R. 33 (1912).

(2) Parbati *v.* Panchanand, 6 A. 243 (1884).

(3) Abdul Gafur *v.* Albyn, 30 C. 713 1903); 7 C. W N. 821; Sayadkhan *v.* Davies, 28 B. 198 (1903).

(4) Begg, Dunlop and Co. *v.* Jagannath Marwari, 16 C. W. N. 402 (1911); 39 C. 104.

(5) Willcock *v.* Terrell, 3 Ex. D. 331 (1878).

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

Partnership property.—This section has been introduced in consequence of representations that, for the protection of commercial enterprise, the rules relating to the attachment of any interest in partnership property should be assimilated to the English practice. It has been thought that, at any rate in the commercial centres, the time has arrived for introducing the provisions of sect. 23 of the Partnership Act, 1890 (53 & 54 Vict. c. 39); but how far they are likely to be useful when applied to the family business forming portion of the joint estate of Hindus is a matter which remains to be seen. The enactment in question has, therefore, been tentatively adapted, as sub-clauses (1) to (3), to which sub-clauses (4) and (5) embodying the simplified procedure directed by O. 46, rr. 1*a* and 1*b* of the Rules of the Supreme Court, are merely ancillary.

50. *(1) Where a decree has been passed against a firm, execution may be granted—*

Execution of decree against firm.

(a) against any property of the partnership;

(b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with the summons and has failed to appear:

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

Cross-references.—As to actions by or against partners in the name of the firm, see O. XXX. rr. 1–3, *supra*. Action against the person trading under an assumed or trading name, r. 10 of same Order. Actions between co-partners, execution not to issue without leave, O. XXX. r. 9. As to issue directed under this rule to try question of liability of retiring partners, see note (1).

"Where a decree has been passed against a firm."—Where a writ has been issued against a firm and served on a partner according to O. XXX. r. 3, *supra*, judgment must be signed against the firm. It cannot be signed against one partner separately for default of appearance.(2) But it has been held in England that where judgment has been recovered against the firm, the plaintiff is not confined to the remedy given by this rule but may still bring an action on the judgment against the individual members of the firm without any special leave of the Court.(3) A plaintiff having obtained judgment against a firm cannot by subsequent service of the writ render the person served liable as a partner hereunder. He must apply under this rule.(4)

Infant partner.—It has been held by the House of Lords,(5) (*a*) that an infant can be a partner in a firm; (*b*) that though a partner he cannot contract debts by trading, and is not therefore liable for the debts of the firm; (*c*) that the adult partner is entitled to insist that all the assets of the partnership shall be applied in payment of the liabilities of the partnership, and until this is done the infant partner has no claim on them; (*d*) that a judgment against a firm containing an infant partner, and bankruptcy proceedings based upon such judgment, must specifically exclude the infant partner.(6) The form of judgment in such a case, therefore, is in England as follows: "Adjudged that the plaintiff recover against the defendant firm, other than A.B. an infant partner," etc.(7) On a judgment so worded, execution issues as of course on the property of the firm, irrespective of the question of infancy of any member thereof; and, *semble*, even if the sole member of the firm were an infant, the right of the plaintiff to issue execution against the goods of the firm would not be affected. But no execution can issue against the private property of the infant partner. It would seem to follow from the above that an infant partner could not be served as a partner, though, *semble*, the firm might be served by service on him as the person in control of the business. It would seem also to follow that an infant partner can neither appear nor defend as a partner.(8)

"Execution may be granted."—See also O. XXX. rr. 6–8, *supra*, as to subsequent proceedings. No execution can issue against any partnership property except on a judgment against the firm. Where a partnership was dissolved as to A., and afterwards an action was instituted against the firm for a debt contracted before the dissolution, but A. was not served with the writ and had no notice of the action till after judgment, it was held that his liability must

(1) Worcester Banking Co. *v.* Trotter, 3 Times Rep. 708. Cf. also Davis *v.* André, 24 Q. B. D. 598, and Davies *v.* Morris, 10 Q. B. D. 436.

(2) Jackson *v.* Lichfield, 8 Q. B. D. 474.

(3) Clark *v.* Cullen, 9 Q. B. D. 355. See also Davies *v.* Morris, 10 Q. B. D. 436.

(4) See O. XXX. r. 3, *supra*.

(5) In Lovell *v.* Beauchamp, A. C. 607 (1894).

(6) Cf. also Harris *v.* Beauchamp, 2 Q. B. 534 (1893).

(7) Ann. Pr., notes to O. 48A, r. 8.

(8) Ann. Pr., ib.

be determined before the judgment could be enforced against him, and a debtor's summons founded on the judgment was dismissed.(1) A partner so situated cannot now be made liable unless he has been served with the writ.(2) But where there had been a dissolution under an order by consent in the Chancery Division, and a receiver appointed of the partnership property, and subsequently a judgment in the King's Bench Division was recovered for a debt accruing due after dissolution, it was held that a charging order on the property of the firm in the hands of the receiver was valid, and could not be set aside by partners who had not been served with the writ.(3) Where the action is between a firm and one or more of its members, or between firms having one or more members in common, no execution can issue without an order.(4) Where a judgment is recovered by a firm suing in the firm name, and afterwards one of the partners dies, the surviving partner may issue execution by leave hereunder.(5)

"**Against any property of the partnership.**"—As already stated, execution will not issue against any partnership property except on a judgment against the firm.

"**Against any person who has appeared,**" **etc.**—As to effect of entry of appearance under O. XXX. rr. 6–8, see that rule, *supra*, and respective notes thereto, "They shall appear individually" and "Unless he is a partner of the firm sued." If in an action against a firm in the firm name, a partner who has appeared as such dies before judgment, his estate is not liable, except so far as it consists of property of the partnership.(6)

"**Has failed to appear.**"—Where one person is trading as a firm, execution cannot in England issue against him under clause (*c*) of this rule, unless he has been individually served (either personally or by substituted service), or leave has been obtained under the rule.(7) As to a case where the writ is served first on the person in charge of the business of the firm and afterwards on a partner, see below.(8)

"**Claims to be entitled to cause the decree to be executed.**"—This does not include a partner who has left the firm to the knowledge of the plaintiff before action brought. If he has been served with the writ as provided by O. XXX. r. 3, *supra*, he becomes liable under clause (*b*) or (*c*) of this rule. The proviso to that rule is imperative, and if he has not been served with the writ no order can be made against him hereunder.(9) Where the Master ordered an issue, "Whether the said S.M.H. was, *or had held himself out to be*, a partner," and the Judge varied the issue by limiting it to whether the person sought to be

(1) *Ex parte* Young, 19 C. D. 124; and see Davies *v.* Morris, 10 Q. B. D. 436.

(2) Wigram *v.* Cox & Co., 1 Q. B. 792 (1894).

(3) Brand *v.* Sandground, 85 L. T. 517.

(4) See O. XXX. r. 9. Cf. also note, "Action between partners."

(5) Davies *v.* Andrews, W. N. (84) 94; see also Daniells, Ch Pr. 832.

(6) See Ellis *v.* Wadeson, 1 Q. B. 714 (1899).

(7) See O. XXX. r. 10, note, "Cases."

(8) See Alden *v.* Beckley & Co., 25 Q. B. D. 543; O. XXX. rr. 1–3, cited *supra*, note, "Several services;" and see O. XXX. r. 5, note, "Deemed to be served as a partner." See also Baishnab Charan Saha *v.* Bank of Bengal, 19 C. L. J. 581 (1914) (service on an alleged partner who failed to appear).

(9) Wigram *v.* Cox & Co., 1 Q. B. 792 (1894).

made liable was a partner at the time the cause of action arose, the C. A. reversed the Judge's order, and held that the issue directed by the Master was right.(1)

"**Shall not release, render liable or otherwise affect.**"—These and the preceding and following words of the rule limit in England the operation of a judgment against a firm to (*A*) partnership property within the jurisdiction; (2) (*B*) the private property of any partner who was within the jurisdiction when the writ was issued and has become liable to execution under (*a*), (*b*), or (*c*) of this rule; (*C*) the private property within the jurisdiction of any partner who was out of the jurisdiction when the writ was issued, but who has become liable to the jurisdiction of the Court, 1st, by appearing to the writ, or 2ndly, by failing to appear after being duly served outside the jurisdiction, or having been served with the writ within the jurisdiction and having failed to appear. The present rule omits reference to jurisdiction in clause (*a*), and clause (1) has been simplified in the manner appearing.

The rule in England as regards joint contractors has been thus stated: (3) "An action and a judgment against some of several joint contractors is a bar to subsequent proceedings against the remainder of them on the same contract.(4) And this holds good when the joint contractors are partners in a firm (5) sued, not in the firm name, but as individuals. A judgment against a firm sued in the name of the firm is a judgment against all the partners in the firm.(6) And even where partners are sued together by their names and not in the name of the firm, judgment against one is no bar to continuance of the action against the others.(7) But a judgment entered by consent against one joint contractor, if pleaded, is a bar to further proceedings against others.(8) And it has been held that where one of two joint contractors gave a cheque for the amount of the joint debt, and was sued to judgment on the dishonoured cheque, the action and judgment were no bar to a subsequent action against the other joint contractor on the original contract.(9) Sect. 43 of the Contract Act alters the rule of English law, that all joint contractors must be sued jointly. The promisee may, in this country, sue any one or more of the joint promisors.(10) The applicability moreover of the principle of bar for jointness (11) in this country has been the subject of considerable discussion. It was considered applicable

(1) Davis *v.* Hyman & Co., 1 K. B. 854, C. A. (1903).

(2) Cf. note, "Infant partner," *supra*.

(3) Ann. Pr., notes to O. 48A, r. 8.

(4) King *v.* Hoare, 13 M. & W. 494.

(5) Kendall *v.* Hamilton, 4 App. Cas. 504.

(6) See judgment of Lindley, L. J., Western National Bank & Co. *v.* Perez, 1 Q. B., p. 314 (1891).

(7) See Ann Pr., note to O. 48, r. 8, "Joint Contractors," and Weall *v.* James, 68 L. T. 54.

(8) McLeod *v.* Power, 2 Ch. 295 (1898); and cf. Munster *v.* Cox, 10 App. Cas 680, cited O. XXX. rr. 6-8, *supra*, and notes as to "Action against firm," and "Appearance by one," etc.

(9) Wegg-Prosser *v.* Evans, 2 Q. B. 101 (1894); 1 Q. B. 108 (1895).

(10) Lukmidas Khimji *v.* Purshotam Haridas, 6 B. 700, 701 (1882); though a defendant might apply to the Court to have his co-contractor added as a party: Pollock's Indian Contract Act, p. 188.

(11) See Hukm Chand, Res. Jud., 734, where the subject is fully discussed; and Pollock, p. 41, and p. 186, and Cunningham & Shepherd's Contract Act, notes to s. 43.

in the cases undermentioned.(1) The Allahabad High Court,(2) however, has held that the effect of sect. 43 of the Contract Act being to exclude the right of a joint contractor to be sued along with his co-contractors, the English rule is no longer applicable in India; at all events in the Mofussil. Since the passing of that Act a judgment obtained against some only of the joint contractors, and remaining unsatisfied, is no bar to a second suit on the contract against the other joint contractors.(3)

Unless summons has been served.—Partners carrying on business within the jurisdiction may be sued in the name of the firm (O. XXX. r. 1); service within the jurisdiction is to be deemed good service on the firm whether any members are out of the jurisdiction or not (ib. 2, 3).

Attachment of negotiable instruments.

51. *Where* the property *is* a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

Attachment of property *in custody of* Court or *public* officer.

52. *Where* the property *to be attached is* in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice *is* issued:

Provided that, *where* such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

Property in Court's custody.—This rule corresponds with sect. 237 of Act VIII. of 1859, save that in such section the property in deposit was described as property which "*shall consist of money, or any security.*" It is similar to sect. 272 of the Codes of 1877 and 1882, save for the slight verbal alterations indicated in italics. The rule does not apply to a case where the property sought to be attached has, under the decree being executed, been declared the property of

(1) Hemendro Coomar Mullick *v.* Rajendro Lall Moonshee, 3 C. 353 (1878); Gurusami Chetti *v.* Samurti Chetti, 5 M. 37 (1881); Luckmidas Khimji *v.* Purshotam Haridas, *supra*; Lakshmishankar *v.* Vishnuram, 24 B. 77 (1899).

(2) Muhammad Askari *v.* Radhe Ram Singh, 22 A. 307 (1900); and see Mathura Prasad *v.* Ramchandra Rao, 25 A. 57 (1902).

(3) Sir F. Pollock, in his Indian Contract Act, p. 187, expresses an opinion in the same sense, but states that until it has been adopted by the other High Courts or confirmed by the Privy Council the point must be regarded as open.

decree-holder.(1) The form of attachment is given in the First Sched. App. E. No. 7.

"**Where the property.**"—This does not include the life interest of a beneficiary in a trust estate in the hands of the Official Trustee.(2)

"**In the custody of.**"—This means actual custody,(3) and not in anticipation of property coming into custody.(4) If it be in the custody of a Receiver appointed by Court, sanction to attach must first be obtained from the Court, and will only be granted on such terms as would ensure equality between the creditors; (5) such an attachment without sanction will not be recognized.(6) Letters containing money addressed to the judgment-debtor can be attached in the hands of the Post Office.(7) The Official Trustee is a public officer.(8)

"**Shall be made by a notice.**"—A Court has no discretion to refuse an application for attachment under this rule.(9) A notice sent to a Court is sufficient to make an effectual attachment of moveables in its hands even though the Court refuse to receive it.(10)

"**May be held subject to the further orders.**"—A Collector in whose hands moneys are attached cannot pay away the same without orders of the attaching Court.(11)

"**In the custody of a Court.**"—The second clause does not cover the custody of a Collector, and no determination of any question can be made.(12)

"**Any question of title or priority.**"—Where one Court attaches and then makes an order directing another Court to pay certain moneys to A and before payment the amount is attached by B, the second Court has ceased to have a disposing power over the money, and cannot try any question of title or priority.(13) A and B obtained a decree against X and Y. Z obtained a decree against A and B for a lesser sum and attached the first decree, whereupon A and B paid the money into Court and alleged Z's decree was really that of X, it was held that, though such allegations had not been raised in Z's suit, it could be raised in execution and, on its being substantiated, that A and B were entitled to enforce for the purpose of satisfying their decree any claim that X could have done, and Z's claim to the money in Court was disallowed.(14)

(1) Pudmanund *v.* Chundi Dat Jha, 1 C. W. N. 170 (1896).

(2) Abdul Lateef *v.* Doutre, 12 M. 250 (1889).

(3) Muttukaruppan *v.* Mutturamalinga, 7 M. 47 (1883).

(4) Tulaji Fatesing *v.* Balabhai, 22 B. 39 (1896); followed in Padmanund *v.* Ramaprasad, 16 C. W. N. 14 (1911); 14 C. L. J. 127.

(5) J. Khan *v.* Alli Mahomed, 16 B. 577 (1892).

(6) Mahommed Zohuruddeen *v.* Mahomed Noorooddeen, 21 C. 85 (1893).

(7) Narasimhulu *v.* Adiappa, 13 M. 242 (1890).

(8) Abdul Lateef *v.* Doutre, 12 M. 250 (1889).

(9) Noor Jehan *v.* Mashitty, 8 C. L. R. 17 (1880).

(10) John Tiel & Co. *v.* Abdool Hye, 19 W. R. 37 (1872).

(11) Saefollah *v.* Luchmeeput, 13 W. R. 58 (1870).

(12) In matter of Brojonath Mitter, 13 W. R. 301 (1870).

(13) Gopee Nath *v.* Acheha Bibee, 7 C. 553 (1881).

(14) Atchayya *v.* Bangarayya, 16 M. 117 (1892).

"**Shall be determined by such Court.**"—That is, the Court in whose custody the property is. Thus, where such Court is the Small Cause Court and an attachment is made under this rule by the High Court, the Small Cause Court is still the Court to adjudicate on questions raised by a claimant.(1) The mode of investigating is provided for in O. XXI. rr. 58–63.(2) A suit, it has been held, lay to set aside an order made under the former section.(2)

Attachment of decrees.

53. (1) *Where* the property *to be attached is* a decree, *either* for *the payment of* money *or for sale in enforcement of a mortgage or charge*, the attachment shall be made,—

(*a*) *if the decrees were passed by the same Court, then* by order of *such* Court, and,

(*b*) *if the* decree *sought to be attached was* passed by *another* Court, *then* by *the issue* to such *other* Court *of* a notice *by* the Court which passed the decree sought to be executed, requesting *such other* Court to stay the execution of its decree unless and until—

(*i*) the Court which passed the decree sought to be executed cancels the notice, or

(*ii*) the holder of the decree sought to be executed *or his judgment-debtor* applies to the Court receiving such notice to execute its own decree.

(2) *Where a* Court *makes an order under clause* (*a*) *of sub-rule* (1), *or* receives *an* application *under sub-head* (*ii*) *of clause* (*b*) *of the said sub-rule, it* shall, *on the application of the creditor who has attached the decree or his judgment-debtor*, proceed to execute the *attached* decree and apply the *net* proceeds in satisfaction of the decree sought to be executed.

(3) *The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule* (1) *shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.*

(4) *Where the property to be attached in the execution of a decree is a decree* other *than a* decree *of the nature referred to in sub-rule* (1), the attachment shall be made, by a notice *by* the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, *where* such decree has been passed by any other Court, also by sending to such *other* Court a notice to abstain from executing the decree

(1) Jeynarayan Meghraj *v.* Ismail Kurimali, 19 B. 710 (1895).

(2) Tikum Singh *v.* Sheo Ram, 19 C. 286 (1891).

sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this *rule* shall give the Court executing the *decree* such information and aid as may reasonably be required.

(6) *On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.*

Attachment of decrees.—This rule corresponds with sect. 273 of Acts X. of 1877 and XIV. of 1882, though the arrangement has been altered. The third and sixth clauses are new. The particular procedure by this rule in the previous Code was confined to money decrees. A money decree cannot be sold.(1) Under the Code of 1859, however, a decree for money could be sold.(2) A decree for dissolution of partnership can be regarded as a money decree and cannot be sold.(3) But a decree declaring a person entitled to recover possession of immoveable property with mesne profits is not a decree for money; (4) nor was a decree on a mortgage,(5) and it could be sold; (6) so also might a decree for redemption.(7) Under the present Code the procedure in regard to the attachment and realization of a decree for sale in enforcement of a mortgage or charge is regulated by this rule.(8) This rule applies to cases of attachment before judgment.(9)

Clause (*a*).—Under the wording of the first clause of sect. 273 of Act X. of 1877, which ran, "*If the property be a decree for money passed by the Court which passed the decree sought to be executed, the attachment shall be made by an order of the Court,*" etc., it was held that this also applied to cases where the decrees were passed by different Courts but were being executed by one Court.(10)

(1) Gopal Nanashet *v.* Joharimal, 16 B. 522 (1891); Sultan Kuar *v.* Gulzari Lal, 2 A. 290 (1879); Tiruvenga[illegible] *v.* Vythilinga, 6 M. 418 (1883); Jotindro Nath *v.* Dwarka Nath, 20 C. 111 (1891).

(2) Golam *v.* Indro Chand, 15 W. R. 34 (1871); 7 B. L. R. 318.

(3) Sidlingappa *v.* Shankarappa, 27 B. 556 (1903).

(4) Vasudeva *v.* Narayana, 24 M. 341 (1900).

(5) Baij Nath Lohea *v.* Binoyendra Nath Palit, 6 C. W. N. 5 (1901); Jogendra *v.* Hiranyakumar, 2 C. L. J. 499 (1904); Macnaghten *v.* Surja Prosad, 4 C. W. N. xxxv. (1899); Delhi & London Bank *v.* Partab Singh, 28 A. 771 (1906).

(6) Jogendra *v.* Hiranyakumar, 2 C. L. J. 499 (1904).

(7) Naigar Timapa *v.* Bhaskar, 10 B. 444 (1886).

(8) Kuppusami *v.* Subbaraya, 22 M. L. J. 161 (1911).

(9) Venkayya *v.* Lakshmiah, 22 M. L. J. 394 (1912).

(10) Sultan Kuar *v.* Gulzari Lal, 2 A. 290 (1879).

Clause (*b*). "Passed by another Court."—This does not include a decree for money passed by a Revenue Court.(1) The other Court on receiving the order is bound to comply therewith, and is debarred from proceeding with the execution unless the bar is removed in one of the ways specified in the section, and a sale notwithstanding the order attaching the decree is invalid.(2)

"Shall . . . proceed to execute."—The Court has no power after receipt of notice to sanction an adjustment; (3) nor can it return the notice to the Court which sent it as the amount for which the attachment was issued was not stated, and then proceed to execute its own decree. The Court on receiving the notice is bound to comply with it.(4)

Sub-rule (4).—This refers to decrees other than money decrees; (5) and under the previous Code, where the wording of this clause ran, "*In the case of all other decrees*," it was held to include decrees for redemption,(6) and decrees for sale of immoveable property under sect. 88 of the Transfer of Property Act.(7) The present rule, however, excludes decrees for sale in enforcement of a mortgage or charge as well as decrees for the payment of money from the operation of this clause. When "the Court which passed the decree" attaches its own decree, it may execute such decree on the application of the attaching creditor.(8) In the previous Code this clause concluded with the words, "Every Court receiving such notice shall give effect to the same until it is so cancelled"; that is, to abstain from executing the decree. The Court receiving the notice cannot substitute in the record of the decree being attached the judgment-creditor for the judgment-debtor in the decree being executed.(9)

Attachment of immoveable property.

54. (*1*) *Where* the property *is* immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from *taking any benefit from such transfer or charge.*

(*2*) *The* order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be *affixed on* a conspicuous

(1) Aulia Bibi *v.* Abu Jafar, 21 A. 405 (1899).

(2) Manik Lal Seal *v.* Banamali Morkeyee, 32 C. 1104 (1905); s. c., 10 C. W. N. 193.

(3) Gopal Nanashet *v.* Joharimal, 16 B. 522 (1891).

(4) Manik Lal Seal *v.* Banamali, 32 C. 1104 (1905); 10 C. W. N. 193; 3 C. L. J. 27. It was said by Maclean, C.J., in Adhar *v.* Lal Mohun, 24 C. 778 (1897) (under the last Code), that attachment of a decree did not prevent a holder from executing it; but the Madras High Court has held that the only person competent to execute is the attaching creditor who will be liable in damages if he allows the decree to be barred by limitation T. Unni Koya *v.* A. P. Umma, 35 M. 622 (1911).

(5) Sultan Kuar *v.* Gulzari Lal, 2 A. 290 (1879).

(6) Naigar Timapa *v.* Bhaskar, 10 B. 444 (1886).

(7) Delhi & London Bank *v.* Partap Singh, 28 A. 771 (1906); 3 A. L. J. 585 (F. B.).

(8) Peary Mohun *v.* Romesh Chunder, 15 C. 371 (1888); Rangasami *v.* Periasami, 17 M. 58 (1893).

(9) Barbma Din *v.* Baji Lal, 26 A. 91 (1903).

part of the property and *then upon a conspicuous part* of the court-house, *and also, where* the property is land paying revenue to *the* Government, in the office of the Collector of the district in which the land is situate.

Mode of attachment of immoveable property.—The first clause of the present rule corresponds with sect. 235 of Act VIII. of 1859, the wording being practically the same. The present form was adopted by sect. 274 of Act X. of 1877, save that the words "*taking any benefit from such transfer or charge*" have been substituted for "*receiving the same from him by purchase, gift, or otherwise.*" The remaining clause corresponds with portions of sect. 239 of Act VIII. of 1859. In that section the words were "*the written order shall be read out.*" This was altered by sect. 274 of Act X. of 1877 to "*the order shall be proclaimed,*" which Act added the words "*by beat of drum or other customary mode*" and "*paying revenue to Government.*" Certain verbal alterations have been made as shown in italics.

"**Where the property is immoveable.**"—Decrees for money charged on land are immoveable property.(1) A decree for redemption cannot be attached under this rule, but under O. XXI. r. 53.(2) A debt secured by mortgage of immoveable property should be attached under this rule and not under O. XXI. r. 46; (3) later cases have, however, held that such a debt, especially if the mortgagee is not in possession, is not immoveable property, and need not be attached under this rule; (4) at most omission to attach under this rule is an irregularity.(5)

It has been recently held that in the case of a purely usufructuary mortgage, where there is no debt payable by the mortgagor, the procedure should be by attachment (under this rule) of the interest in immoveable property.(6) An attachment is not necessary in execution of a mortgage decree, where the decree contains a direction for sale.(7) When this point was raised before the Privy Council they would not go into it, and held a sale, without attachment, in execution was good on the ground that the properties had been attached under a previous decree arising out of the same mortgage transaction.(8) The sale of a mortgage debt, in execution of a decree, carries with it the security without

(1) Appasami *v.* Scott, 9 M. 5 (1884); Sami *v.* Krishnasami, 10 M. 169 (1886); Bhawani *v.* Gulab Bai, 1 A. 348 (1877); but see Abdul Majid *v.* Muhammad Faizulla, 13 A. 89 (1890).

(2) Naigar Timapa *v.* Bhaskar, 10 B. 444 (1886).

(3) Srinath Dutt *v.* Gopal Chundra, 9 C. 511 (1883).

(4) Debendro Kumar *v.* Rup Lall, 12 C. 546 (1886); Kasinath *v.* Sadasiv, 20 C. 805 (1893); Karim-un-nissa *v.* Phul Chand, 15 A. 134 (1893); Nataraya Iyer *v.* South Indian Bank of Tinnevelly, 37 M. 51 (1914); 22 M. L. J. 105 (1911); Tarvadi Bholanath *v.* Bai Kashi, 26 B. 305 (1902); Abdul Majid *v.* Muhammad Faizulla, 13 A. 89 (1890); Baijnath Lohea *v.* Binoyundra Nath Palit, 6 C. W. N. 5 (1901); Baldeo Danrup *v.* Ramchandra Balvant, 19 B. 121 (1895); Munivappa Naik *v.* Subrahmaniya Ayyar, 18 M. 437 (1895).

(5) Muniappa *v.* Subramania, 18 M. 437 (1894).

(6) Manilal *v.* Motibhai, 35 B. 288 (1911).

(7) Dayachand *v.* Hemchand, 4 B. 515 (1880).

(8) Dosibai *v.* Ishvardas, 15 B. 222 (1891 P. C.); 18 I. A. 22.

attaching the mortgaged property under this rule.(1) The equity of redemption of a mortgagor can be attached under this rule, the attachment being by order prohibiting the judgment-debtor from dealing with it in any way and all persons from receiving it, such order being proclaimed and notified as therein directed.(2) The execution of mortgage decrees are now governed by O. XXXIV., but prior to the present Code they were governed by the rules made under the Transfer of Property Act in Bengal and Assam.(3) The life interest of a Hindu widow under her husband's will in the income of his immoveable estate is immoveable property and is attachable.(4)

"**By an order prohibiting.**"—This should be the procedure where the property sought to be attached is a factory in the possession of a prior mortgagee, and not by putting *peons* in possession.(5) The prohibitory order does not have the effect of dispossessing the judgment-debtor.(6) For form of prohibitory order, see the First Sched. App. E. No. 8.

"**The property.**"—Where an attachment was made of the debtor's share without specifying the share, it was held only to cover the share and not the whole property.(7)

"**Proclaimed.**"—Omission of the beat of drum was held to be a material irregularity, and the sale was cancelled.(8) Objections as to irregularities in the proclamation cannot be taken on appeal to the P.C. for the first time.(9)

55. *Where—*

Removal **of attachment after satisfaction of decree.**

(*a*) the amount decreed with costs and all charges and expenses resulting from the attachment of any property *are* paid into Court, or

(*b*) satisfaction of the decree *is* otherwise made through the Court *or certified to the Court*, or

(*c*) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Removal of attachment.—This rule corresponds with sect. 245 of Act VIII. of 1859, and down to the words "*otherwise made*" was practically as it

(1) Baldeo Dhanrup *v.* Ramchandra, 19 B. 121 (1893).

(2) Parashram *v.* Govind Ganesh, 21 B. 226 (1895).

(3) *Calcutta Gazette*, Pt. I., p. 414, dated 13th April, 1892; *Assam Gazette*, Pt. III., p. 272, dated 16th April, 1892.

(4) Nath Kerra *v.* Dhunbriji, 23 B. 1 (1898).

(5) Mudhun Mohun *v.* Gokul Doss, 10 Moo. I. A. 563, p. 571.

(6) Narayanrav *v.* Balkrishna, 4 B. 529 (1880).

(7) Suroop Narain *v.* Ram Tahul, 18 W. R. 106 (1872).

(8) Trimbak *v.* Nana, 10 B. 504 (1886).

(9) Ramkrishna *v.* Surfunnissa, 6 C. 129 (P. C. 1880); 7 I. A. 157.

now stands. It then continued "*an order shall be issued for the withdrawal of the attachment; and if the defendant shall desire it and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclaimed or intimated in the same manner as hereinbefore prescribed for the proclamation or intimation of the attachment; and such steps shall be taken as may be necessary for staying further proceedings in execution of the decree.*" This was repealed by sect. 275 of Act X. of 1877, which concluded with the words "*an order shall be issued on the application of any person interested in the property for the withdrawal of the attachment.*" For this has been substituted the last clause in italics by the present Code, which also added the words in italics in clause (*b*). But where property has been attached, an order dismissing an application for execution but not specifically withdrawing the attachment or declaring the decree incapable of execution, did not, it was held, raise the attachment. If on appeal such order were set aside the decree-holder was entitled to the full benefit of his attachment.(1) The striking off of execution proceedings from the file of a Court did not, it was held, interfere with the continuance of an attachment.(2) A sale in pursuance of an attachment being set aside does not displace the attachment; (3) nor does the death of the judgment-debtor,(4) even though he be a Mitakshara coparcener and his interest in the property attached passed to the surviving coparceners.(5) An attachment nine years old in execution of a decree twelve years old in the absence of other information must, it was held, be assumed to have been removed.(6) See, however, now as to striking off on default of prosecution of execution proceedings the notes to r. 57, *post*. Sums paid into Court under this rule are not assets within the meaning of sect. 73.(7)

Order for payment of **coin or currency notes to party entitled** *under decree.*

56. *Where* the property attached is *current* coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

Determination of attachment.

57. *Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.*

(1) Bank of Upper India *v.* Sheo Prasad, 19 A. 482 (1897); Golam Yaheya *v.* Sham Soonduree, 12 W. R. 142 (1869).

(2) Syud Nadir *v.* Pearoo Thovildarinee, 14 B. L. R. 425 note.

(3) Gossain Munraj *v.* Deen Dyal, 20 W. R. 20 (1873).

(4) Sheo Pershad *v.* Hira Lal, 12 A. 440 (1889).

(5) Beni Pershad *v.* Parbati, 20 C. 895 (1892).

(6) Goonjessur *v.* Luchmee, 20 W. R. 418 (1873).

(7) Sorabji Coovarji *v.* Kala Raghunath 36 B. 156 (1911).

"**Decree-holders' default.**"—It was pointed out (1) that the last Code did not contain anything like a complete procedure for proceedings in execution. It did not suggest what procedure should be adopted in cases analogous to those which might occur during the hearing of a suit and which were provided for by Chapter XIII. of that Code. Further, it was clear, both from the Code itself and from the provisions of the Limitation Act, that the Legislature contemplated that there might be a succession of applications for execution.(2) Where final orders adjudicating upon the right to have execution have been made, the principle of *res judicata* is applicable (see sect. 11).(3) But under the former practice an application for execution might be made but might not be proceeded with. The Code did not prohibit an application for execution where a former application to that effect had been withdrawn without liberty to present a fresh one.(4) Nor, as stated, did it provide for cases where the application could not proceed for default of the decree-holder. In such cases a practice arose, with the object of disencumbering the files of the Court, of "striking off" applications. It was frequently pointed out that this practice was not justified by the Code,(5) and that there were (apart from the question of adjournment) only two ways of judicially disposing of any application, that is, by granting or dismissing it in whole or in part.(6) The effect of an order "striking off" was discussed in numerous cases. An attachment was not necessarily at an end because the execution-case was struck off the file. The effect of such an order depended on the circumstances of the case.(7) There was no general rule as to the effect of striking off an execution-case from the file.(8) Such an order did not necessarily put an end to the attachment, and it was competent for the Court to make such an order and at the same time continue the attachment.(9) It was open to the decree-holder to revive the execution-proceedings and continue it from the point where it had previously stopped.(10) Where by a mistake of the Court

(1) See Edge, C.J., in Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893), at p. 94.

(2) Thakur Pershad *v.* Sheikh Fakir-ullah, 22 I. A. 44, 50 (1894).

(3) Ram Kirpal Shukul *v.* Rup Kuari, 11 I. A. 37 (1883); followed in Subba Chariar *v.* Muthuveeran Pillai, 36 M. 553 (1912).

(4) Thakur Pershad *v.* Sheikh Fakir-ullah, 22 I. A. 44, 50 (1894).

(5) Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893), at p. 96; Baroda Sundari *v.* Fergusson, 11 C. L. R. 17 (1882); Biswa Sonan *v.* Binanda Chunder, 10 C. 416 (1884), and cases cited, *post.*

(6) Dhonkal Singh *v.* Phakkar Singh, *supra* at pp. 94, 95.

(7) Zahuran *v.* Tayler, 2 B. L. R. 86, 92 (1868); Srinivasa Sastrial *v.* Sami Rau, 17 M. 180, 182 (1893); Chintaman Damodar *v.* Balshastri, 16 B. 294 (1891).

(8) Mohunt Bhagwan Das *v.* Khetter Moni Dassi, 1 C. W. N. 617 (1896).

(9) Peary Lall Sinha *v.* Chandi Charan Sinha, 11 C. W. N. 163 (1906); but see Ram Newaz *v.* Ram Charan, 18 A. 49 (1895).

(10) Peary Lall Sinha *v.* Chandi Charan Sinha, 11 C. W. N. 163 (1906); Shaikh Kumaruddin *v.* Jawahir Lal, 32 I. A. 102; 9 C. W. N. 601 (1905); and see generally as to the effect of striking off an execution-case, Rajah Muhesh Narain *v.* Kishanund Misr, 9 M. I. A. 328, at p. 337 (1862); Bagram *v.* Wise, 1 B. L. R. 91 (1868), F. B.; Puddomonee Dossee *v.* Roy Mothooranath, 12 B. L. R. 411 (1873) P. C. [it may be presumed that an execution long neglected and finally struck off has ceased to be operative, and in that case a judgment-creditor's title will only date from any subsequent attachment which he may obtain. Dist. in Maharance Indurjeet Kooer *v.* Luchmun Singh, 24 W. R. 56 (1875)]; Jhatu Sahu *v.* Ramacharan Lal, 3 B. L. R. app. 68 (1869) [if property is once attached the attachment will subsist if not expressly abandoned until an order is issued for its withdrawal, even though no further steps are

an application for execution against attached property was dismissed, but there was no order removing the attachment, and the decree-holder obtained a review, and the executing Court was directed to proceed, it was held that the attachment subsisted as against a sale made by the judgment-debtor previous to the review.(1)

The "striking-off" or shelving of an execution application thus admitted of different interpretations according to the circumstances. It might have the effect of killing the particular application without any adjudication on the merits. So if such an order was passed in consequence of some default of applicant not going to the merits of his right to have satisfaction of his decree (*e.g.* default in appearance; failure to pay process fees, or to put in copies of papers called for, etc.), in such cases though the order might put an end to the particular application in which it was passed, it did not bar a subsequent application for execution if it were made within the period of limitation.(2) Further, as sect. 158 of the Code of 1882 did not apply to execution-proceedings, there was no statutory provision for cases of decree-holder's default.(3) If, on the other hand, such an order was passed on the merits of the application, *e.g.* by a finding that the decree had been satisfied or that execution was barred by some previous order which would operate as *res judicata*, then so far as the Court executing the decree was concerned, the application was taken to have been finally disposed of in a manner adverse to applicant's right to have the decree executed, and no further application for execution could be entertained unless in pursuance of a successful appeal.(4) In these cases the effect of the order was to render the decree dead and incapable of execution or further execution.

Further, as pointed out by Edge, C.J., in the case cited,(5) it is necessary

taken on the attachment within a reasonable period]; Sheikh Golam *v.* Mt. Shama Sundari, 3 B. L. R. 134 (1869) [mere striking off does not release attachment]; Binda Bibee *v.* Lalla Gopee Nath, 14 B. L. R. 323 (1874) [striking off in this case extinguished attachment]; Chamun Lall *v.* Domun Lall, 9 W. R. 205 (1867); Syud Nadir Hossein *v.* Pearoo Thovildarinee, 14 B. L. R. 425 n. (1873) [striking off affects only the files of the Court, and application for sale not attachment]; Baroda Sundari *v.* Fergusson, 11 C. L. R. 17 (1882) [striking off is not in accordance with the Code, but for convenience of Court]; Biswa Sonan *v.* Binanda Chunder, 10 C. 416 (1884) [proper cause is not to strike off but to dismiss; a case so dismissed may be restored]; Surdharee Lall *v.* Girindar Chunder, 1 C. L. R. 475 (1877); Mungal Pershad Dichit *v.* Grija Kant Lahiri, 8 C. 51 (1881); Syam Singh *v.* Baidya Nath Rai, 13 C. L. R. 176 (1883); Soondur Singh *v.* Buhooria Alum, 24 W. R. 36 (1875); Gungagotti Pal *v.* Ram Sunder Dut, 8 C. L. R. 159 (1881) [attachment held removed]; Rangasami *v.* Periasami, 17 M. 58 (1893); Raghubans Gir *v.* Sheosaran Gir, 5 A. 243 (1882); Venkatrav Bapu *v.* Bijesing Vithalsing, 10 B. 108 (1885); Lakshmi *v.* Atchanna, 15 M. 240 (1891) [a decree-holder whose application is struck off for failure to pay process-fees may apply again]; Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893); Jitmal *v.* Jivala Prasad, 21 A. 155 (1898) [struck off because application infructuous]; Ram Newaz *v.* Ram Charan, 18 A. 49 (1895) [order striking off and maintaining attachment illegal]; Rattanji *v.* Hari Har Dat, 12 A. 243 (1895) [appeal from order striking off]. Krishna Subudhi *v.* Janaki Ram, 19 C. L. J. 348 (1914) (attachment terminable by order of dismissal).

(1) Aziz Bakhsh *v.* Kaniz Fatima, 34 A. 490 (1912).

(2) Dhonkal Singh *v.* Phakkar Singh, 15 A. 84 (1893), at p. 103; Mandhyan Sheikiya *v.* Badram Dalni, 17 C. W. N. 204 (1912).

(3) Ib., at p. 93.

(4) Ib., at pp. 102, 103.

(5) Ib., at p. 95.

that the Courts should have power to dispose of applications for execution when the parties fail to appear or when a party to whom time has been granted to do a particular act necessary to the progress of the application fails to do so.

This rule is apparently designed to cure this defect.

It was said in the statement of Objects and Reasons of the first Bill that the necessity for some definite procedure in these matters was generally admitted, and one of the principal objects of the draft suggested was to prevent delay and uncertainty by compelling creditors to put the Court in a position to proceed until their claims were satisfied and by prescribing more clearly what classes of orders operated as a bar to applications and objections. No doubt a decree-holder who has from time to time to trace and identify his judgment-debtor's property cannot be expected to prosecute the execution-proceedings with the regularity and continuity exigible in a suit. At the same time the former practice, by encouraging the decree-holder to drop successive applications without informing the Court, tended to throw proceedings into confusion and uncertainty and encumbered the files of the Court. It was, moreover, apprehended that the want of any inducement to press on the execution to a conclusion resulted in the practice of merely keeping alive the decree with the object of harassing the judgment-debtor by allowing interest and costs to accumulate.(1) It was therefore considered desirable (and with this view the first draft was prepared) to declare that execution-proceedings, once started, must be continuous and to impose penalties for default, but on the other hand to afford a decree-holder reasonable facilities for staying proceedings and having them removed from the file. With this object elaborate provisions were proposed in the original draft.

The Select Committee, while adopting in the main the principles of the draft, omitted some provisions and shortened or modified others. The original draft provided that unless the order of dismissal was set aside, the decree-holder should be precluded from proceeding further with the execution of the decree The Select Committee, however, considered that this was too severe a penalty for an error of procedure; and the rule was by them limited to the disability to preclusion from assistance of the same nature as that sought from the Court *in the application dismissed for default.* The original draft provided *that* dismissal on the merits should, unless such dismissal was reversed in appeal, be a bar to further execution. This was omitted, as the *res judicata* clause of the original Bill expressly extended to proceedings other than suits and thus dispensed with this provision. Though sect. 11 of the present Act has not been amended as proposed, the principle of *res judicata* is recognized to be applicable. See notes to sect. 11 on interlocutory orders and execution-proceedings. Where an application for execution is dismissed for default on the part of the decree-holder, the Court executing the decree may direct him to bear all costs incurred by him in the execution-proceedings.(2)

The provisions of these rules, if adopted, would have affected the previously existing practice with regard to "striking off" applications, and renewal of applications; and have met several deficiencies in the preceding Code and enacted a stricter procedure in matters of execution.

(1) See observations of Edge, C.J., in Dhonkal Singh *v.* Phakkar Singh, 15 A. 84, at pp. 90, 91 (1893).

(2) See Dhonkal Singh *v.* Phakkar Singh, 15 A. 84, at pp. 87, 91 (1893).

Under these rules the Court was required to proceed with execution if it was in a position to do so. If it was not in such a position by reason of the decree-holder's default, the Court might require him to put it in a position to proceed, and allow time for such purpose, and thereafter or at once dismiss the application. The effect of such an order, unless set aside, was that above stated. If, being in a position to proceed, it dismissed the application on the merits (in the sense stated), whether upon the judgment-debtor's objection or otherwise, any further application was barred unless the order of dismissal was set aside on appeal. Where an order for execution was made *ex parte*, the judgment-debtor might, on the analogy of decrees,(1) apply to set aside the order. In all these cases definite orders granting, dismissing or setting aside grants should have been made which would have had the effect stated.

Provision was finally made for withdrawal (but only with the leave of the Court) of the application. This leave was required in order to put an end to capricious and harassing withdrawals. The effect, however, of this "striking off" of the application from the list differed from what was held to be in many cases the effect of a similar order under the preceding Code. The attachment no longer existed, all processes in execution of the decree coming to an end. A fresh application for execution could subsequently be made unless it was barred by limitation. The provisions proposed by the Select Committee have not been adopted, and in their place has been substituted the present rule, which provides that if the Court does not adjourn the proceedings it shall dismiss the application upon which the attachment ceases. There is to be no "striking off" of applications. If the proceedings are not adjourned the application must be dismissed. There is no doubt that a dismissal after hearing on the merits is, unless reversed on appeal, a bar to further execution. The present rule does not state, however, whether a dismissal for default can, and if so on what grounds, be set aside, and whether if not set aside a fresh application for execution, if made within the period of limitation, is or is not barred. This provision does not apply to a case in which an order for attachment before judgment was obtained.(2) Revival of execution-proceedings will not revive the attachment so as to prejudice the rights of strangers who have in the interval acquired an interest in the property.(3) It is not open to the Courts to consider what the Judge or the parties intended. After the dismissal of an application under this rule, the attachment ceases, even if the Judge intended to continue it.(4) Default in this rule cannot be given a restricted meaning; but must have its ordinary meaning—failure to do what one is legally bound to do.

(1) See Biswa Sonan Chunder *v.* Binanda Chunder, 10 C. at p. 422 (1884); where by virtue of s. 647 of the last Code s. 108 was held applicable to execution-proceedings. But the view expressed was no longer correct after the passing of Act VI. of 1892. See Dhonkal Singh *v.* Phakkar Singh, 15 A. 84, at pp. 92, 93 (1893).

(2) Ganesh *v.* Banwari, 16 C. W. N. 1097 (1912).

(3) Patringa *v.* Madhava, 16 C. W. N. 333 (1911); Sasirama *v.* Maherban, 13 C. L. J. 240 (1911).

(4) Namuna *v.* Roshan, 38 C. 482 (1911); 13 C. L. J. 621; 15 C. W. N. 428.

Investigation of claims and objections.

Investigation of claims to, and objections to attachment of, attached property.

58. (1) *Where* any claim *is* preferred to, or any objection *is* made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

Postponement of sale.

(2) *Where* the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Evidence to be adduced by claimant.

59. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Release of property from attachment.

60. *Where* upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in *the* possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall *make* an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

Disallowance of claim to property attached.

61. *Where* the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

Continuance of attachment subject to claim of incumbrancer.

62. *Where* the Court is satisfied that the property is subject to a mortgage or *charge* in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or *charge*.

Saving of suits to establish right to attached property.

63. *Where a claim or an objection is preferred*, the party against whom an order is *made* may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Applicability.—R. 58 states that the investigation is to take place as if the claimant or objector "was a party to the suit." That is, it assumes that the claimant is not a party. Claims of third parties only are dealt with under that rule. This rule gives a statutory right of suit to the unsuccessful party in claim proceedings.(1) Questions between the parties to a suit are dealt with under sect. 47.(2) The cases just cited establish the principle, though as regards its application in the instances dealt with by them reference must now be made to the amendments made in sect. 244 of the last Code by sect. 47 of this. Where the case falls under sect. 47 there is an appeal, otherwise not. Where a judgment-debtor alleged that he was in possession of attached property only as *Shebait* of a deity it was held that the case did not fall within sect. 47.(3) A judgment-debtor who is not in fact a party to the claim proceedings does not in the eye of the Law become such by reason solely of his being the judgment-debtor.(4) These provisions apply only where the property sought to be sold has been attached in execution, but not where the decree has ordered its sale.(5)

The provisions of the Code are permissive. They do not impose an obligation on persons having claims to prefer to property attached to prefer them during execution and annex, in case of failure to do so, forfeiture of their right

(1) Annapurani *v.* Subramanian, 31 M. 347 (1908).

(2) Mukarrab Husain *v.* Hurmat-un-nissa, 18 A. 32 (1895); Rahimuddi Sirkar *v.* Lall Meah, 29 C. 696 (1902); Ram Pershad *v.* Jagannath Ram, 30 C. 134 (1902); Ramanathan Chettiar *v.* Lekvai Marakayar, 23 M. 195 (1898); Bhajahari Pal *v.* Ram Lal Das, 6 C. W. N. 63 (1901); Mohamed Kahimaddin *v.* Lall Meah, 6 C. W. N. 727 (1902); Beg Raj Marwari *v.* Sri Kundali Debya, 8 C. W. N. 353 (1902); Dayaram *v.* Govardhandas, 28 B. 458, at p. 459 (1904); but see Benode Lall Pakrashee *v.* Gireedhur Chuckerbutty, 22 W. R. 392 (1874); Sundar Singh *v.* Ghasi, 18 A. 410, 412 (1896); Punchanun Bundopadhya *v.* Rabia Bibi, 17 C. 711, at p. 719 (1890); Maharajah Mahatab Chand *v.* Mt. Pearee Dossee, 6 W. R. 61 (1866) [claim by alleged representative of property as his own]; *contra* Shankar Dial *v.* Amir Haidar, 2 A. 752 (1880); Matthu Amah *v.* Parameswaran, 17 M. L. J. 377 (1906) [decree against karnavan: objection to execution by members of *tarwad*]; s. c., 30 M. 215; Hara Dhan Kalia *v.* Purna Chundra Mondul, 11 C. W. N. 145 (1906).

(3) Kartick *v.* Ashutosh, 14 C. L. J. 425, 428 (F. B.) (1911).

(4) Krishnasami *v.* Somasundaram, 30 M. 335 (1909); 17 M. L. J. 428; distinguished in Ramu Aiyer *v.* Palianappa, 35 M. 35 (1910).

(5) Hukam Singh *v.* Raghubir Saran, 27 A. 700 (1905).

to establish their title to the property by a regular suit.(1) These provisions do not deprive a claimant of his remedy by suit but give him a more speedy and summary remedy.(2) If he avails himself of it the Court is bound in a proper case where the claim is made at a proper time, that is before sale,(3) to make an inquiry, and can be compelled by application in revision to do so.(4) His remedy by suit is also optional, and if he does not choose to avail himself of it, a sale will give him a fresh cause of action with a new period of limitation.(5)

These provisions were held not to apply to the case where a person served with a prohibitory order applies to have the attachment raised on the ground that the debt attached did not exist.(6) It has been held that the application of the Official Assignee to release the property of an insolvent debtor falls within these provisions.(7) If the debtor is declared insolvent and a receiver is appointed this does not prevent a person claiming.(8) It was held that sect. 170 of the Bengal Tenancy Act bars a claim under these provisions to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, and its operation is not confined merely to claims to the tenure or holding, but extends to claims based on the ground that the property claimed does not form part of the tenure or holding attached.(9) The word "suit" in sect. 55 of the Court of Wards Act includes miscellaneous proceedings, and therefore if a claim is preferred by the Manager of the Court of Wards without the sanction of the Court of Wards, the order disallowing the claim is not binding upon the Ward of Court.(10) As to whether the amendment of sect. 28 of the Presidency Small Cause Court Act by Art. IV. of 1906 affects these provisions in relation to claims to tiled huts, see case cited.(11)

An objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached, but also on the ground that he has an interest in it; and it has been held that where an executing Court disallows a claim under sect. 281 of the last Code (now represented by r. 61 of this Order) it has jurisdiction to do so, notwithstanding that it erroneously refrains

(1) Krishnabhupati Devu *v.* Vikrama Devu 18 M. 13, 17 (1894); see Rani Indomati *v.* Jageshar, 28 A. 644 (1906); but see Man Kuar *v.* Tara Singh, 7 A. 583 (1885); Sankar *v.* Madan, 14 C. W. N. 298 (1909).

(2) Sundar Singh *v.* Ghasi, 18 A. 410 (1896); Raghunath Mukund *v.* Sarosh Kama, 23 B. 266 (1898); Kanhaya Lal *v.* National Bank of India, 17 C. W. N. 541 (1913), P. C., 40 C. 598 (1913).

(3) Maharajah of Burdwan *v.* Heeralall Seal, 11 W. R. 54 (1869).

(4) Mt. Jameela *v.* Luckmun Panday, 4 C. L. R. 74 (1879). As to the extent of the investigation, see Sardhari Lal *v.* Ambika Pershad, 15 C 521, 526 (1888).

(5) Anant Brazu Garu *v.* Narayanurazu Garu, 36 M. 383 (1911).

(6) Harilal Amthabhai *v.* Abhesang Meru, 4 B. 323 (1880).

(7) Kashi Prasad *v.* Miller, 7 A. 752 (1885); Sardarmal Jagonath *v.* Aranvayal Sabhapathy, 21 B. 205, 212 (1896); but see notes on representatives in sect. 47.

(8) Paras Ram *v.* Karam Singh, 9 A. 232 (1887).

(9) Amrita Lall Bose *v.* Nemai Chand Mukhopadhya, 5 C. W. N. 474 (1901), F. B.; overruling Jagabandhu Chattopadhya *v.* Deenu Pal, 4 C. W. N. 734 (1887). But see Bipra Das *v.* Rajaram, 13 C. W. N. 298 (1909); Nanda *v.* Kalachand, 15 C. W. N. 820 (1910).

(10) Ram Chandra Mookerjee *v.* Raja Rangit Singh, 4 C. W. N. 405 (1899).

(11) Gunaputty Roy Agarwalla *v.* Thakurdye Thakurani, 34 C. 823 (1907).

from going into the question of possession and disallows the objection on some other ground.(1) Rules 58 and 60 of this Order speak of claims to attached property and the release of property from attachment; but they do not justify the conclusion that if moveable property of a perishable nature has been attached and a claim has been preferred to it, the claim must prove nugatory if the decree-holder can induce the Court to sell the property before the claim has been investigated.(2) The true aim of an attachment is to place the property in the custody of the Court so as to make it available for the realization of the decree. If by reason of the dismissal of the suit or the default of the decree-holder the Court dissolves the attachment, the property ceases to be in its custody. The Court cannot take it back into its custody so as to prejudice a title acquired in the interval (3)

Property.—The rules relate to claims preferred to and objections made to the attachment of "*any property*" attached. Sect. 266 of the last Code (now 60) specifies a debt as one species of property which is liable to attachment, and sect. 268 of that Code (now O. XXI. r. 46) prescribes the mode in which a debt is to be attached. Debts and other species of intangible property are therefore not excluded : (4) such as an equity of redemption.(5)

The word "property" as applied to land does not simply mean land, but the share or interest in land attached. It includes undivided shares in land. So where property belongs to two persons jointly, and in execution against one anything more than his right and interest in the property are attached; the other joint holder has a right to come in and claim that the attachment may be removed *quoad* his share.(6)

The section in the last Code was held inapplicable to claims to property directed to be sold by a mortgage decree,(7) and provision was made in sect. 282 of that Code (now r. 62) for the continuance of attachment subject to claim of

(1) Bhagwan Das *v.* Raj Nath, 34 A. 365 (1912).

(2) Rasik *v.* Jitendra, 15 C L. J. 167 (1910).

(3) Patringa *v.* Madhavanand, 14 C. L. J. 476 (1911).

(4) Chidambara Patter *v.* Ramasamy Patter, 27 M. 67, 71 (1903); diss. from Basavayya *v.* Syed Abbas, 24 M. 20 (1900). The Code of 1859 was held to apply only to immoveable property or to specific moveable property and not to a debt due: Mt. Rambutty Koeer *v.* Kamessur Pershad, 22 W. R. 36 (1874); Kunyil Parkum Puthukkayi *v.* Varana Kot Illoth, 35 M. 168 (1911).

(5) Amrata *v.* Pandharinath, 2 Bom. L. R. 134 (1900). As to sale of equity in execution of decree, see Mt. Saraswati Debi *v.* Nabadwip Chandra Gossain, 5 B. L. R. 380 (1870).

(6) Cowar Rajkumar Roy *v.* Kadambini Debi, 4 B. L. R. F. B. 175 (1870). See Khub Lal *v* Ram Lochun, 17 C. 260 (1889); Ram Dayal *v.* Durga Singh, 12 A. 209 (1890); Ramanadan *v.* Rajagopala, 12 M. 309 (1889); and the Court should investigate the claim, Issur Chunder *v.* Mohince Mohun, 17 W. R. 74 (1872), however the title is derived, Hurrish Chunder *v.* Brojo Soondur, 6 W. R. 164 (1866), and whether the property is moveable or immoveable, Deanuth Biswas *v.* Issur Giric, 14 W. R. 52 (1870).

(7) Deefholts *v.* Peters, 14 C. 631 (1887); Himatram *v* Khushal, 18 B. 98 (1893); Joy Prokash Singh *v.* Abhoy Kumar Chund, 1 C. W. N. 701 (1897); and if the Court did apply a procedure which was inapplicable there was no statutory bar excluding a suit by either party : Joy Prokash Singh *v.* Abhoy Kumar Chund, 1 C. W. N. 701 (1897). As to sale subject to mortgage, see Sha Nagindas *v.* Halal Kore Nathwa, 5 B. 470 (1881); Dulichand *v.* Ramkishen Singh, 7 C. 648 (1881); Shantappa Chodambaraya *v.* Subrao Ramchandra, 18 B. 175 (1893).

incumbrancer. Though the execution of mortgage decrees is expressly incorporated in the Code, the Select Committee were of opinion that claims and objections arising out of the execution of such decrees should not be the subject of summary procedure under these rules, but should be determined in the ordinary course. This, however, does not imply that the procedure under the later rules as to resistance to possession or dispossession does not apply. A mortgagee who was in possession of the mortgaged property when it was attached in execution of a decree against the mortgagor, was held entitled to claim that the attachment should be withdrawn.(1) Where certain property was attached under sect. 13 (3) of the Provincial Insolvency Act of 1907 before the petitioner was declared an insolvent, and a receiver appointed, it was held that under r. 58 the Court was bound to hear and adjudicate upon any claims preferred by persons alleging themselves to be the owners of such property.(2)

The Court.—As to jurisdiction (3) and Small Cause Court,(4) cf. cases cited.

"**Shall proceed to investigate.**"—Under the Code of 1859 the Court was to investigate with the like powers as if the claimant had been originally made a defendant to the suit; words which were held to mean that the Court was to have the same powers of investigation as if the claimant was a party to a suit which would give it power to summon the claimant and to dispose of the case against him if he should refuse to attend.(5) Sect. 278 of the last Code did not provide expressly for the judgment-debtor being summoned,(6) but directed the Court to investigate with the like power as regards the examination of the claimant or objector, and in all other respects as if he were a party to the suit. R. 58 expressly provides that no investigation shall be made where the Court considered that the claim or objection was designedly or unnecessarily delayed. Where the order was that the plaintiff came in too late for inquiry,(7) or the property was simply released without inquiry,(8) there was held to be no order under the section. Before any claim can be investigated it is necessary to ascertain whether the claim was heard in a suit originating before or after the attachment made by the decree-holder.(9) Where there are several independent claims each must be heard separately.(10) The application ought either to be dismissed or numbered and registered as a suit.(11) In an investigation the

(1) Kassisa *v.* Vithaldas, 10 B. H. C. R. 100 (1873); Ganesh *v.* Purshottom, 33 B. 311 (1908).

(2) Hashmet Bibi *v.* Bhagwan Das, 36 A. 65 (1913).

(3) Indur Chunder Doogur *v.* Gopal Chunder Sanha, 11 W. R. 557 (1869); Vishnu Dikshit *v.* Narsingrao, 6 B. 584 (1882).

(4) Deno Nath Batabyal *v.* Naffu Chunder Nundy, 3 C. W. N. 590 (1899); 26 C. 778; s. c., in appeal, 4 C. W. N. 410 (1900).

(5) Nga Tha *v.* Burn, 11 W. R. F. B. 8 (1868); Punchanun Bundopadhya *v.* Rabia Bibi, 17 C. 711, at pp. 719, 720 (1890).

(6) Shivapa *v.* Dod Nagaya, 11 B. 117, 118 (1881). And as to *res judicata, vide ib.*

(7) Roghoonath Doss *v.* Bydonath Doss, 14 W. R. 364 (1870).

(8) Jagobundhoo Bose *v.* Sachya Bebee, 16 W. R. 22 (1871); 8 B. L. R. app. 39. See Sah Mukhun *v.* Sah Koondun, 21 A. 210 (1875).

(9) Beebee Saheb Jehan *v.* Syad Shah, 5 W. R. Misc. 28 (1866).

(10) Sharoda Moyee *v.* Nobin Chunder, 11 W. R. 255 (1869); 2 B. L. R. 333.

(11) Sahoo Gokul *v.* Mt. Zynub, 1 A. H. C. R. 255 (1869).

Court has to determine the question of possession only, and cannot go into the question of title with respect to the property taken in attachment.(1) If the possession of the person holding the property is on his own account the fact that the judgment-debtor may have a beneficial interest or some title in it cannot be gone into.(2) The words "possession" and "possessed" in the last Code were held not to be used in a restricted sense as relating to mere tangible or physical possession, but to include constructive possession, or possession in law of debts and other intangible property.(3) The onus is on the applicant to prove his claim, and he must begin.(4) His evidence, which may be of any kind sufficient for the purpose (5) and must be received,(6) should be confined to his own claim and not to establish the right of a third party.(7) Where an objection has been made and disallowed it cannot be renewed by the same person in the same attachment.(8)

Order of Court.—Rules 60 and 61 specify the cases in which the Court is to allow or disallow a claim. R. 59 deals with the evidence to be adduced by the claimant, and it was held that to reconcile the sections the words "some interest" were to be taken to imply such an interest as would make the possession of the judgment-debtor possession not on his own account but on account of, or in trust for, the claimant. The rules relating to claims to attached property provide for a summary investigation into possession. The question of title is required to be gone into only so far as may be necessary to determine whether the person in possession was so as agent of, or as trustee for, another.(9) Sect. 280 of the last Code (now r. 60) was held to refer to cases in which the possession of a claimant as trustee was of such a character as to be really the possession of the debtor, and not to cases in which intricate questions of law might arise as to whether or not valid trusts might result in particular instances, the real question to be determined being that of possession.(10)

(1) Monmohiney Dassee *v.* Radha Kristo Dass, 29 C. 543 (1902); Khelat Chunder *v.* Bhuggobutty, 14 W. R. 144 (1870).

(2) Monmohiney Dassee *v.* Radha Kristo Dass, 29 C. 543 (1902). See Sabhapathi Chetti *v.* Narayanasami Chetti, 25 M. 555 (1901), where it was held that a beneficial interest was as much an interest within the meaning of sect. 279 of the last Code as a legal interest in the property attached.

(3) Chedambara Patter *v.* Ramasamy Patter, 27 M. 67 (1903), diss. from Basavayya *v.* Syed Abbas, 24 M. 20 (1900); and in Amrata *v.* Pandharinath, 2 Bom. L. R. 134 (1900), the section was held not limited to physical possession. See Kunzil Parkum Puthukkayi *v.* Varnakot Illoth, 35 M. 168 (1911).

(4) Nga Tha *v.* Burn, 11 W. R. F. B. 8; 2 B. L. R. 91 (1868); Panchanun Bundopadhya *v.* Rabia Bibee, 17 C. 711, 719 720 (1890); Hooroo Doss Roy *v.* Sona Monee Dossia, 20 W. R. 345 (1873); Hurrish Chunder *v.* Bhoobun Moye, 4 W. R. 99 (1865).

(5) Benode Lall Pakrashee *v.* Gireedhur Chuckerbutty, 22 W. R. 392 (1874).

(6) Bhoitarinee Dabee *v.* Nil Monee Singh, 24 W. R. 422 (1875).

(7) Nga Tha *v.* Burn, *supra.*

(8) Khilat Chunder Ghose *v.* Bhuggobutty Churn Mookerjee, 14 W. R. 144 (1870). See Kunyil Parkum Puthukayyi *v.* Varanakot Illoth, 35 M. 168 (1911).

(9) Mohunt Bhagwan Ramanuj Das *v.* Khetter Moni Dassi, 1 C. W. N. 617, 622 (1896).

(10) Hamid Bakhut Mozumdar *v.* Buktear Chand Mahto, 14 C. 617 (1887), foll. in Sheoraj Nandan Singh *v.* Gopal Saran Narain Singh, 18 C. 290, 295 (1891) [possession of person in trust for judgment-debtor]; and see Burjorji Dorabji *v.* Dhunbai, 16 B. 1, at p. 12 (1891).

Under r. 60 the conditions upon which the property is to be in whole or in part released are: (*a*) that the property was not when attached in the possession of the judgment-debtor, or of some person in trust (1) for him, or in the occupancy of a tenant or other person paying rent to him; or (*b*) that being in the possession of the judgment-debtor at such time it was so in his possession, not on his own account or as his own property, but on account of or in trust (2) for some other person or party (3) in his own account and partly on account of some other person. It is not necessary (to defeat the claim) to prove that the trust is one capable of enforcement by law.(4) The claim is disallowed under r. 61 if the property was in the possession of the judgment-debtor as his own or was in the possession of some other person in trust for him, or in the occupancy of his tenant.

The Court has to "*make an order for releasing the property wholly or to such an extent as it thinks fit from attachment.*" The order is passed after investigation of the claim of the objector.(5) It must be made before the sale has taken place, for upon the sale the application terminates *ipso facto*.(6) When the property of the insolvent judgment-debtor, which was attached, had vested in the Official Assignee during the pendency of claim proceedings, it was held that the latter was not a necessary party and that the decree ought only to declare that the property belonged to the judgment-debtor and not to declare it liable to attachment.(7) Where the claimant paid the amount of the decree and got the property released, the Court was held to have no jurisdiction to make an order for repayment.(8) Where the Court was, after such investigation, of opinion that the property attached ought not to be sold, the proper order was one simply releasing the property from attachment,(9) the order being one made with reference merely to the particular claimant who has obtained the order.(10) The rule contemplates

(1) See Hureehur Mookerjee *v.* Nobin Chunder Doss, 20 W. R. 202 (1873) [claimant alleged to be benamidar of debtor]; Khellat Chunder Ghose *v.* Gour Churn Mojoomdar, 18 W. R. 402 (1872); Kassirav Saheb Holkar *v.* Vithaldas Mangalji, 10 B. H. C. R. 100 (1873); Velji Hirji *v.* Bharmal, 21 B. 287 (1896). As to position of Administrator-General, see Bhaiji Bhimi *v.* Administrator-General, 23 B. 428 (1898).

(2) See Bishen Chand Basawat *v.* Nadir Hossein, 15 C. 329 (1887) [property held by judgment-debtor in trust for a specific purpose—attempt to attach surplus after fulfilment of trust]; s. c., 15 I. A. 15; Bhajahari Pal *v.* Ram Lal Das, 6 C. W. N. 63 (1901) [property held as *sebait*]. Kartick *v.* Ashutosh, 16 C. W. N. 26 (1911), F. B.; McIntosh *v.* Bidhu, 16 C. W. N. 959 (1912).

(3) Sitanath Koer *v.* Land Mortgage Bank, 9 C. 888, 893 (1883) [joint family property]; Rama Krishna *v.* Namasivaya, 7 M. 295 (1884); Timmappaya *v.* Lakshminarayana, 6 M. 284 (1883); Misree Begum *v.* Punnoo Singh, 8 W. R. 362 (1867).

(4) McIntosh *v.* Bidhu, 16 C. W. N. 959 (1912).

(5) Bishen Chand Basawat *v.* Nadir Hossein, 15 C. 329 (1887). As to the amount of inquiry which constitutes an investigation, see Koyyana *v.* Doosy, 29 M. 225 (1905); Rahim Bux *v.* Abdul Kadir, 32 C. 537 (1904); Bibi Aliman *v.* Dakeshwar, 1 C. L. J. 296, 300 (1904).

(6) Gopal *v.* Nitobar, 16 C. W. N. 1029 (1912).

(7) Annapurani *v.* Subramanian, 31 M. 347 (1908).

(8) Varajlal Motichand *v.* Kachia Garbad, 22 B. 473 (1896).

(9) Bhyrub Lall Bhukut *v.* Meer Abdul Hossein, 8 W. R. 93 (1876).

(10) Mt. Imam Bandee *v.* Mirza Mahomed Takee, 8 W. R. 27 (1867).

not only the entire release of the property, but also the retention of the attachment to such extent as the Court thinks fit.(1) The person against whom an order is passed is the decree-holder.(2) It depends upon the facts of each case whether the judgment-debtor is a party against whom an order was made so as to be bound by the special rule of limitation prescribed for suits by such a party.(3)

Where, on the other hand, the claimant does not appear in support of his claim (4) or failed to adduce evidence (5) or evidence not worthy of credit,(6) and the Court is satisfied of the existence of the conditions mentioned in sect. 281 (now r. 61), the proper order to make is that the claim be disallowed. It has been, however, more recently in some cases held that these provisions contemplate an investigation of the merits of the claim, and that an order is not conclusive where the decree has been disallowed for default (7) or withdrawn.(8) An order of disallowance enures only to the benefit of the person in whose favour it was passed, that is, the attaching creditor.(9) Where the claimant was in actual possession the effect of an order disallowing his claim was held to be that he was in possession without title.(10) The effect of an order disallowing the claim is to give the auction-purchaser a title as against the claimant unless the claim is established by suit brought within the period of limitation from the date of the order.(11) Where intervenors claim a share of attached property, the Court should define the respective shares of the debtor and the intervenor, and sell the debtor's definite share only.(12) An order in favour of one of several decree-holders on an objection was held not to enure for the benefit of other decree-holders who

(1) Yashwant Shenvi *v.* Vithoba Sheti, 12 B. 231, 235 (1887).

(2) Sardhari Lal *v.* Ambika Pershad, 15 C. 521, at p. 525 (1888).

(3) Guruva *v.* Subbarayadu, 13 M. 366 (1890); Shivapa *v.* Dod Nagaya, 11 B. 114, 118 (1886); Kedar Nath Chatterji *v.* Rakhal Das Chatterji, 15 C. 676, 680 (1888); Ajibal Narasinha *v.* Shirekoli Timapa, 17 B. 629 (1892); Ambalathilakath *v.* Ambalathilakath, 25 M. 721 (1902).

(4) Bibi Aliman *v.* Dakeshwar Pershad, 1 C. L. J. 296 (1904); Tripoora Soondoree *v.* Ajjatoonnissa, 24 W. R. 411 (1875); Karsan *v.* Ganpatram, 22 B. 875, 883 (1897); Sreemunto Hajrah *v.* Tajooddeen, 21 W. R. 409 (1874); Malla Goondur Lall *v.* Hubeeboonissa, 15 W. R. 311 (1871); see Dhunput Singh *v.* Inder Chunder Doogur, 13 W. R. 121 (1870), but see Mohadeb Mundal *v.* Modhoo Mundal, 16 W. R. 59 (1871); Jugal Kishore *v.* Ambika, 16 C. W. N. 882 (1912).

(5) Karsan *v.* Ganpatram, 22 B. 875, 883 (1897); Sreemunto Hajrah *v.* Tajooddeen, 21 W. R. 409 (1874); Kaminee Debia *v.* Issur Chunder Roy, 22 W. R. 39 (1874).

(6) Karsan *v.* Ganpatram, *supra*; Gooroo Doss Roy *v.* Sona Monee, 20 W. R. 345 (1873).

(7) Kallar Singh *v.* Toril Mahton, 1 C. W. N. 24 (1895) [dist in Rahim Bux *v.* Abdul Kader, 32 C. 537 (1904)]; see Karsan *v.* Ganpatram, 22 B. 875, 882 (1897); Mohadeb Mundal *v.* Modhoo Mundal, 16 W. R. 59 (1871).

(8) Munisami Reddi *v.* Arunachala Reddi, 18 M. 265 (1894). In Gooroo Das *v.* Kamal Kant, 20 W. R. 456 (1873), it was held that if a claim was withdrawn it could not be revived; in Kumarasamy *v.* Panna Soona, 7 M. H. C. R. 359 (1874), a withdrawal was held not to be a consent to the sale.

(9) Boolroonnissa Bebee *v.* Kureemoonnissa Khatoon, 21 W. R. 230 (1873); Khub Lal *v.* Ram Lochun Koer, 17 C. 260 (1889); Gunga Narain Ghose *v.* Haradhun Ghose 6 W. R. 157 (1866).

(10) Brijo Kishore Nag *v.* Ram Dyal Bhudra 21 W. R. 133 (1874).

(11) Khub Lal *v.* Ram Lochun Koer, 17 C. 260 (1889).

(12) Udit Narain Singh *v.* Murtaza Khan, 27 A. 464 (1905).

were not parties to the proceedings.(1) An order for release being only provisional and liable to be set aside by a regular suit, has not the effect of putting an end to an attachment duly made.(2)

"**May institute a suit.**"—A party to an investigation is excluded from any other remedy than that expressly provided for him by rule 63 by a regular suit brought within the period of limitation.(3) Where, however, a claim was rejected but the decree-holder withdrew his attachment, it was held that the parties were restored to the *status quo ante*, and the claimant was not required to bring a suit,(4) though a party may proceed to clear his title by suit even though the attachment has ceased to exist.(5) The special right of suit conferred is not controlled by the proviso to sect. 42 of the Specific Relief Act.(6) The right to be established in a suit instituted after an adverse order must be substantially the same right as that for which the party has contended in the execution,(7) and the suit should be determined by ascertaining the rights of the parties at the date of the order.(8) Where the same property is attached in execution of different decrees and all the attachments are removed, it is not necessary for each attaching creditor to bring a separate suit. A decree obtained in a suit brought by one enures to the benefit of all.(9) The right of suit is not a personal right confined to the original claimant, and therefore a suit will lie by the purchaser of the rights of a person who had unsuccessfully filed an objection.(10) The attachment constitutes the cause of action, and different purchasers of the attached property may be properly joined as defendants in the same suit.(11)

The decree-holder may sue to have his right to attach, and sell the property declared.(12) All that he has to prove is that on the date of the attachment the judgment-debtor had a subsisting right in the property, and the suit must be tried as if it were a suit for possession by the judgment-debtor.(13) The claimant may bring a declaratory suit to establish his right,(14) and to obtain any further

(1) Jagan Nath *v.* Ganesh, 18 A. 413 (1896); Vadapalli Narasimham *v.* Dronamraju, 31 M. 163 (1907).

(2) Ram Chandra Marwari *v.* Mudeshwar Singh, 33 C. 1158 (1906); Ali Ahmed *v.* Bansidhar, 31 A. 367 (1909).

(3) Settiappan *v.* Sarat Singh, 3 M. H. C. R. 220 (1866); Phul Kumari *v.* Ghanshyam, 35 C. 202 (1907); Annapurani *v.* Subramanian, 31 M. 347 (1908).

(4) Gopal Purdshotam *v.* Bai Divali, 18 B. 241 (1893).

(5) Sreeputty Mirdha *v.* Kartick Singh. 11 C. L. R. 181 (1882).

(6) Kristnam Sooraya *v.* Pathma Bee, 29 M. 151 (1905).

(7) Colvin *v.* Elias, 2 B. L. R. 212, 214 (1869); s. c., 11 W. R. 40.

(8) Harishankar Jebhai *v.* Naran Karsan, 18 B. 260 (1893).

(9) Chintamonee Sein *v.* Issur Chunder, 12 W. R. 221 (1869).

(10) Ganesh Prasad *v.* Kashi Nath Jivan, 26 A. 89 (1903).

(11) Dorasamy Pillai *v.* Muthusamy Morppan, 27 M. 94 (1903).

(12) See Mitchell *v.* Mathura Das, 12 I. A. 150 (1885); Tofail Ahmad *v.* Banee Madhub Mookerjee, 24 W. R. 394 (1875); Dallu Mal *v.* Hari Das, 23 A. 263 (1901).

(13) Vasudeo *v.* Eknath, 35 B. 79 (1910).

(14) Narayanrav Damodar *v.* Balkrishna Mahadev, 4 B. 529 (1880); Rapgovithal *v.* Rikhivadas, 11 B. H. C. R. 174 (1874); Kolasherri Illath *v.* Kolasherri Illath, 4 M. 131 (1881); Sukhdeo Prasad *v.* Jamna, 23 A. 60 (1900); Bank of Hindustan *v.* Premchand Raichand, 5 B. H. C. R. O. C. J. 83 (1868), with a prayer for consequential relief; Kunhiamma *v.* Kunhunni, 16 M. 140 (1892); Sadu bin Raghu *v.* Ram bin Govind, 16 B. 608 (1892). The object is to have the right

relief to which he may be entitled,(1) and need not wait until his possession is actually disturbed,(2) and as long as a decree is operative, a temporary cessation of the execution proceedings under it does not deprive the execution creditor of his rights to sue to set aside the order.(3) There is nothing in these provisions which limits the plaintiff's right to compensation for his loss, or the defendant's responsibility for his wrongful act; and if the existence of the summary procedure leads to delay, and that delay to further loss, the consequences must fall upon the defendant.(4) It has been held that a suit by a claimant under sect. 283 of the last Code (now represented by this rule) should be decreed if it is found that the claimant was in possession after a purchase for valuable consideration, but that the defendant in such a suit can set up the defence of fraud annulling the transfer.(5) In a suit by a judgment-creditor to establish his debtor's title a claimant has no right to set up any irregularities there may be in the execution proceedings, a matter with which he is not concerned; (6) or to impeach the decree as collusive; (7) though this last decision has been dissented from on the ground that the section does not introduce an exception to the rule that a defendant is bound and entitled to set up every defence available to him.(8) When a person fails to establish a prescriptive title in a suit in which he is plaintiff, it does not follow that the defendant is entitled to recover the subject of such suit in an action brought by him.(9)

The suits though brought to establish rights negatived in execution proceedings are not appeals from orders, but substantive suits to all intents and purposes, and must be tried like any other suits subject to the ordinary rules of procedure and evidence.(10) The Judge is bound to find the facts upon the evidence rendered and taken in the suit, and not upon any evidence taken in the summary proceeding;(11) nor is the judgment in the claim case admissible.(12) Where a suit is brought by an intervenor the onus is on him to prove his title, and not on the purchaser to prove that of the judgment-debtor.(13) In a suit

established, not to have the order in the claim proceeding set aside: Bibi Aliman *v.* Dakeshwar Pershad, 1 C. L. J. 296 (1904).

(1) Sadu bin Raghu *v.* Ram bin Govind, 16 B. 608 (1892).

(2) Shrivram Chintaman *v.* Jivri, 13 B. 34 (1888).

(3) Balaji *v.* Moroba, 21 B. 58 (1895).

(4) Kishori Mohun Rai *v.* Hursook Das, 12 C. 696 (1886); 17 C. 436 (1889).

(5) Abdul Kader *v.* Ali Mia, 16 C. W. N. 717 (1912); 15 C. L. J. 649.

(6) Tofail Ahmud *v.* Banee Madhub Mookerjee, 24 W. R. 394 (1875).

(7) Gulibai *v.* Jagannath Galvankar, 10 B. 659 (1885).

(8) Naranayyan *v.* Nageswarayyan, 17 M. 389 (1893).

(9) Shridhar Vinayak *v.* Babaji, 6 B. H. C. R. 220 (1869).

(10) Kishori Mohun Rai *v.* Hursook Das. 12 C. 696 (1886); 17 C. 436, which also deals with the question of damages.

(11) Lekhraj Roy *v.* Mutty Madhub Sen, 14 W. R. 95 (1870).

(12) Kishori Mohun Rai *v.* Hursook Das, 12 C. 696, 701 (1886); 17 C. 436, 439.

(13) Nathu Sadashiv *v.* Ramchandra Annaji, 5 B. H. C. R. A. C. J. (1868); Shekh Adam *v.* Jamnadas Ranchordas, 17 B. 94 (1891); Sreenarain Chuckerbutty *v.* Miller, 15 W. R. 7 A. C. C. (1871); Govind Atmaram *v.* Santai, 12 B. 270 (1887); Mitchell *v.* Mathura Das, 12 I. A. 150 (1885). As to the onus and evidence required, see Amjud Ali *v.* Kunkoo Shaw, 17 W. R. 304; s. c., 9 B. L. R. app. 28 (1872); Tulsee Money *v.* Peary Mohun 25 W. R. 79 (1876); Digumburee Domi *v.* Banee Madhub Ghose, 15 W. R. 155 (1871); Naffur Dass *v.* Nil Madhub, 11 W. R. 467 (1869); Mothoora Pandey *v.* Ram Ruchya, 11 W. R. 482 (1869); Toofanee Doss *v.* Mun

brought by the owner against the purchaser, the execution-creditor is properly made a party, the object being to restore all parties to the position which they occupied previously to such attachment and sale,(1) and if the claimant further desires relief by partition all the owners should be made parties.(2) As to the position of the debtor in a suit by the creditor, see *ante*.

Whether the suit is to be brought in the Ordinary or Small Cause Court depends upon the nature of the claim and the right sought to be enforced.(3) The judgment-debtor is not a necessary party.(4) Where an application was decreed with costs to be paid by the decree-holders, and the latter were declared in a subsequent suit to be entitled to sell the property, but no relief was asked in regard to the costs, it was held that they could not be refunded by the Court executing the decree.(5) The effect of a successful suit at the instance of an attaching creditor is to set aside the order of release and to restore the state of things which it had disturbed.(6) An application to revive a previous application for execution, which has been temporarily suspended by an order under these provisions, is, according to the Calcutta, Bombay, and Allahabad High Courts, governed by Art. 178 of the Limitation Act.(7) A Full Bench of the Madras High Court has held that the valuation of the subject-matter of the suit is the amount for which the attachment was made.(8) The Privy Council have recently determined that a suit under r. 63 falls within clause 1, Art. 17, Sched. II., Court Fees Act, and a Court fee of Rs. 10 is payable thereon.(9)

"**The right which the plaintiff claims to the property in dispute,**" means the right which is claimed in the proceeding in respect of the property, that is, the right to have it sold or the right to have it released from attachment. They do not mean the right or title to the property. When, therefore, a claimant, being unsuccessful in a claim, has got the property released from attachment by coming to terms with the decree-holder, without notice to the judgment-debtors, a suit subsequently brought by him against the judgment-debtors for recovery of possession is not barred.(10)

Rakhun, 15 W. R. 202 (1871); Pemraj *v.* Narayan, 6 B. 215 (1882); Ram Dayal *v.* Durga Singh, 12 A. 209 (1890) [decree against Hindu father—attachment of joint family property]; Radha Pershad *v.* Ram Khelawan, 23 C. 302 (1895) [decree against member of Mitakshara family]. Nanni Jan *v.* Karam Ali, 30 A. 321 (1908).

(1) Bank of Hindustan *v.* Ahmedbhai, 5 B. H. C. R. 83 (1868).

(2) Sadu bin Rajhu *v.* Ram Bin Govind, 16 B. 608 (1892).

(3) See Shiboo Narain *v.* Mudden Ally, 7 C. 608 (1881); Akbar Ali *v.* Jozuddin, 8 C. 399 (1882); Mahomed Koya *v.* Kasmi, 9 M. 206 (1885); Chhaganlal Nagardas *v.* Dalsukhram, 4 B. 503 (1879); Godha *v.* Naik Ram, 7 A. 152 (1883); Ilahi Baksh *v.* Sita, 5 A. 462 (1883); Makund Lal *v.* Nasir-uddin, 4 A. 416 (1882); Pagi Partap Hamir *v.* Varajlal Mulchand, 8 B. 259 (1884); Davud Beg *v.* Kullappa, 11 M. 264 (1887).

(4) Ghasi Ram *v.* Mangal Chand, 28 A. 41 (1905).

(5) Ragho Nath Das *v.* Badri Prasad, 6 A. 21 (1883).

(6) Mahomed Warris *v.* Pitambur Sen, 21 W. R. 435 (1874); Bonomali Rai *v.* Prosunno Narain Chowdhry, 23 C. 829 (1896).

(7) Mitra's Limitation Act, 4th ed. 1115, *et seq.*, where also the different view of the Madras High Court is given.

(8) Krishnasawmi Naidu *v.* Somasundaram Chettiar, 17 M. L. J. 95 (1907). See Dhan Devi *v.* Zamurrad Begam, 27 A. 440 (1905).

(9) Bibi Phul Kumari *v.* Ghanshyam Misra, 17 M. L. J. 618 (1907).

(10) Morshia Barayal *v.* Elahi Bux Khan, 3 C. L. J. 381 (1905).

"**Subject to the result of such suit.**"—When property has been released from attachment and subsequently declared liable to attachment by a decree against which an appeal is pending, a sale of such property before the final result of the appeal is not illegal.(1)

"**The order shall be conclusive.**"—Where an order has been passed unless a suit is brought, the unsuccessful party cannot assert his right in any capacity, whether as plaintiff or defendant,(2) and he is prevented from pleading adverse possession at the date of the order.(3) The conclusiveness exists only as regards the particular property in dispute.(4) The order is conclusive subject to the other provisions of the Code, such as those relating to review (5) and revision.(6) On the same principle matters finally heard and decided cannot be reopened on a second application; (7) but it has been held that where there is no investigation of a claim which is dismissed for default, a fresh claim may be made.(8) The discharge of the order of attachment cannot be properly asked for in such suit. The intervenor having established his title by declaratory decree, should then carry the decree to the Court by which the attachment was issued, when such Court, being bound to recognize the adjudication, will govern itself accordingly.(9) An order is not appealable.(10) An order passed by a Judge on the Original Side of the High Court dismissing a claim preferred by mortgagees of immoveable property which was attached in execution, was held subject to appeal under the Letters Patent.(11)

Attachment before judgment.—By O. XXXVIII. r. 9 (formerly 487) this rule applies to attachment before judgment.(12)

Mortgage.—The distinction between r. 62 and r. 66 is that in the former

(1) Fathula *v.* Munyappa, 6 M. 98 (1882).

(2) Nilo Pandurangi *v.* Rama Pattoji, 9 B. 35 (1884); Badri Prasad *v.* Muhammad Yusuf 1 A. 381 (1877); Bapu Khandu *v.* Baji Jivaji, 14 B. 372 (1889); Achuta *v.* Mamavu, 10 M. 357, 361 (1886); Surnamoyi Dasi *v.* Ashutosh Goswami, 27 C. 714, 722 (1900).

(3) Velayuthan *v.* Laksmana, 8 M. 506 (1885); Surnamoyi Dasi *v.* Ashutosh Goswami, 27 C. 714, 721 (1900); [dist. Gend Lall Tewari *v.* Denonoth Ram Tewan, 11 C. 673 (1885)].

(4) Dinkar Ballal *v.* Hari Shridhar, 14 B. 206 (1889); cf. Radha Prasad Singh *v.* Lal Sahab Rai, 13 A. 53, at p. 62 (1890).

(5) See Cochrane *v.* Heera Lal Seal, 7 W. R. 79 (1867).

(6) Although in Ittiachan *v.* Velappan, 8 M. 484, 493 (1885), the Court appeared to consider that it had not the power, *sed qu.*

(7) See Khelat Chunder Ghose *v.* Bhuggobutty Churn Mookerjee, 14 W. R. 144 (1870).

(8) See cases cited, *ante*, at p. 940, and see Sarala Subba *v.* Kamsala Timmayya, 31 M. 5 (1907).

(9) Kolasherri Illath *v.* Kolasherri Illath, 4 M. 131 (1881). See Narayanrav Damodar *v.* Balkrishna Mahadev, 4 B. 529 (1880).

(10) Dayaram *v.* Govardhandas, 28 B. 458 (1904); Sakharam Krishna *v.* Gadya, 2 Bom. L. R. 241 (1900); Bhajahari Pal *v.* Ram Lal Das, 6 C. W. N. 63 (1901); Abdul Rahman *v.* Muhammad Yar, 4 A. 190 (1880); Nimayo Churn *v.* Jogendro Nath Banerjee, 21 W. R. 365 (1874); Rash Behary Mookerjee *v.* Surnomoye, 9 C. L. R. 79 (1881) [sect. 244 of old Code inapplicable as interest was acquired prior to suit]; Urjoon Sahoy *v.* Nil Monee Singh, 20 W. R. 90 (1873).

(11) Sabhapathi Chetti *v.* Narayanasami Chetti, 25 M. 555 (1901).

(12) See Java Ramgi *v.* Jadavji Natha, 1 B. H. C. R. 224 (1864); *Ex parte* Gamble, 2 B. H. C. R. 142 (1865); *In re* Gocool Dass Soonderjee, Bourke, 240 (1865); Kartick Chunder Mookerjee *v.* Mookta Ram Sircar, 10 W. R. 21 (1868).

case the Court, after being satisfied of the existence of the mortgage, sells onl the judgment-debtor's right of redemption, so that the purchaser does no acquire any greater rights than those of redeeming the mortgage. In the latte the Court decides nothing as to the existence of the mortgage. The purchase buys the property with notice of the mortgage, and subject to such risks a the notice might involve.(1) A person who purchases a property in executio of his own decree apparently subject to a mortgage lien as declared by th Court under r. 62, without, however, acquiescing in the order made in favou of the mortgagee, is entitled to question the mortgage, if done so within a yea of the order in the claim case, by way of defence in the suit brought against hin by the mortgagee to enforce his lien, although he may not have instituted an suit under r. 63 to establish the right which he claims in the property in dispute.(2

Sale generally.

Power to order property attached to be sold and proceeds to be paid to person entitled.

64. Any Court *executing a decree* may order that any pro perty attached *by it and liable to sale,* o such portion thereof as may seem necessary t satisfy the decree, shall be sold, and that th proceeds of such sale, or a sufficient por tion thereof, shall be paid to the party entitled under the decre to receive the same.

Order for sale.—This rule corresponds with sect. 242 of Act VIII. o 1859, but that section provided only for the sale of such attached property a did not consist of money or bank-notes. The present wording, save the word in italics, was introduced by sect. 284 of Act X. of 1877. The words in italic are additions made by the present Code. Where the same property is unde attachment by two Courts of different grades a sale effected by the Court o lower grade is not a nullity. Sect. 63, *ante,* is a directory section dealing wit procedure, and does not take away the jurisdiction to sell conferred on the Cour by this rule.(3) Sect. 89 of the Transfer of Property Act contemplates a certai state of things, but where such state does not exist that section does not exclud other ways of enforcing a decree, and a Court has general jurisdiction to direct sale, if not under that section, then under this rule.(4)

"May."—It is, however, imperative on the Court to act when an applica tion is duly made by a party interested and having the right to apply, but whe property has been sold in execution of a decree it cannot be sold again at th instance of another decree-holder who attached it prior to the attachment unde the decree under which it was sold.(5)

(1) Shib Kunwar Singh *v.* Sheo Prasad Singh, 28 A. 418 (1906).

(2) Shah Zia-uddin *v.* Kailash Chandra Shaha, 2 C. L. J. 599 (1905).

(3) Gopi Chand Bothra *v.* Kasimunnessa, 34 C. 836 (1907).

(4) Abir Paramanik *v.* Jahar Mahammad 6 C. L. J. 95 (1907).

(5) Kashi Nath *v.* Surbanand Shaha, 12 C 317 (1885).

"**Any property attached.**"—This does not include a decree for money, which cannot be sold.(1)

"**Shall be sold.**"—When a sale takes place, all previous attachments effected upon the property sold fall to the ground.(2) As to payment of proceeds to party entitled, see case cited.(3)

Appeal.—An appeal lay under sect. 588 (*j*) of Act X. of 1877 from an order refusing the judgment-debtor's application that the property be sold in successive shares, the question being one between the parties in respect of the execution of a decree.(4) But see now O. XLII. r. 1.

65. *Save as otherwise prescribed, every* sale in execution of *a* decree shall be conducted by an officer of the Court or by *such* other person *as* the Court may appoint *in this behalf*, and shall be made by public auction in manner *prescribed.*

Sales by whom conducted and how made.

Sales.—A sale in execution is a sale by the Court which has a statutory power conferred on it of transferring the interest of the judgment-debtor to the purchaser, and to that end a certain course of procedure is prescribed terminating with the sale-certificate.(5) As to sales of agricultural produce, see rr. 74, 75. In order that the sale be good it must have been held under a good decree,(6) and it must have been conducted by a person duly authorized. The words "*whom the Court may appoint*" in the former section were held to apply not only to the words "*any other person,*" but also to the officers of the Court.(7) When a Court postponed a sale, but information not reaching the Nazir in time, he sold the property; it was *held* that the sale was void.(8) In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers.(9) Where a sale was conducted by two officers of the Court, one a chief clerk and officiating bailiff, and the other, his deputy, being the auctioneer, and the purchaser made a bid on the representation of the latter in the presence and hearing of the former that he was selling the land at the instance of the mortgagees, though a proclamation was read in English (which the purchaser did not understand) to the effect that only the

(1) Gopal Nanashet *v.* Joharimal, 16 B. 522 (1891); Sultan Kuar *v.* Gulzari Lal, 2 A. 290 (1879); Tiruvengada *v.* Vythilinga, 6 M. 418 (1883); Jotindro Nath *v.* Dwarka Nath, 20 C. 111 (1891); Kashi Nath *v.* Surbanand Shaha, 12 C. 317 (1885).

(2) Kashi Nath *v.* Surbanand Shaha, 12 C. 317 (1885).

(3) Gayanoda *v.* Butto Kristo, 33 C. 1040, 1046 [payment to Crown].

(4) Chandhari Sital *v.* Jhumah Singh, 4 C. L. R. 27 (1879).

(5) Baroda Kanta Bose *v.* Chander Kanta Ghose, 29, C. 682, 686 (1902).

(6) Jadu Nath Kundu *v.* Braja Nath Kundu, 6 B. L. App. 90 (1871); Golam Asgar *v.* Lakhimani Debi, 5 B. L. R. 68 (1870); dist. in Najabut Ali Chowdhry *v.* Sheikh Busseeroolah, 11 B. L. R. 42 (1873).

(7) Judoonath Roy *v.* Ram Buksh Chatterjee, 12 W. R. 238 (1869). In Omur Chunder Doss *v.* Soormunnissa Khatoon, W. R. 44 (1864), the sale by the Peshkar was by direction of the Munsif, who was ill.

(8) Sant Lal *v.* Umrao-un-nissa, 12 A. 96 (1889).

(9) Mahomed Kala Mia *v.* Harperink, 36 I. A. 32.

interest of the judgment-debtor was being sold, it was held by the Privy Council that as the interest of the judgment-debtor was a mere equity to redeem property mortgaged far beyond its value, the Court could not enforce a bargain so illusory against a purchaser misled by its agents. And it was also held that the chief clerk was right in referring the matter to the Court for direction, and also in not proceeding under sect. 306 of the last Code (now represented by r. 84 of this Order).(1)

66. (*1*) *Where* any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

Proclamation of sales by public auction.

(*2*) Such proclamation shall *be drawn up after notice to the decree-holder and the judgment-debtor and shall* state the time and place of sale, and specify as fairly and accurately as possible—

(*a*) the property to be sold;

(*b*) the revenue assessed upon the estate or part of the estate, *where* the property to be sold is an interest in an estate or *in* part of an estate paying revenue to *the* Government;

(*c*) any incumbrance to which the property is liable;

(*d*) the amount for the recovery of which the sale is ordered; and

(*e*) every other thing which the Court considers material for *a* purchaser to know in order to judge of the nature and value of the property.

(*3*) *Every application for an order for sale under this rule shall be accompanied by a statement signed and* verified in the manner hereinbefore *prescribed* for the *signing and* verification of *pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule* (*2*) *to be specified in the proclamation.*

(*4*) For the purpose of ascertaining the matters to be specified *in the proclamation,* the Court may summon any person whom it thinks necessary *to summon* and *may* examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

Proclamation.—It has been held that the object of issuing a proclamation is to give notice to intending purchasers of what is sold and not to the judgment-debtor.(2) The Court should be careful to specify in the proclamation the

(1) Mahomed Kala Mia *v.* Harperink, 36 I. A. 32.

(2) Lack Ram *v.* Mohesh Doss, 12 W. R. 488 (1869); Shaikh Abdool *v.* Syud Jaun Ali,

details given in this rule, for an omission causing substantial injury may form ground for setting aside the sale under r. 90, *post*.(1) Under r. 69 the Court may adjourn the sale. It is necessary in such case to mention the date and hour of sale.(2) If this is done for a longer period than seven days a fresh proclamation (3) must issue unless the judgment-debtor waives it.(4) Where there is a series of short postponements less than seven days, which taken together in the aggregate amount to more than seven days, a fresh proclamation is necessary.(5) Another date should be fixed. Where a sale did not take place on the day fixed in the original notice, it was held that an indefinite postponement could not be regarded as an adjournment from day to day.(6) Proceedings mentioned in this rule have been held to be of an administrative and not judicial character. They are not therefore orders within sect. 47 (formerly 244) or appealable. But if a sale does take place objection may be taken on any of the grounds mentioned in r. 90 (formerly sect. 311), some of which may relate to the contents of the proclamation.(7) It has been said that the sales contemplated by the rule

18 W. R. 55 (1872) [on one point dissented from in Mt. Nuzeeran *v.* Moulvie Ameerooddeen, 24 W. R. 3 (1875); see as to declaratory portion of proclamation, Dwarka Nath *v.* Aloke Chunder, 9 C. 641 (1883), and as to discrepancy between proclamation and certificate, Uma Churn Sen *v.* Gobind Chunder, 1 C. L. R. 460 (1878).

(1) See notes to section cited; and Arunachellam *v.* Arunachellam, 12 M. 19 (1888); Bhoop Singh *v.* Gouree Mull, S. D. N. W. 533 (1860) [omission of jumma and name of decree-holder; sale upheld as no injury]; Thakoor Das *v.* Hardeo, S. D. N. W. (1862) 104 [application of same decree-holder in five separate cases; entire right of all sharers sold; failure to specify right of each judgment-debtor or his liability in each case—no injury; sale upheld]; Nundeeput *v.* Urquhart, 13 W. R. 209 (1870) [two lots sold as one though proclamation treated them as separate]; Babu Luchmeeput *v.* Lekraj Roy, 8 W. R. 415 (1867) [proclamation not specifying numbers and values of promissory notes sold]. As to misdescription in the case of a sale under the Public Demands Recovery Act, see Ram Taruk Hazra *v.* Mosaheb Ali Khan, 6 C. W. N. 246 (1901).

(2) Bhikari Misra *v.* Rani Surjamoni, 6 C. W. N. 48 (1901); Mahabir Pershad *v.* Dhanukdhari Singh, 8 C. W. N. 685 (1904); s. c., 31 C. 815, 818 (1904); Surnomoyee Debi *v.* Dakhina Ranjan Sanyal, 24 C. 291 (1896).

(3) See as to necessity for a fresh proclamation after postponement, Shoshee Mookhee *v.* Dwarka Nath Biswas, 6 W. R. Misc. 84 (1866); Sanwal Singh *v.* Makhu Panday, 2 A. H. C. R. 143 (1870); Okhoy Chunder Dutt *v.* Erskine & Co., 3 W. R. Misc. 11 (1865); Tekait Rai *v.* Mirza Bandeh, S. D. N. W. (1856) 322 [sale taking place on day originally fixed after an order for postponement had been passed]; Jhoomuck Chowdhry *v.* Rajah Radha Pershad, 25 W. R 328 (1876); Roy Gouree Nath *v.* Fukeer Chund, 18 W. R. 347 (1872); Sm. Asmutoonnissa Bibee *v.* Khudeemoonissa Bibee, 17 W. R. 278 (1872). The omission to issue a fresh proclamation is an irregularity only: Bagal Chunder *v.* Rameshur Mundal, 18 C. 496 (1891).

(4) See Noorul Hossein *v.* Oomatul Fatima, 25 W R. 34 (1875); Baboo Hurdeo Narain *v.* Girdhari Singh, 19 W. R. 227 (1873); Bagal Chunder *v.* Rameshur Mundal, 18 C. 496 (1891); Preo Lall Paul *v.* Radhika Prosad Paul, 6 C. W. N. 42 (1901).

(5) Jamini Mohun Nundy *v.* Chundra Kumar Roy, 6 C. W. N. 44 (1901).

(6) Jhoomuck Chowdhry *v.* Rajah Radha Pershad, 25 W. R. 328 (1876).

(7) Sivagami Ache *v.* Subrahmania Ayyar, 27 M. 259 (1903), F. B., dissenting from Sivasami Naickar *v.* Ratnasami Naickar, 23 M. 598 (1900); Lachman *v.* Ganga, 15 C. W. N. 713 (1910); Sakhi Chand *v.* Kulanand, 14 C. L. J. 607 (1911); Ganga Prosad *v.* Raj Coomar Singh, 30 C. 617 (1903). In Rajah Ramessur Pershad *v.* Rai Sham Krissen, 8 C. W. N. 257 (1901), it was also held that there was an appeal.

are sales in execution of decrees, and the procedure and the rules laid down regarding them are framed on the assumption that the property to be sold has been already attached.(1) It has been held therefore that property not attached and not proclaimed cannot be sold; (2) and where plaintiff attached before judgment and the suit was dismissed but decreed in appeal, it was held that a sale without further attachment was void.(3) It has, however, also been held that though the absence of attachment is an irregularity, a sale is not to be considered as a nullity merely by reason of the absence of any attachment.(4) Publication of a sale-proclamation upon the décree-holder's property at a distance of some half-mile from the judgment-debtor's property is a material irregularity in the publication of the sale.(5) The former section was held to have no application to a case in which property was being sold under a mortgage-decree in which a claimant objected that the property had previously been sold to him at a private sale.(6) An order of sale after attachment on a money-decree may create a valid charge on the property.(7)

"**After notice.**"—The proclamation was in the Mofussil usually prepared without notice to the judgment-debtor and behind his back, and he was not therefore likely to receive any intimation of its contents until it was fixed up in the Court-house or Collectorate or was published upon the property. The faultiness of this practice was held therefore to excuse objection by the judgment-debtor.(8) The Code has therefore been altered to give effect to a practice followed in Calcutta with great advantage of drawing up the proclamation after notice to the parties, who are thus afforded an opportunity of settling the contents correctly, and in a great measure are restrained from subsequently raising obstructive and dilatory objections. If objections are not taken they may be deemed to have been waived.(9) The original Bill proceeding on the ground that the object of those proceedings was to give notice to intending purchasers rather than the judgment-debtor,(10) required a notification at the time of sale of any information coming after issue of the proclamation to the knowledge of the parties or of the Court executing the decree. And it was at first considered that as the rejections of a claim preferred, or an objection under rule 58, opened up the prospect of litigation, the intending purchaser should have notice of the matter.

(1) Deno Nauth Ruckit *v.* Mutty Lal Paul, 1 Hyde 158 (1862-3).

(2) Ram Onoogroho *v.* Mt. Montorun, 6 W. R. 823 (1866); Fida Husain *v.* Kutub Husain, 7 A. 38 (1884).

(3) Ram Chand *v.* Pitam Mal, 10 A. 506 (1888).

(4) Kishory Mohun Roy *v.* Mahomed Mujaffar Hossein, 18 C. 188 (1890); 22 C. 909 (1895); distinguished in Sasirama *v.* Meherban, 13 C. L. J. 243 (1911).

(5) Jamini Mohun Nundy *v.* Chandra Kumar Roy, 6 C. W. N. 44 (1901).

(6) Himatram *v.* Khushal Jetheram, 18 B. 98 (1893).

(7) Suraj Bunsi Koer *v.* Sheo Persbad Singh, 5 C. 148 (1879); s. c., 6 I. A. 88; Rai Balkishen *v.* Rai Sita Ram, 7 A. 731 (1885): see Madho Parshad *v.* Mehrban Singh, 18 C. 157 (1890).

(8) Rajah Ramessur Porshad *v.* Rai Sham Krissen, 8 C. W. N. 257, 262 (1901).

(9) See as to waiver of mis-statements in proclamation, Girdhari Singh *v.* Hurdeo Narain, 3 I. A. 230 (1876); Arunachellam Chetti *v.* Arunachellam Chetti, 15 I. A. 171 (1888); Preo Lal Paul *v.* Radhika Prosaud Paul, 6 C. W. N. 42 (1901); Pran Singh *v.* Janardan, 14 C. L. J. 541 (1911).

(10) Lack Ram *v.* Mohesh Das, 12 W. R. 488 (1869); Saadatmand Khan *v.* Phu Kuar, 20 A. 412 (1898); s. c., 2 C. W. N. 550.

The Select Committee, however, cancelled the proposed clause which provided for information likely to be useful to the public in bidding, and as above stated proposed to require the proclamation to be settled after notice to the parties.

"**Time and place of sale.**"—Property cannot be sold before the expiry of the period mentioned in r. 68. The proclamation should fix a day for the sale which is not a holiday, or a day on which the Courts are closed by order of the High Court.(1) Both the proclamation of the time and place of sale and the holding of such sale at such time and place are conditions precedent to the sale being a sale under the Code.(2) It was held under the last Code that it was intended that a sale of moveable property should ordinarily be held in some place within the jurisdiction of the Court ordering the sale. Good and sufficient reason must be shown for directing otherwise.(3)

"**The property to be sold.**"—The judgment-debtor has the right to have the property to be sold described with reasonable accuracy.(4) As this is to be expressly stated, where the proclamation set out particulars of the property, but subsequent to such proclamation a portion of the property was released to a third party, it was held that a fresh proclamation must be made.(5) If a Court directs the sale of property not warranted by the decree, the person aggrieved may follow the property in a regular suit.(6) In a recent case where decree-holders had applied for execution by attachment and sale of a certain encumbered share of a *mahal*, which was fully described in the Schedule, and the share was attached and sold, but the Subordinate Judge granted a certificate stating that a different and unencumbered share had been purchased, it was held by the Privy Council that there was no power to sell the latter share, since this was not a case of a mere misdescription but of a mistake as to identity.(7) The sale of a decree partly executed only enables the purchaser to execute what remains to be carried out.(8) In the under-mentioned case (9) it was held that the sale of a decree for possession of land did not carry the mesne profits to the debtor. An application to set aside a sheriff's sale or for compensation on the ground of deficiency in the area of land sold was refused.(10)

"**The revenue assessed.**"—Not stating the revenue is an irregularity, but

(1) Haro Jemadar *v.* Jadub Chunder Holdar, 3 W. R. Misc. 24 (1865).

(2) Basharutulla *v.* Uma Churn Dutt, 16 C. 794 (1889); as to place of sale, see Govind Salekar *v.* Bank of India, 4 B. H. C. R., A. C. J. 164 (1867).

(3) Lakshmibai *v.* Santapa Rivapa, 13 B. 22 (1880).

(4) Rajah Ramessur Pershad *v.* Rai Sham Krissen, 8 C. W. N. 257 (1901).

(5) Shib Prokash Singh *v.* Sardar Doyal Singh, 3 C. 544 (1878).

(6) Assamathem Nessa *v.* Roy Lutchmeeput, 4 C. 142 (1878); see Dorab Ali Khan *v.* Khajah Mohecoodeen, 3 C. 806 (1878); as to purchaser's right to receive back purchase-money, see r. 93; distinguished in Ram Kumar *v.* Ram Gour, 37 C. 67 (1909).

(7) Raja Thakur Barmha *v.* Jiban Ram (P. C.), 19 C. L. J. 161 (1913).

(8) Grish Chunder Chuckerbutty *v.* Grish Chunder Chuckerbutty, 6 C. 243 (1880).

(9) Ganesh Lal Tewari *v.* Ramnarain, 6 C. 213 (1880).

(10) Ram Narain *v.* Dwarka Nath Khettry, 4 C. W. N. 13 (1899).

this objection should be taken in the first Court when seeking to set aside a sale.(1) The words "*part of an estate*" mean an aliquot part of an estate.(2)

"**Any incumbrance.**"—In the case of a mortgage the amount of the mortgage-debt unpaid should be stated.(3) An absence of the specification of the incumbrance may amount to a material irregularity avoiding the sale.(4) If a decree-holder knowing of the existence of an incumbrance does not notify it, the land passes free from it.(5) *Semble*, a third person purchasing mortgaged property *bonâ fide* at a sale in execution of a money-decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgagee's lien unless the sale is made subject to it.(6) Where the holder of two decrees attached property in execution of one of them, he was held to have a right to state in the notification of sale that he likewise claimed the same property in satisfaction of his second decree.(7) It was held that claims admitted by the parties or established by decree of Court should be entered in the proclamation as charges upon the property, though they came to the knowledge of the Court in an inquiry under this rule only, and have not been made the subject of an order under sect. 282 of the former Code. It was also held that mortgages noted in the proclamation as claims upon the property sold, should not necessarily be entered in the certificate of sale, or be computed as part of the purchase-money unless they had been admitted by the parties or established by decree, or unless they had been declared under that section to be charges on the property, and the Court has seen fit to sell it subject to them, but they should be so entered and computed if they have thus been admitted or established, or if they had been declared under that section and the sale was held subject to them.(8)

"**Every other thing.**"—It has been held that the proclamation should specify as fairly and accurately as possible the value of the property, inasmuch as it was a material fact for the purchaser to know in judging of the nature and value of the property.(9) It was proposed to amend the rule to the effect that no valuation was to be entered in the proclamation. But this proposal

(1) Macnaghten *v.* Mahabir Pershad, 9 C. 556 (1882); Madarshah Maracayar *v.* Palaniappa Chetti, 23 M. 628 (1900).

(2) Kally Prosonno Bose *v.* Dino Nath Mullick, 11 B. L. R. 56 (1873).

(3) Mohunt Megh Lall *v.* Shib Pershad Panadi, 7 C. 34, 41, 42 (1881).

(4) Moti Laul Roy *v.* Bhawani Kumari Debi, 6 C. W. N. 836 (1902).

(5) Kasturi *v.* Venkata Chalapathi, 15 M. 12 (1892); and see Nursing Narain Singh *v.* Raghoobur Singh, 10 C. 609 (1884); but a Bombay registration was held to be notice, Dhondo *v.* Ravji, 20 B. 290 (1895); which was doubted in Ram Chandra *v.* Jairam, 22 B. 686, 691 (1897). As to estoppel on real owner, see Baswantapa Shidapa *v.* Ranu, 9 B. 6, at p. 93 (1884).

(6) Husein *v.* Shankagiri Guru, 23 B. 119 (1898); Sahadu Manaji *v.* Derlya Jaba, 14 Bom. L. R. 254 (1911).

(7) Balakee Lall *v.* Khuruckdharee Singh, 12 W. R. 79 (1869); where mortgagee sells under separate decrees for instalments of same debt, see Dosibai *v.* Ishwardas, 15 B. 222 (1891).

(8) Shantappa *v.* Subrao, 18 B. 175 (1893).

(9) Saadatmand Khan *v.* Phul Kuar, 2 C. W. N. 550 (1898); s. c., 20 A. 412; 25 I. A. 146; Rajah Ramessur Pershad *v.* Rai Sham Krissen, 8 C. W. N. 257 (1901); Ganga Prosad *v.* Raj Coomar Singh, 30 C. 617 (1903) [right of appeal]. As to whether there should be a regular investigation into the question of valuation, see Kashi Pershad Singh *v.* Jamuna Pershad Singh, 31 C. 922 (1904); s. c., 8 C. W. N. 264.

has not been adopted. If the property of which the sale is sought is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence or otherwise of the debt, and if it comes to the conclusion that no debt exists should abstain from proceeding to sale.(1) Should the Court have reason to believe that the property the sale of which was asked for was held by occupancy tenure, it is its duty to notify that fact in the proclamation as a warning to prospective bidders.(2)

"Every application," etc., sub-rule (3).—The Code has thus adopted a practice stated to have obtained in the Madras presidency,(3) under which the decree-holder is required to assist the Court by ascertaining and communicating the particulars to be specified in the proclamation of sale.

"For the purpose of ascertaining," sub-rule (4).—An objection raised in the course of an inquiry under this rule cannot be treated as a claim under r. 58 (formerly 278), the latter rule having reference to claims to and objections to attachment.(4) Where a person came forward in response to a notice issued under this rule, and claimed a mortgage-lien over the property, which was allowed and entered in the proclamation of sale, and the property was sold, it was held that the plaintiff (whose proper remedy was indicated) could not sue to have the sale set aside and a re-sale ordered of the property freed from the alleged incumbrance.(5) The enquiry under this rule should be of the most summary character.(6) An order by an executing Court under this rule, determining the valuation of immoveable properties attached and sought to be sold in execution of a decree is not appealable as a decree.(7)

Mode of making proclamation.

67. (*1*) *Every* proclamation shall be made *and published as nearly as may be*, in *the* manner prescribed by *rule 54, sub-rule* (*2*).

(*2*) *Where* the Court so directs, such proclamation shall also be published in the local official Gazette, *or* in *a* local newspaper, *or in both*, and the costs of such publication shall be deemed to be costs of the sale.

(*3*) *Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.*

(1) Harilal Amthatbhai *v.* Abhesang Meru, 4 B. 323 (1880); Sirish *v.* Muckanachary, 10 M. 194 (1887).

(2) Basdeo Perasad *v.* Jothan Ram, 27 A. 684 (1905).

(3) In Sm. Giribala Debia *v.* Mina Kumari, 5 C. W. N. 497 (1900), it was pointed out that there was no express provision requiring the decree-holder to notify incumbrances, though under the High Court rules he had to notify the existence of arrears. In Ram Chandra *v.* Jairam, 22 B. 686, 691 (1897), it was held the applicant was bound to disclose his own liens.

(4) Bhiku Bal Patil *v.* Khemchand Kulershet, 14 B. 369 (1890).

(5) Parshotam Manji *v.* Ganesh Vinayak, 23 B. 759 (1899).

(6) Pran Singh *v.* Janardan, 14 C. L. J. 541 (1911).

(7) Deoki *v.* Bansi, 16 C. W. N. 124 (1911); Panch Duar *v.* Mani Raut, 16 C. W. N. 970 (1912).

"**Shall be made.**"—See notes to last rule and to r. 5, and as to fixing in Court House note.(1) The words "*as nearly as may be*" have been inserted because the provision applies generally to sales of both kinds of property, and in the case of moveables the provisions of r. 5 relating to immoveables cannot be applied in their entirety. An omission to carry out the provision of this rule is an irregularity, but does not render a sale void.(2)

Advertisement.—It is right that the Court should permit any advertisement reasonably required which might have the effect of giving notice to all possible purchasers.(3) The power of advertisement is now still further extended, and an option is given not to publish in the Gazette, which is not commonly read by the classes most affected. The costs are as under the last Code costs in the sale.(4) A want of correspondence between the advertisement and the schedule of the proclamation is an irregularity which might need to be set right by the Court if the sale was otherwise regular.(5)

"**Lots.**"—The substance of the decision (6) on the subject of the division of a joint area into lots has been incorporated. It had been previously held, prior to the amendment of the last Code by sect. 29 of Act VII. of 1888, that where several separate properties are attached there must be a separate proclamation.(7)

Time of sale.

68. *Save* in the case of property *of the kind described* in the proviso to *rule 43*, no sale *here*under shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been *affixed* on the court-house of the Judge ordering the sale.

"**Consent.**"—An application made on the day of sale by the judgment-debtor that a part only of the property should be sold, instead of the entirety, is not a consent under this rule.(8)

Sale in contravention of rule.—There has been a difference of opinion on the question whether contravention of the provisions of the section (290) which this rule replaces, is an illegality vitiating the sale,(9) or as is the case

(1) Mohunt Megh Lal Pooree *v.* Shib Pershad Madi, 7 C. 34 (1881).

(2) Nana Kumar Roy *v.* Golam Chunder Dey, 18 C. 422 (1891); Jagernath Sahai *v.* Dip Rani Koer, 22 C. 871, 876 (1895).

(3) Rai Monindra Bahadoor *v.* Luchmeshwar Singh, 1 C. W. N. clv. (1897).

(4) Thus removing the difficulty dealt with in Kristo Kishore *v.* Soorjonath Sircar, 10 W. R. 354 (1868).

(5) Raja Thakur Barmha *v.* Jiban Ram (P. C.), 19 C. L. J. 161 (1913), p. 165.

(6) Pedro de Penha *v.* Jalbhoy Ardeshir, 12 B. 368 (1887).

(7) Tripura Sundari *v.* Durga Churn Pal, 11 C. 74 (1884).

(8) Harbuns Sahai *v.* Bhairo Pershad, 5 C. 259 (1879).

(9) Bakshi Nand *v.* Malak Chand, 7 A. 289 (1885); Sadhusaran *v.* Panchdeo, 14 C. I. (1886); Jasoda *v.* Mathura Das, 9 A. 511 (1887); Ganga Prasad *v.* Jag Lal Rai, 11 A. 353 (1889).

a mere irregularity,(1) which did not avoid the sale in the absence of proof of substantial injury.

Adjournment or stoppage of sale.

69. (*1*) The Court may, in its discretion, adjourn any sale *hereunder* to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment:

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(*2*) *Where* a sale is adjourned under *sub-rule* (*1*) for a longer period than seven days, a fresh proclamation under *rule* 67 shall be made, unless the judgment-debtor consents to waive it.

(*3*) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to *the* officer *conducting the sale*, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court *which* ordered the sale.

"**The Court.**"—That is the Court executing the decree. A Judge cannot order a Subordinate Judge to postpone a sale in a case pending before the Court of the latter officer.(2)

Adjournment.—This is a matter of discretion. Whether it should be granted must be determined upon the particular facts, and precedents (3) are not profitable. The Court must consider not only the interests of the judgment-debtor, but also the possibility of prejudice to the decree-holder. When, however, a sale is adjourned, the provisions of the rule should be followed with exactitude.(4) See notes to r. 66, *ante*, "Proclamation." It is the practice to place all properties intended for sale on a list, and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property which is the

(1) Kokil Singh *v.* Edal Singh, 31 C. 385 (1904); Tassaduk Rasul Khan *v.* Ahmad Husain, 21 C. 66 (1893); 20 I. A. 176; Abdul Nasia *v.* Doobal Dass, 11 C. L. R. 302 (1882); Mohunt Megh Lall Pooree *v.* Shib Pershad Madi, 7 C. 34, 39 (1881); Venkata *v.* Sama, 14 M. 227 (1890); Bagal Chunder *v.* Rameshur Mundal, 18 C. 496 (1891); held also that it was not necessary that sect. 290 of former Code must be equally followed when adjournment under sect. 291 of that Code unless all the judgment-debtors waived fresh proclamation]; Rahchandar Bahadur *v.* Kamta Prasad, 4 A. 300 (1882).

(2) Jaistee Ram *v.* Bijai Kooer, 5 A. H. C. R. 177 (1873).

(3) Janakee Nath Mookerjee *v.* Radha Mohun Chatterjee, 20 W. R. 130 (1873); Ahmed Reza *v.* Khujooroonissa, 13 W. R. 281 (1870); Venkata Narasimha *v.* Venkata Krishna, 5 M. H. C. R. 410 (1870); Govind Valekar *v.* Bank of India, 4 B. H. C. R., A. C. J. 164 (1867) [sale need not be closed on first day]; Jaistee Ram *v.* Bijai Kooer, 5 A. H. C. R. 177 (1873).

(4) Venkata Subbaraya *v.* Zamindar of Karvetinagar, 20 M. 159 (1896).

consequence of such procedure is not an adjournment within the meaning of this rule.(1)

"**Any sale.**"—The rule applies to mortgage-sales.(2)

"**Specified day and hour.**"—See notes to r. 66, "Proclamation." Assuming that a fresh proclamation is necessary, an omission to issue it is only an irregularity, and if it involved no loss to the judgment-debtor, it cannot be set aside. Thus where a sale was postponed and a fresh proclamation was issued directing it to be held on a certain date, but owing to the absence of the presiding officer on that date it took place some days later, the Privy Council held that it was not in contravention of sects. 289 and 291 of the last Code (now represented by rules 66 and 69 of this Order) and that even if there had been any irregularity in it, it could not be set aside in the absence of substantial injury.(3) In such case the judgment-debtor should object to the confirmation of sale and not seek to impeach it by suit.(4)

"**Fresh proclamation.**"—See notes to r. 66, "Proclamation."

"**Knocked down.**"—A bid may be withdrawn until the lot is knocked down.(5)

Payment.—An assignee after decree in a mortgage-suit is entitled to deposit, and where this was refused and the judgment-creditor bought himself, the sale was set aside.(6) A payment made to prevent a sale is not a voluntary payment, whether made by the debtor or a third party claiming the property.(7)

Saving of certain sales.

70. Nothing in *rules 66 to 69* shall *be deemed to* apply to *any* case in which the execution of *a* decree has been transferred to the Collector.

Defaulting purchaser answerable for loss on re-sale.

71. *Any* deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court *or to the Collector or sub-ordinate of the Collector, as the case may be*, by the officer *or other person* holding the sale, and shall, at the instance of either the *decree-holder* or the judgment-debtor, be recoverable from the

(1) Lal Mohun Chowdhry *v.* Nunu Mohamed, 17 C. 152 (1889).

(2) See Rajah Ram Singhji *v.* Chunni Lal, 19 A. 205 (1897); Harjas Rai *v.* Rameshwar, 20 A. 354 (1898); see Bibi Jan Bibee *v.* Sachi Bewa, 8 C. W. N. 684; s. c., 31 C. 863; Bipin *v.* Jatindra, 37 C. 897 (1910).

(3) Thakur Rang Lal *v.* Ravaneshwar Pershad, P. C., 16 C. W. N. 1 (1911); 38 I. A. 200.

(4) Gajrajmati Teorain *v.* Akbar Hossain, 17 M. L. J. 112 (1906); s. c., 9 Bom. L. R. 83; 34 I. A. 37; 29 A. 196; 11 C. W. N. 393.

(5) Agra Bank *v.* Hamlin, 14 M. 235 (1890); Kenaram *v.* Kailash Chandra, 18 C. L. J. 53 (1913).

(6) Bihari Lal *v.* Ganpat Rai, 10 A. 1. (1887).

(7) Omrito Lal Sircar *v.* Ramdhun Chakeo, 18 W. R. 503 (1872): Fatima Khatoon *v.* Mahomed Jan Chowdry, 12 M. I. A. 65 (1868); Act IX. of 1872, sect. 69.

defaul*ting purchaser* under the *provisions relating to* the execution of a decree for *the payment of* money.

"**Purchaser's default.**"—Sect. 254 of Act VIII. of 1859, so far as it relates to the subject-matter of the present rule, ran, "*If the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court.*" The present wording was adopted by sect. 293 of Act X. of 1877, save as indicated in italics. Of the alterations so indicated the only important ones are the addition of the words "*or to the Collector or subordinate of the Collector, as the case may be,*" and "*or other person*" which were made by the present Code.

The rule applies to re-sales in consequence of default in payment of deposit under O. XXI. r. 84, or in payment of purchase-money under O. XXI. r. 85 and O. XXI. r. 86; (1) and under O. XXI. r. 77; (2) and whether the property be moveable or immoveable: (3) even when the property is re-sold forthwith, owing to the judgment-creditor repudiating the bid of his agent; (4) also where the purchaser refuses to pay the purchase-money owing to the same property being sold the next day in execution of a decree of another party who had a previous lien on the property; (5) but the re-sale must be of the same property as first sold and under the same description, and any substantial difference in matters required by O. XXI. r. 66, disentitles the decree-holder to recover any deficiency of price.(6) It does not apply to a case where the purchaser makes default and a re-sale is ordered but does not take place owing to the property being sold in execution of another decree at the instance of another judgment-creditor at a lower price.(7)

"**Any deficiency of price.**"—Does not include interest on the price.(8)

"**Shall be certified.**"—The absence of a certificate will not prevent the decree-holder or the judgment-debtor from recovering the deficiency from the defaulter.(9)

"**At the instance of either the decree-holder or the judgment-debtor.**"—The judgment-debtor is not bound to proceed under this rule, and it does not debar him from having the re-sale set aside on the ground of irregularity; (10) nor does it debar the judgment-creditor from proceeding upon his decree against any other property of the judgment-debtor than that originally

(1) Javherbai *v.* Haribhai, 5 B. 575 (1881).

(2) Ramdhani *v.* Rajrani, 7 C. 337 (1881); Rajendra Nath *v.* Ram Charan, 2 C. W. N. 411 (1898).

(3) Ramdhani *v.* Rajrani, 7 C. 337 (1881).

(4) Vallabhan *v.* Pangunni, 12 M. 454 (1889).

(5) Sooraj Buksh *v.* Sree Kishen, 6 W. R. Mis. 126 (1866).

(6) Baijnath Sahai *v.* Moheep Narain, 15 C. 535 (1889). Cf. Gangadas *v.* Bai Suraj, 36 B. 329 (1911); 14 Bom. L. R. 250.

(7) Bisokha Moyee *v.* Sonatun, 16 W. R. 14 (1871).

(8) Soorj Buksh *v.* Sreekishon, 9 W. R. 500 (1868).

(9) Tapesi Lal *v.* Deoki Nandan, 19 A. 22 (1896).

(10) Bepin Chunder *v.* Modhoo Sudun, 12 C. L. R. 316 (1882).

sold.(1) He has not to wait till the deficiency is realized ; (2) nor can the amount bid at the first sale be deducted from the decretal claim ; (3) but the Calcutta High Court held that the judgment-debtor was entitled to credit for the full amount bid at the first sale.(4)

"**Defaulting purchaser.**"—The principal and not the agent bidding at the sale is liable, and recourse should be had against the principal, and on his proving his repudiation, the agent can be proceeded against on breach of contract or for a false representation.(5)

Suit.—A suit will lie to set aside an order under this rule.(6)

Appeal.—An appeal, it was held, lay from an order rejecting a petition to recover from a defaulter who was the judgment-creditor ; (7) and even where the defaulter was not a party to the suit.(8) The Allahabad High Court, however, held that no appeal lay ; (9) while the Calcutta High Court held that both an appeal and a second appeal lay from an order directing a defaulter to make good the deficiency.(10)

72. (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

Decree-holder not to bid for or buy property without permission.

(2) *Where* a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, *subject to the provisions of section 73*, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

***Where* decree-holder purchases, amount of decree may be taken as payment.**

(3) *Where* a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person *whose* interests *are affected by* the sale, by order set aside the sale ; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

(1) Khiroda Moyee *v.* Golam Somdance, 21 W. R. 149 (1874) ; 13 B. L. R. 114.

(2) Gour Chunder *v.* Chunder Coomar, 8 C. 291 (1882) ; 10 C. L. R. 236.

(3) Anandrav Bapuji *v.* Shekh Baba, 2 B. 562 (1878).

(4) Joobraj Sing *v.* Gour Buksh, 7 W. R. 110 (1867).

(5) Hurce Ram *v.* Hur Pershad, 20 W. R. 80 and 397 (1873).

(6) Tapesi Lal *v.* Deoki Nandan, 19 A. 22 (1896).

(7) Vallabhan *v.* Pangunni, 12 M. 454 (1889) ; Amir Baksha *v.* Venkatachala, 18 M. 439 (1895).

(8) Baijnath Sahai *v.* Moheep Narain, 16 C. 535 (1889).

(9) Ilahi Baksh *v.* Baij Nath, 13 A. 569 (1891) ; Deoki Nandan *v.* Tapesi Lal, 14 A. 201 (1892).

(10) Kali Kishore *v.* Guru Prosad, 25 C. 99 (1897) ; 2 C. W. N. 408 ; Rajendra Nath *v.* Ram Charan, 2 C. W. N. 411.

Bidding by decree-holder.—This rule is similar to sect. 294 of Act X. of 1877, save that the last clause has been added by Act XIV. of 1882, and the words in italics by the present Code. Of these, the words "*subject to the provisions of section* 73" have been substituted for "*if he so desires*," and the words "*whose interests are affected by*" for "*interested in.*"

"**Holder of a decree.**"—An assignee of a decree under an oral agreement, the consideration of which was not paid till after the sale, is not a decree-holder, and it is unnecessary for him to obtain permission to bid.(1)

"**Where a decree-holder purchases.**"—He is bound to exercise the most scrupulous fairness; if he or his agent dissuades others from purchasing, or openly disparages the property,(2) it is sufficient ground to set aside the sale.(3) The Privy Council have held that that is too sweeping in its terms, and leave to bid puts him in the same position as any other purchaser.(4) It would be different if the disparaging remarks were made by a purchaser who was not the decree-holder.(5) If the decree be reversed the sales under it to decree-holders fall through, but not the sales to *bonâ fide* purchasers who were not parties.(6) A decree-holder purchasing with leave to bid and set off must pay the deposit required by sect. 306 (O. XXI. r. 84) in cash, but the sale ought not to be set aside for default where all parties (including the Government as represented by the officer conducting the sale) waive their right to the deposit in cash.(7)

"**With such permission.**"—The decree-holder is absolutely bound to obtain permission before he can purchase.(8) Leave to bid puts the decree-holder in the same position as any other purchaser.(9)

"**Be set off.**"—This was not allowed where the provisions of sect. 295 of the former Code applied,(10) the set off being intended to prevent trouble and inconvenience and not to alter the substantial nature of the transaction; (11) and the set off can only be accepted for so much of the judgment debt as the assets applicable to its discharge may suffice to satisfy.(12) The purchaser can only be compelled to refund the rateable amount due to the other attaching creditor, either by summary process in execution, or by suit, or he may be given the option of electing a re-sale.(13) The terms of the present rule make the set-off subject to the provisions of sect. 73. A mortgagee decree-holder, with

(1) Dakshina Mohan *v.* Basumati, 4 C. W. N. 474 (1900).

(2) Rukhinee Bullubh *v.* Brojonath, 5 C. 308 (1879).

(3) Woopendro Nath *v.* Brojendro Nath, 7 C. 346 (1881).

(4) Mahomed Mira *v.* Savvasi Vijaya, 23 M. 227 (1899); 27 I. A. 17; 4 C. W. N. 228; Dakshina Mohun *v.* Basumati, 4 C. W. N. 474 (1900).

(5) Lalmohun *v.* Nunu Mohamed, 17 C. 152 (1889); Gunga Narain *v.* Annada Moyee, 12 C. L. R. 404 (1883).

(6) Zain-ul-Abdin *v.* Muhammad Asghar, 10 A. 166 (1887); 15 I. A. 12; Set Umedmal *v.* Srinath, 27 C. 810 (1900); 4 C. W. N. 692.

(7) Gopal Singh *v.* Roy Bunwari, 5 C. L. R. 181 (1879).

(8) Rukhinee Bullubh *v.* Brojonath, 5 C. 308 (1879).

(9) Mahabir Pershad *v.* Macnaghten, 16 C. 682 (1889 P. C.); 16 I. A. 107, p. 114; Mahomed Mira *v.* Savvasi, 23 M. 227 (1899 P. C.).

(10) Shrinivas *v.* Radhabai, 6 B. 570 (1882).

(11) Taponidi *v.* Mathura Lall, 12 C. 499 (1885).

(12) Viraragava *v.* Varada Ayyangar, 5 M. 123 (1882).

(13) Madden *v.* Chappani, 11 M. 356 (1887).

permission, purchasing the mortgaged property in execution of a decree, and setting off the price, which was insufficient to satisfy his decree, was not bound in subsequent execution proceedings to give credit for the market value of the mortgaged property, but only for the actual purchase price ; (1) but where the property sold was the equity of redemption, and after purchase the mortgagee decree-holder applied for execution of the balance of his decree against the assignee of the mortgagor, he had to give credit for the price set off, plus the mortgage debt, that being what an independent person would have had to pay if he had purchased.(2) It would be otherwise if he had sold the mortgaged property.(3) The mortgagee decree-holder purchasing does not stand in a fiduciary position towards his mortgagor,(3) and is only obliged to give credit for the amount of his bid.(4) In the Mofussil the purchaser may give a receipt for the amount due under his decree, instead of paying cash into Court.(5)

"**By himself or through another person.**"—A purchase by the undivided son of a decree-holder is presumably with joint funds and is the purchase of the decree-holder.(6)

"**The Court may.**"—It is discretionary with the Court to set aside a sale, and it will not do so if no substantial injury has resulted.(7)

"**On the application of the judgment-debtor.**"—This cannot be done by suit as the dispute falls within sect. 47 ; (8) even where the sale was procured by fraud, and purchased by a person who was not a party, a suit will not lie, at all events as against the judgment-creditor ; (9) likewise where the sale was brought about secretly and the purchasers were *benameedars* of the decree-holders ; (10) nor will a suit for possession lie after the sale has been set aside.(11)

"**By order set aside the sale.**"—A purchase by a decree-holder, without permission, is not *ipso facto* void ; it is a good sale until set aside ; (12) but where he applied for permission and it has been refused and yet he purchased *benami*, the sale was set aside.(13)

Appeal.—An appeal lies from an order under this rule under O. XLIII. r. 1 (*f*). But it was held that no appeal lay from an order refusing permission

(1) Muhammad Husen *v.* Thakur Dharam, 18 A. 31 (1895).

(2) Krishnasami Janakiammal, 18 M. 153 (1893).

(3) Sheonath Doss *v.* Janki Prosad, 16 C. 132 (1888) ; Mahabir Pershad *v.* Macnaghten, 16 C. 682 (1889 P. C.) ; 16 I. A. 107, p. 114.

(4) Gunga Pershad *v.* Jowahir, 19 C. 4 (1891).

(5) Khellat Chunder *v.* Keshub Chunder, 16 W. R. 46 (1871). This decision was before there was any provision for set off in the Code.

(6) Narayan *v.* Anaji, 5 B. 130 (1880).

(7) Mathura Das *v.* Nathuni Lall, 11 C. 731 (1885).

(8) Viraraghava *v.* Venkatacharyar, 5 M. 217 (1882) ; Genu *v.* Sakharam, 22 B. 271 (1896).

(9) Sakharam *v.* Damodar, 9 B. 468 (1885) ; Mohendro Narain *v.* Gopal Mondul, 17 C. 769 (1890).

(10) Durga Kunwar *v.* Balwant Sing, 23 A. 478 (1901).

(11) Viraraghava *v.* Venkata, 16 M. 287 (1892).

(12) In the matter of Veerapah Chetty, 14 W. R. 405 (1870) ; s. c., 6 B. L. R. App. 37 ; Javherbai *v.* Haribhai, 5 B. 575 (1881) ; Chintamanrav *v.* Vithabai, 11 B. 588 (1887).

(13) Mahomed Gazee *v* Ram Loll, 10 C. 757 (1884) ; followed in Thathu Naick *v.* Kondu Reddi, 32 M. 242 (1909).

to a decree-holder to bid, but it did against an order confirming or setting aside or refusing to set aside a sale.(1) No second appeal lies from an order on appeal under this rule, notwithstanding that sect. 47 bars a separate suit in such a case.(2)

Restriction on bidding or purchase by officers.

73. No officer *or other person* having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in *the* property sold.

Bidding by officers.—This rule corresponds with sect. 292 of Act X. of 1877, save that the words "*or other person*" have been added by the present Code, which also substituted "*the property sold*" for "*any property sold at such sale*"

"**No officer.**"—The pleader of a party is not an officer; (3) but where such a pleader acted improperly, a sale to him was set aside.(4) The Calcutta High Court have, however, held it was improper for a vakeel acting in execution proceedings to make himself in any way interested in the purchase; (5) and in the North-West, pleaders are directed by circular orders not to purchase property sold in execution of decrees in which they are concerned, and it was inexpedient that they should by purchase become the persons entitled to execute decrees in such suits.(6) The words added give the rule a much wider scope. No Judge, legal practitioner, or officer connected with any Court is allowed to deal in actionable claims by sect. 136 of the Transfer of Property Act.(7)

Sale of moveable property.

Sale of agricultural produce.

74. (*1*) *Where the property to be sold is agricultural produce, the sale shall be held,—*

(*a*) *if such produce is a growing crop, on or near the land on which such crop has grown, or,*

(*b*) *if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited:*

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(1) Durga Sundari *v.* Govinda Chandra, 10 C. 368 (1883); Jodoonath *v.* Brojo Mohun, 13 C. 174 (1886); Ko Tha Hnyin *v.* Ma Hnin, 15 C. W. N. 862 (P. C. 1911); 38 C. 717; 14 C. L. J. 241; 38 I. A. 126.

(2) Bhagbut Lall *v.* Narku Roy, 21 C. 789 (1894).

(3) Alagirisami *v.* Ramanathan, 10 M. 111 (1886).

(4) Subrarayudu *v.* Kotayya, 15 M. 389 (1892).

(5) Nundeeput *v.* Urquhart, 13 W. R. 209 (1870); 4 B. L. R. 181; see also Wajed Hossein *v.* Hafiz Ahmed, 17 W. R. 480 (1872).

(6) Goshain Jag Roop *v.* Chingun Lal, 2 N. W. P. H. C. R. 46 (1870).

(7) See also Rathnasami *v.* Subramanya, 11 M. 56 (1887); and Singaracharlu *v.* Sivabai, 11 M. 498 (1888).

(2) *Where, on the produce being put up for sale,—*

(a) *a fair price, in the estimation of the person holding the sale, is not offered for it, and*

(b) *the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,*

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

Special provisions relating to growing crops.

75. (1) *Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.*

(2) *Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.*

Sale of agricultural produce.—With reference to sub-rule (1) of r. 74 it has been considered that agricultural produce should, on the analogy of the Bengal Tenancy Act, 1885, sect. 129, ordinarily be sold at the place where they are attached, unless a better price is likely to be realized by sale at the nearest place of public resort. In sub-rule (2) a discretion has been allowed, on the analogy of sect. 131 of the same enactment, to postpone the sale of agricultural produce where such a course is necessary or desirable to prevent the property from being purchased at an inadequate figure.

Negotiable instruments and shares in *corporations.*

76. *Where* the property to be sold *is* a negotiable instrument or a share in *a* corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

"**May.**"—The sale through a broker is permissive and not obligatory.(1)

Sale by public auction.

77. (*1*) *Where* moveable property *is sold by public auction* the price of each lot shall be paid at the time of sale or as soon after as the officer

(1) Baboo Luchmeeput *v.* Lekraj Roy, 8 W. R. 415 (1867).

or other person holding the sale directs, and in default of payment the property shall forthwith be *re*-sold.

(*2*) On payment of the purchase-money, the officer *or other person* holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(*3*) *Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.*

"**Where moveable property,**" etc.—That is other than negotiable instruments or shares sold through a broker. The sale of arms by a Nazir is excluded from the operation of the Indian Arms Act.(1)

"**Purchase-money.**"—The provisions of this rule give the officer or other person holding the sale a discretion to allow the purchase-money to be paid at a reasonable time after the sale has been made.(2) The provisions of r. 71 making a defaulting purchaser liable for any deficiency apply to a re-sale under this rule.(3)

"**Co-owner.**"—It was originally proposed to check the litigation attendant upon the sale of moveables belonging to the judgment-debtor and a co-owner. It was considered that where the property was not of the nature referred to in r. 76, the fairest solution was to concede to the co-owner a right of pre-emption analogous to that conferred by r. 88, and at the same time debarring him from any remedy other than participation of the proceeds where he has failed to purchase, and is unable to show that in spite of due care and diligence he had notice of the sale. The Select Committee, however, while retaining the right of pre-emption, considered that they did not feel justified in penalizing a third part for the indebtedness of a judgment-debtor who happened to be a co-owner in joint property.

Irregularity not to vitiate sale, but any person injured may sue.

78. No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person *is* the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

Irregularity in sale of moveable property.—This rule corresponds with

(1) Wala Hiraji *v.* Hira Patil, 9 B. 518 (1885).

(2) Shah Fareed Alum *v.* Sheo Charun Ram, 4 A. H. C. R. 37 (1872).

(3) Ramdhani Sahai *v.* Rajrani Kooer, 7 C. 337 (1881).

sect. 252 of Act VIII. of 1859. By sect. 298 of Act X. of 1877, the words "*publishing or conducting*" were inserted, and instead of the words "*by reason of such irregularity may recover damages by a suit in Court,*" the words "*by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person be the purchaser) for the recovery of the specific property and for compensation in default of such recovery*" were substituted.

"**Irregularity.**"—The omission in the sale proclamation of the amount of the decree is not an irregularity; (1) nor the omission of the service of the notification of sale on the judgment-debtor or in his village.(2) The fact that the amount really due is overstated will not invalidate a sale in execution; (3) but if the sale proclamation warrants a title the injured party may apply to set the sale aside,(4) it not being a mere irregularity,(5) and the owner can follow the property in the hands of the purchaser.(5)

"**Any person.**"—If a person sues to recover possession of what was taken in excess of the interest of a judgment-debtor, without seeking to interfere with the sale in execution of the interest of the judgment-debtor, he need not sue within the period of limitation prescribed by law for a suit to set aside a sale.(6)

"**At the hand of any other person.**"—A decree-holder is liable to be sued by the rightful owner for the value of property not belonging to the judgment-debtor sold in execution.(7) The latter part of this rule codifies the decision in Mohanund Haldar *v.* Akial.(8)

79. (*1*) *Where* the property sold is moveable property of which actual seizure has been made, *it* shall be delivered to the purchaser.

Delivery of moveable property, *debts and shares.*

(*2*) *Where* the property sold is moveable property *in* the possession of some person other *than* the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(*3*) *Where* the property sold is a debt not secured by a negotiable instrument, or is a share in *a corporation*, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and

(1) Kassee Nauth *v.* Hullodhur, 2 W. R. 60 (1865).

(2) Romesh Chunder *v.* Jadob Chunder, 6 W. R. Civ. Ref. 14 (1866).

(3) Chutter Singh *v.* Dhurrum, 1 N. W. P. H. C. R. 1 (1869).

(4) Framji Besanji *v.* Hormasji, 2 B. 259 (1877).

(5) Mohanund Haldar *v.* Akial, 9 W. R. 118 (1868).

(6) Sharafat *v.* Lachmi Narain, 8 N. W. P. H. C. R. 288 (1875).

(7) Kanaye Pershad *v.* Hur Chand, 14 W. R. 120 (1870).

(8) 9 W. R. 118 (1868).

the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the *corporation* from permitting any such transfer or making any such payment to any person except the purchaser.

Notice.—Sub-rule (2) has been slightly remodelled. For form of notice under this section, see Form No. 146, Schedule IV., of former Code.

Delivery of debts and shares, sub-rule (3).—In the under-mentioned case (1) the Court said, "No question has been raised as to whether the order required by sect. 301 of the Code was served. The presumption, therefore, is that this order was served; and it may be a question whether, if the order after sale required by sect. 301 were served, the service of the prohibitory order, which is the form of attachment before sale required by the Code, is material or is wholly immaterial." See Schedule IV., Forms 147, 148 of last Code. In this as in other parts of the Code the reference to public companies in connection with shares has been omitted, it being presumably considered that the word "corporation" sufficiently covers the case.

Transfer of negotiable instruments and shares.

80. (*1*) *Where the execution of a document or the* endorsement of the party in whose name a negotiable instrument or a share in *a corporation* is standing is required to transfer such *negotiable* instrument or share, the Judge *or such officer as he may appoint in this behalf* may execute such document *or make such endorsement* as may be necessary, *and such execution or endorsement shall have the same effect as an execution or endorsement by the party.*

(*2*) *Such* execution or endorsement *may* be in the following form, *namely*:—

A. B. by C. D., Judge of the Court of (*or as the case may be*), in a suit by E. F. against A. B.

(*3*) Until the transfer of such *negotiable* instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt *so* signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

Transfer of negotiable instruments and shares.—This rule corresponds with sect. 267 of the Code of 1859 and (with slight alterations) 302 of the last.

(1) Debendra Kumar Mandil *v.* Rup Lall Das, 12 C. 546, 548, 549 (1886).

As to reference to corporation, see notes to last rule. A held shares in a company which were duly seized and sold in execution of a decree against him to B. The Judge, acting under the corresponding section of the Code of 1859, executed deeds of transfer to the purchaser, and the company was ordered to register the transfer in their books, but refused to comply with the order. The purchaser was unable to obtain from A the certificates of the shares. *Held* that, although the company's deed of settlement (under which the Act of Parliament declared that the company should be regulated) gave to the Board of Directors power of approval or disapproval of intending shareholders, they had no option as to registering a shareholder who purchased a share in execution, and that they were bound to grant him, under the circumstances, new share certificates.(1)

Vesting order in case of other property.

81. In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

Sale of immoveable property.

What Courts may order sales.

82. Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

"**Sales of immoveable property.**"—This rule is similar to sect. 304 of Act X. of 1877. A decree charging land is an interest in immoveable property.(2) Huts are immoveable property.(3) A decree declaring a decree-holder's lien on property without distinctly declaring his right to sell the same may be executed against that property either by attachment and sale or by attachment and management.(4) A debt secured by a mortgage lien upon immoveable property, more especially if the mortgagee is not in possession, is not immoveable property.(5) A Munsif cannot sell property lying outside his jurisdiction.(6)

"**Court of Small Causes.**"—If such a Court sells immoveable property the purchaser acquires no title.(7) The rights and interests under a mortgage of immoveable property is not saleable by a Court of Small Causes.(8)

(1) Toolsee Dass Nundy *v.* East Indian Railway Co., 1 Ind. Jur. N. S. 258 (1862).

(2) Bhawani Kuar *v.* Gulab Rai, 1 A. 348 (1877); Sami Ayyar *v.* Krishnasami, 10 M. 169 (1886).

(3) Nattoo Meah *v.* Nund Ranee, 17 W. R. 309 (1872).

(4) Nuddyabashee *v.* Reza, 15 W. R. 337 (1871).

(5) Debendra Kumar *v.* Rup Lall, 12 C. 546 (1886). See Nataraya Iyer *v.* South Indian Bank of Tinevelly, 37 M. 51 (1914), and notes on O. 21, r. 46 and 54 *ante*.

(6) Syud Nowab Ali *v.* Shaikh Uzir, 23 W. R. 233 (1875).

(7) Nattoo Meah *v.* Nund Ranee, 17 W. R. 309 (1872).

(8) Buddoo Mull *v.* Maharoop, 6 N. W. P. H. C. R. 129 (1874).

Postponement of sale to enable *judgment-debtor* to raise amount of decree.

83. (*1*) *Where* an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by *the* mortgage or ease or private sale of such property, or some part thereof, or if any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of *the* property omprised in the order for sale *on such terms and* for such period s it thinks proper, to enable him to raise the amount.

(*2*) In such case the Court shall grant a certificate to he judgment-debtor authorizing him within a period to be nentioned therein, and notwithstanding anything contained in ection 64, to make the proposed mortgage, lease or sale:

Provided that all monies payable under such mortgage, ease or sale shall be paid, not to the judgment-debtor, *but, save n so far as a decree-holder is entitled to set off such money under he provisions of rule* 72, into Court:

Provided also that no mortgage, lease or sale under this *ule* shall become absolute until it has been confirmed by the Court.

(*3*) *Nothing in this rule shall be deemed to apply to a sale f property directed to be sold in execution of a decree for sale in nforcement of a mortgage of, or charge on, such property.*

Postponement of sale.—The first clause of this rule corresponds with part f sect. 243 of Act VIII. of 1859. The rest, save the last proviso in the second lause, and the portions in italics, was added by sect. 305 of Act X. of 1877. hat Act also appended a clause: "*When such certificate has been granted and long as it remains in force the provisions of section* 248 *shall not apply.*" This as repealed by Act XIV. of 1882, which added the last proviso in the second lause, and also added the words, "*and notwithstanding anything contained in ct.* 276 [sect. 64]" to the second clause. The words in italics have been added y the present Code. The Bombay High Court held that the corresponding ction to this rule applied to a mortgage decree, declaring that certain properties e sold in satisfaction of the mortgage debt; (1) but the Calcutta High Court eld otherwise; (2) and by notification such section was made applicable to roceedings after decree in mortgage suits, but now the third clause of the rule istinctly excludes such proceedings, so far as Bengal and Assam were con-erned.(3) The rule does not apply to suits for rent in Bengal.(4)

(1) Krishnaji *v.* Mahadev, 25 B. 104 (1900).
(2) Womda Khanum *v.* Rajroop, 3 C. 335 .877); 1 C. L. R. 295.
(3) See *Calcutta Gazette* of 13th April, 1892, Part I. p. 414; *Assam Gazette* of 16th April, 1892, Part III. p. 272.
(4) Bengal Tenancy Act, VIII. of 1885, s. 148 (*a*).

"**Sale of immoveable property.**"—This was held to include all sales of immoveable property, the decision being given in reference to a decree on mortgage,(1) but property directed to be sold in execution of a decree for the enforcement of a mortgage or charge is now excluded by the third clause of the present rule.

"**The amount of the decree.**"—That is, the whole amount due on the decree. No mortgage will be sanctioned, or certificate granted, or the mortgage confirmed, unless the decree can be fully paid off.(2)

"**The Court may postpone the sale.**"—This is an enabling rule, and qualifies the prohibitions contained in sect. 64. On compliance with the conditions of this rule a private alienation, notwithstanding sect. 64, becomes absolute, even against all claims enforceable under the attachment.(3) Postponement is discretionary with the Court.(4) It should exercise its discretion, and if it finds that a fair case has been made out, it should postpone the sale ; (5) but the judgment-debtor must most distinctly show that the money due can be well raised in some way other than by immediate sale, and that the creditor will not be put to loss ; (6) and that the debt will be paid off in a reasonable time ; (7) twenty years,(7) two or three years,(8) and even one year are unreasonable,(9) but six months has been considered reasonable.(7) Where, however, the property has been put up to auction in execution and bids have been made, the Court cannot postpone the sale merely on the representation of a judgment-debtor that he can obtain a higher price by private transfer, there being no reasonable ground to believe that the judgment debt would be realized thereby.(10)

"**Authorizing him.**"—The authority is only to the judgment-debtor to whom it is granted, and the sale in pursuance thereof does not affect the share of another judgment-debtor.(11) Where the defendant is the guardian of a minor under the Guardian and Wards Act of 1890, the authority under this rule will not give him power to mortgage unless he also gets the permission of the Court which appointed him guardian.(12) The Court cannot itself give a lease or mortgage. It can only grant the debtor time to do so himself.(13) The rule is enabling, and qualifies the provision contained in sect. 64. On compliance with

(1) Krishnaji *v.* Mahadev, 25 B. 104 (1900).
(2) Gurusami *v.* Venkatsami, 14 M. 277 (1890).
(3) Shivlingappa *v.* Chanbasappa, 30 B. 337 (1905) ; 8 B. L. R. 16.
(4) Bishenmun *v.* Land Mortgage Bank, 11 C. 244 (1884) ; 12 I. A. 7, p. 10.
(5) Kishen Coomaree *v.* Golab Coomaree, 15 W. R. 477 (1871).
(6) Ram Ruttun *v.* Land Mortgage Bank, 17 W. R. 193 (1872).
(7) Mohinee Mohun *v.* Ram Kant, 15 W. R. 322 (1871) ; see also Rednum *v.* Khaja Mahomed, 5 M. H. C. 272 (1870).
(8) Suhuj Narain *v.* Ram Pershad, 21 W. R. 146 (1874).
(9) Ram Ruttun *v.* Land Mortgage Bank, 17 W. R. 193 (1872) ; Fyaz-ood-deen *v.* Giraudh Singh, 2 N. W. P. H. C. R. 1 (1870).
(10) Luchmee Narain *v.* Bhyroo, 1 N. W. P. H. C. R. Mis. 11 (1866).
(11) Danappa *v.* Yamnappa, 26 B. 379 (1902).
(12) Dattaram *v.* Gangaram, 23 B. 287 (1898).
(13) Luchmeeput *v.* Jugul Indur, W. R. 1864, Mis. 5.

the conditions of the rule, a private alienation, notwithstanding sect. 64, becomes absolute, even against all claims enforceable under the attachment.(1)

"**Until it has been confirmed.**"—When in pursuance of a certificate to sell granted by two Courts the attached property was sold, and the sale confirmed by the superior of the two Courts, confirmation by the other Court was unnecessary.(2)

Appeal.—See sect. 47.

84. (*1*) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer *or other person* conducting the sale, and, in default of such deposit, the property shall forthwith be *re*-sold.

Deposit by purchaser and re-sale on default.

(*2*) *Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule* 72, *the Court may dispense with the requirements of this rule.*

"**Deposit.**"—The officer conducting the sale cannot insist upon a deposit being made before acceptance of a bidding; but if it appears that persons without means have been put forward to make sham biddings, and fraudulently frustrate the sale, he would be justified in inquiring into the trustworthiness of the bidder before accepting his bid.(3) A decree-holder of the party to whom the lot is knocked down is equally bound to make the prescribed deposit as any other auction-purchaser.(4) But where all parties interested waived their right to a deposit, it was held the sale should not be set aside.(5) A relaxation of the rule is now made in the case mentioned in the second sub-rule. If there is any dispute as to whether the deposit was offered or not it should be decided by the Judge before commencing a second sale.(6) There has been a conflict of opinion whether, if the deposit is not made as required, the sale is no sale at all,(7) or whether this circumstance is an irregularity only.(8) The first opinion is no longer law.(9) But it has been recently held that if the balance of purchase

(1) Shivlingappa *v.* Chanbasappa, 30 B. 337 (1905).

(2) Andanapa *v.* Bhimrao, 19 B. 539 (1894).

(3) Rajah Muhesh Narain *v.* Kishanund Misr, 9 M. I. A. 324, 328, 341 (1862); and the sham bidder would be liable under sect. 228 of the Penal Code for obstructing the sale: In the matter of Mohesh Chunder Mookerjee, 1864, W. R. Misc. 3.

(4) Chulkoo Dutt Jha *v.* Leelanand Singh, 1864, W. R. Misc. 30.

(5) Gopal Singh *v.* Roy Bunwaree Lall, 5 C. L. R. 181 (1879).

(6) Kunnayyan *v.* Ramasami Ayyan, 6 M. 197 (1883).

(7) Intizam Ali Khan *v.* Narain Singh, 4 A. 316 (1883).

(8) Venkata *v.* Sama, 14 M. 227 (1890). In Beepeen Chunder Shickdar *v.* Pureshnath Biswas, 9 C. 98 (1882), it was held that there was such substantial injury that the sale should be set aside; Bhim Singh *v.* Sarwan Singh, 16 C. 33 (1888).

(9) Ahmad Baksh *v.* Lalta Prasad, 28 A. 238 (1905), overruling Intizam Ali Khan *v.* Narain Singh, *supra*. In Amir Begum *v.* Bank of Upper India, Ltd., 30 A. 273 (1908) in which the latter case was followed, the former was not cited

money is not paid, there is no sale under the Code.(1) The mere making of the last bid does not conclude the sale : for the conclusion of a sale it is necessary for the sale-officer to accept the final bid and to make a declaration who is the purchaser and to order him to pay him the deposit under this rule.(2)

"**Default.**"—The sale is to be held "*forthwith*," so a fresh proclamation or statement of the hour of sale is not necessary.(3) The sale is not to be adjourned. The putting up of the property again, and soliciting fresh bids is a continuation of the original sale, a part and parcel of the proceedings which had their origin in the first putting up of the property, and which do not come to an end until the property has been knocked down to a purchaser, and that purchaser has made the statutory deposit.(4) An officer conducting a second sale is not bound to commence from the next highest bid below that made by the defaulter. He may do so if the next highest bidder is willing to abide by his bid, otherwise he should commence the sale *de novo*.(5)

Loss on re-sale.—Under r. 71 a defaulting purchaser is answerable for loss by re-sale. It has been held that the corresponding section in the last Code applied to re-sales here dealt with, and that the first purchaser could be compelled to pay the difference between the first and the second sales.(6)

85. The full amount of purchase-money *payable* shall be *paid* by the purchaser *into Court* before the Court closes on the fifteenth day *from* the sale of the property :

Time for payment in full *of purchase-money.*

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

"**Shall be paid.**"—The provisions of the rule are imperative, and must be given effect to.(7) In default of payment the deposit is forfeited, if the Court thinks fit, under the next rule,(8) and the property re-sold under r. 85, and the defaulting purchaser is answerable for loss by re-sale.(9) The proviso to the rule is new.

(1) Munshi Mahomed Ali *v.* Kibria, 15 C. W. N. 350 (1911).

(2) Munshi Lal *v.* Ram Narain, 35 A. 65 (1912).

(3) Vallabhan *v.* Pangunni, 12 M. 454, 458 (1889).

(4) Bhim Singh *v.* Sarwan Singh, 16 C. 33, 38 (1888); but see Vallabhan *v.* Pangunni, 12 M. 454, at p. 458 (1889), where it was held that for the purposes of r. 71 there is a resale.

(5) Gour Mookh Singh *v.* Lalla Gour Sunker, 1 W. R. Misc. 11 (1864).

(6) Ramdhani Sahai *v.* Rajrani Kooer, 7 C. 337 (1881): Vallabhan *v.* Pangunni, 12 M. 454 (1889).

(7) Sambasiva Ayyar *v.* Vydinadasami, 25 M. 535 (1901); Munshi Mahomed Ali *v.* Kibria, 15 C. W. N. 350 (1911).

(8) See Mathura *v.* Gauri Shankar, 32 A. 380 (1910) (this Code gives the Court a discretion as to forfeiting deposit), and notes to r. 86.

(9) Javherbai *v.* Haribhai, 5 B. 575 (1881); Ramdhani Sahai *v.* Rajrani Kooer, 7 C. 337 (1881); Vallabhan *v.* Pangunni, 12 M. 454 (1889).

"**Into Court.**"—These words have been inserted to render it clear that the purchaser is bound to see that the money reaches the Court in time. The post office is not the agent of the Court.(1)

Date of payment.—Sect. 307 of the last Code, which the rule replaces, ran, "before the Court closes on the fifteenth day *after* the sale of the property *exclusive of such day*,(2) *or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.*" Instead of the words "*after*" and "*exclusive of such day*," the present rule uses the word "*from*," which will have the same effect. The provisions relative to the occurrence of a Sunday have been omitted because the matter is sufficiently covered by sect. 10 of the General Clauses Act of 1897. In these two respects, therefore, the former section and the present rule are the same. Under the last Code, however, it was held that days (as during the vacation) when the Court was closed but the office was open were not holidays within the meaning of the former section.(3) The practice of the Original Side of the High Court is that payment of interest follows as a matter of course, when the purchaser of property at a Registrar's sale is out of time in paying into Court the balance of his purchase-money.(4)

Procedure in default of payment.

86. In default of payment within the period mentioned in the last preceding *rule*, the deposit *may, if the Court thinks fit*, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

Default.—This rule corresponds with a portion of sect. 254 of Act VIII. of 1859 and with sect. 308 of Acts X. of 1877 and XIV. of 1882, save that the words in italics have been substituted for the word "*shall*" appearing in the earlier Codes. The former section has been applied to proceedings in execution under a mortgage decree in Bengal and Assam.(5)

"**In default of payment.**"—Under the rules of the Madras High Court payment into the Government Treasury is sufficient payment; (6) likewise, it is a sufficient compliance with the decree, if the judgment-debtor bring the money into Court within the specified time and diligently take the necessary steps required by departmental rules for the actual payment into the Treasury.(7)

(1) Ram Chandra Krishnapa *v.* Subrao Vithoba, 22 B. 415 (1895).

(2) See Amanee *v.* Koorban Ali, 3 Agra 204.

(3) Motiram Raghunath *v.* Bivraj, 20 B. 745 (1895).

(4) Kanye Lall Dass *v.* Shama Churn Dawn, 21 C. 566 (1894), which deals also with costs as against the purchaser when there has been delay on the part of the party having carriage of the proceedings.

(5) *Calcutta Gazette* of 13th April, 1892, Part I. p. 414; *Assam Gazette* of 16th April, 1892, Part III. p. 272.

(6) Srinivasa *v.* Malayacha, 7 M. 211 (1883).

(7) Gujadhur *v.* Naik Pauree, 8 C. 528 (1882).

"**Be forfeited to Government.**"—This is imposed in order to prevent waste of the Court's time in conducting re-sales. The fact that the decree-holder and the judgment-debtor do not ask for a re-sale was held to be no reason why Government should forego the forfeiture; (1) but the wording of the Code was then imperative, "*shall be forfeited.*" The modification introduced by the present Code makes it discretionary with the Court to direct the forfeiture or not, and has been inserted to prevent hardship caused in such cases as the last mentioned.(2)

Appeal.—An appeal under the last Code lay from an order under the corresponding section where the defaulting purchaser attached the decree in execution of which the property was sold to him, and a petition for revision was held not to be maintainable.(3) According to this decision an appeal lies under sect. 47, *ante*.

Notification on re-sale.

87. Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh *proclamation* in the manner and for the period hereinbefore prescribed for the sale.

"**Fresh proclamation.**"—This rule is sect. 309 of the last Code. A fresh notification is not prescribed in the case of *every* re-sale, but only when the re-sale is in default of payment of the purchase-money within the time allowed for such payment.(4) The rule does not apply to a postponed sale,(5) or to a case in which the property is put up again and sold forthwith under r. 84, *ante*.(6)

***Bid* of co-sharer to have preference.**

88. *Where* the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively *bid* the same sum *for such property or for any lot, the bid* shall be deemed to be the *bid* of the co-sharer.

Bidding by co-sharer.—This rule modifies the terms of sect. 14 of Act XXIII. of 1861, which provided that where "*a share of a putteedaree estate paying revenue to government*" was sold, "*if the lot shall have been knocked down to a stranger, any co-sharer other than the judgment-debtor, or any other member of the co-parcenary, may claim to take the share sold at the sum at which the lot was knocked down. Provided that the claim be made on the day of sale and that the claimant fulfil all the conditions of the sale.*" The rule was altered to its present form by sect. 310 of Act X. of 1877, save that this rule omits the words "*in execution of a decree*" after the words "*property sold,*" and substitutes the words "*bid the same sum for*

(1) Sambasiva *v.* Vydinadasami, 25 M. 535 (1901).

(2) Mathura *v.* Gauri Shankar, 32 A. 380 (1910).

(3) Sah Man Mull *v.* Kanagasabapathi, 16 M. 20 (1892).

(4) Vallabhan *v.* Pangunni, 12 M. 454, 458 (1889).

(5) Budree Nath Bhutt *v.* Rajah Chunder Sekhur, 1 W. R. Misc. 3 (1864).

(6) Rajendra Nath Roy *v.* Ram Charan Sinha, 2 C. W. N. 411 (1898).

such property or for any lot, the bid shall be deemed to be the bid" for *"advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding"* as it appeared in the Code of 1877.

"Is a share of undivided immoveable property."—This does not include the interest of a mortgagee in such a share, and this rule does not apply to the sale of such interest.(1) Sect. 14 of Act XXIII. of 1861 was held not to apply to land sold in execution of a decree of a Revenue Court.(2)

"Co-sharer."—An officer conducting a sale of land which was a share of a *putteedaree* estate had to take notice of a claim made by a person under sect. 14 of Act XXIII. of 1861 and to receive the purchase-money as a fulfilment of the conditions of sale, subject to any question which might be raised by any party interested as to the claimant's title.(3) If his right were clear the sale might be confirmed in his favour; if doubtful, the sale might be confirmed in favour of the other bidder, leaving the co-sharer to his remedy by suit; (3) he ought not to have been substituted for the actual purchaser. His position was that he could advance his claim to pre-emption, which would be adjudicated on later.(4) Under that Act a co-sharer having preferred his claim to pre-emption, the sale could not be held as void merely by the failure of the person to whom the property was knocked down to make the deposit.(5) The right of pre-emption can only be claimed by those who are co-sharers or members of the coparcenary at the time the auction sale takes place.(6) A title which is still defeasible at the date of the sale is not sufficient to support a claim under this rule.(7) A decree-holder, who under Mahomedan law would be entitled to pre-emption, is not entitled to that right on sale in execution of his decree.(8) Where the judgment-debtor's rights in a *putteedaree* estate were sold and purchased by his son in the name of his father-in-law, who was not a co-sharer and who after the sale waived his rights in favour of the judgment-debtor, held that a co-sharer who had fulfilled requirements was entitled to pre-emption.(9) A suit by a person claiming pre-emption for possession is premature and unmaintainable. He should sue to set aside the order confirming the sale in favour of the auction-purchaser, and to have himself declared entitled to pre-emption and to be substituted for the auction-purchaser.(10) Where a revenue sale has been caused by the default of a co-sharer and the property is purchased at that sale by him, there may be such relations between him and his co-sharer as would justify the Court in treating such sale as for the benefit of both.(11)

(1) Jairam Das *v.* Beni Prasad, 3 A. 15 (1880).

(2) Narain Singh *v.* Muhammad Faruk, 1 A. 277 (1876).

(3) Tasuduk Ali *v.* Muksud Ali, 6 N. W. P. H. C. R. 272 (1874).

(4) Syud Abdool *v.* Kalee Koomar, 6 W. R. Mis. 3 (1866).

(5) Dabee Pershad *v.* Bisheshur, 6 N. W. P. H. C. R. 289 (1874).

(6) Dwarka Parshad *v.* Ram Autar, 7 N. W. P. H. C. R. 281 (1875).

(7) Abdul Ghafur *v.* Ghulam Husain, 35 A. 296 (1913); Kamta Prasad *v.* Mahan Bhagat, 32 A. 45 (1909); Nabihan Bibi *v.* Kauleshar Rai, A. L. J. 351 (1907).

(8) Sheik Nuzmoodeen *v.* Kanye Jha, Marsh, 555 (1863).

(9) Gunga Ram *v.* Moola, 2 N. W. P. H. C. R. 200 (1870).

(10) Shib Sahai *v.* Thika Ram, 7 N. W. P. H. C. R. 97 (1875).

(11) Faizur Rahman *v.* Mimansa Khatun, 18 C. L. J. 111 (1913); Ram Prasad *v* Pawan Singh, 18 C. L. J. 97 (1913).

"**Bid the same sum.**"—Even when the section ran "*advance the same sum*," it was held that this contemplated a distinct bid by the co-sharer in the ordinary manner. It was not sufficient if he asserted his right of pre-emption and offered a sum equal to that bid by the purchaser.(1)

Appeal.—No appeal lies under O. XLIII. r. 1. It was held that the auction bidder, not being a party, could not appeal from an order confirming the sale in favour of a co-sharer,(2) and that a co-sharer aggrieved under the former section, not being a person mentioned in sect. 311, now O. XXI. r. 90, could not appeal objecting to the sale being confirmed in favour of the auction-purchaser and ask its confirmation in his own favour, and an application for revision was also refused.(3)

Application to set aside sale on deposit.

89. (*1*) *Where* immoveable property has been sold *in execution of a decree*, any person, *either owning such property or holding an interest therein by virtue of a title acquired before such sale*, may apply to have the sale set aside on his depositing in Court,—

(*a*) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

(*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(*2*) *Where* a person applies under *rule* 90 to set aside the sale of his immoveable property, he shall not, *unless he withdraws his application*, be entitled to make *or prosecute* an application under this *rule*.

(*3*) Nothing in this *rule* shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Object of rule.—This rule affords a special indulgence to the judgment-debtor. It gives him yet one more chance of saving his property.(4) It also confers a right upon certain persons other than the judgment-debtor. See *post*, note, "Who may apply." A Court has no power to set aside a sale under this rule unless the applicant has strictly complied with its provisions.(5) It

(1) Hira *v.* Unas Ali, 3 A. 827 (1881); Tej Singh *v.* Gobind Singh, 2 A. 850 (1880).

(2) Muniruddin Khan *v.* Abdul Rahim, 3 A. 674 (1881).

(3) Bisheshar Kuar *v.* Hari Singh, 5 A. 42 (1882).

(4) Chundi Charan Mandal *v.* Banke Behary Mandal, 26 C. 449, 452 (1899); Lakshmi Ammal *v.* Sankaran Nair, 24 M. L. J. 205 (1913); Ishar Das *v.* Asaf Ali, 34 A. 186 (1911); Banko Behary *v.* Krishna Chandra, 18 C. L. J. 170 (1913).

(5) Trimbak Narayan *v.* Ramchandra Narasingrao, 1 Bom. L. R. 215 (1899); Rahim Bux *v.* Nundo Lal Gossami, 14 C. 321 (1887).

was the subject of conflict under the last Code whether the former section did,(1) or did not,(2) apply to sales of mortgaged property under the Transfer of Property Act. The section was held to apply to sales of holdings in execution of decrees for arrears of rent; (3) but not to sales under the Public Demands Recovery Act (I. B. C. of 1895).(4) The former section was held to apply even if the execution proceedings be referred to the Collector, who had no power to set aside a sale under the provisions of the Code. It was also held that there was nothing which precluded the Court from setting aside the sale merely because it had been confirmed.(5) When money has been deposited under this rule it is not liable to rateable distribution under sect. 73.(6)

Who may apply.—Under the last Code any person might have applied, "*whose immoveable property has been sold under this Chapter.*" A *benamdar* of a person whose immoveable property was sold could apply.(7) These words gave rise to a conflict of decision. It could hardly be that these words referred to the judgment-debtor alone or the Legislature would have said so. The question then arose to whom else the section did apply. It was not even every judgment-debtor who could apply, but only those whose property had been sold under the Code.(8) It was held that a simple mortgagee of a tenure or holding sold for arrears of rent, such sale being with right to purchaser to avoid incumbrances, could apply,(9) but not a second mortgagee not a party to the suit whose interest had not passed under the sale.(10) The purchaser of a share of an occupancy-holding transferable by custom could apply; (11) as also a judgment-debtor who has effected a private sale of his property during the

(1) Krishnaji *v.* Mahadev Vinayek, 25 B. 104; s. c., 2 Bom. L. R. 635 (1900); Mallikarjunadu Setti *v.* Lingamarti Pantulu, 25 M. 244 (1900); Tirumal Rao *v.* Syed Dastaghir Miyah, 22 M. 286 (1898); Raja Ram Singhji *v.* Chunni Lal, 19 A. 205 (1897). The point was queried in Shiam Lal *v.* Bashir-ud-din 28 A. 778 (1906).

(2) Kedar Nath Raut *v.* Kali Churn Ram, 25 C. 703 (1898), F. B.; s. c., 2 C. W. N. 353.

(3) Janardhan Ganguli *v.* Kali Kristo Thakur, 23 C. 393 (1895); Bungshidhar Haldar *v.* Kedar Nath Mandal, 1 C. W. N. 114 (1896); Benodini Dassi *v.* Peary Mohan Haldar, 8 C. W. N. 55, 56 (1903); Hamidal Huq *v.* Matangini Dassi, 2 C. W. N. cclviii. (1898); dist. in Nitya Nunda *v.* Hira Lal Karmakar, 5 C. W. N. 63 (1900). In Harish Chandra Ghose *v.* Ananta Charan Patra, 2 C. W. N. 127 (1897), the section was held not to apply to sales under Act X. of 1859; dissented from in Chaitan *v* Kunja, 15 C. W. N. 863, 870 (1911); 14 C. L. J. 284.

(4) Bepin Behary Bera *v.* Sosi Bhusan Datta, 18 C. L. J. 628 (1913), p. 632.

(5) Pita *v.* Chuni Lal, 31 B. 207 (1905); s. c., 9 Bom. L. R. 15.

(6) Harai Saha *v.* Faizlur, 17 C. W. N. 636 (1913).

(7) Basi Poddar *v.* Ram Krishna Poddar, 1 C. W. N. 135 (1896); doubted by Rampini, J., in Paresh Nath Singha *v.* Nobogopal Chattopodhya, 29 C. 1 (1901), at p. 16.

(8) Ram Singh *v.* Salig Ram, 28 A. 84, 85 (1905).

(9) Paresh Nath Singha *v.* Nobogopal Chattopadhya, 29 C. 1; s. c., 5 C. W. N. 821 (1901) [see Abdul Rahaman *v.* Matiyar Rohaman, 30 C. 425, 427 (1902); Mahadeo Chintaman *v.* Vasudev Kirtikar, 23 B. 181, at p. 184 (1898)]. In Nitya Nanda Patra *v.* Hira Lal Karmakar, 5 C. W. N. 63 (1900), it was held that a simple mortgagee could not apply.

(10) Mallikarjunadu Setti *v.* Lingamurti, 26 M. 332 (1902). In Srinivasa Ayyangar *v.* Ayyathorai Pillai, 21 M. 416, it was held that a mortgagee who was affected by the sale could apply; Ali Miah *v.* Ramjan, 13 C. W. N. 224 (1908).

(11) Benodini Dassi *v.* Peary Mohan Haldar 8 C. W. N. 55 (1903); Kunja Behary Mondal *v.* Sambhu Chandra Roy, 8 C. W. N. 232 (1903).

pendency of the attachment-proceedings; (1) or a donee under a gift made while the property was under the attachment; or a *durmokararidar* where the *mokarari* tenure was sold for arrears of rent; (2) a purchaser subsequent to attachment and prior to sale.(3) In short, any one whose interest is bound by a sale might apply though he be no party to the suit or to the decree under which the sale took place.(4) An application by a person entitled, together with a person not entitled, was received and payment made jointly by those persons was held to be a sufficient payment.(5) Where under sect. 310A of the former Code a reversionary heir applied for and obtained leave to make a deposit, it was held that he made it as a person interested in the payment of money within the meaning of sect. 69 of the Indian Contract Act.(6)

It was held that the following could not apply:—An under raiyat,(7) but this has since been dissented from; (8) *howladar* under tenure-holder; (9) a purchaser at a private sale from the judgment-debtor after the sale in execution; (10) a purchaser prior to sale in execution of decree against his vendor; (11) nor on the same principle a person claiming a share in immoveable property sold in execution of a decree against his co-sharers; (12) nor a person who has contracted to purchase land, such contract not creating in itself any interest in or charge upon the property; (13) an attaching creditor,(14) nor an owner or holder of an interest who has parted with his title since the sale or has acquired such title since the sale.(15) Even before the passing of the Bengal Tenancy Amendment Act of 1907, this rule did not apply to a tenure or holding attached in execution of a decree for arrears.(16)

It is not quite clear what the effect of the amendment is.(17) The words

(1) Maganlal Mulji *v.* Doshi Mulji, 25 B. 631 (1901), for the private sale would not become operative unless and until the auction sale was set aside; Omar Ali *v.* Moonshi Basirudeen, 7 C. L. J. 282 (1908).

(2) Narain Mandal *v.* Sourindra Mohan Tagore, 32 C. 107 (1904).

(3) Mulchand Dagadu *v.* Govind Gopal, 30 B. 575 (1906); but see *post*.

(4) Erode Manikkoth *v.* Puthiedeth Chembakkoseri, 26 M. 365 (1902).

(5) Cal. H. C. R. 1058, 25th May, 1904.

(6) Pankhabati Chowdhurani *v.* Nani Lal, 19 C. L. J. 72 (1913).

(7) Abid Mollah *v.* Diljan Mollah, 29 C. 459 (1902).

(8) Chandra Kumar Nath *v.* Kamini Kumar Ghose, 11 C. W. N. 742 (1907).

(9) Abid Mollah *v.* Diljan Mollah, *supra*, at p. 460.

(10) Hazari Ram *v.* Badal Ram, 1 C. W. N. 279 (1897), for at the time of the sale the property was not the property of the applicant; dissented from in Appaya Shetti *v.* Kamhali Beari, 17 M. L. J. 127 (1906); s. c., 30 M. 214; Manikka Odayan *v.* Rajagopala Pillai, 17 M. L. J. 291 (1907); s. c., 30 M. 507.

(11) Ram Chandra Dhondo *v.* Rakhmabai, 23 B. 450 (1898), for his interests were not affected by the execution-sale; foll. Arjun Mollah *v.* Jadu Nath Roy Chowdry, 7 C. W. N. 243 (1902), and in case in next note; but see Mulchand Dagadu *v.* Govind Gopal, 30 B. 575 (1906).

(12) Abdul Rahaman *v.* Matiyar Rahaman, 30 C. 425 (1902).

(13) Mahadeo Chintaman *v.* Vasudev Kirtikar, 23 B 181 (1898).

(14) Kedar Nath Sen *v.* Uma Charan, 6 C. W. N. 57 (1900); but see notes to sect. 187.

(15) Ishar Das *v.* Isaf Ali Khan, 34 A. 186 (1911).

(16) Asiruddi *v.* Mokhada, 35 C. 543 (1908); and see Muhammad *v.* Ahmad, 33 A. 481 (1911), a mortgagee who is also the holder of a decree for money and has had a part of the property sold.

(17) See Lakshmi Ammal *v.* Sankaran Nair, 24 L. M. J. 205.

"owning such property or *holding an interest* (1) *therein*" (the latter term no doubt applying to cases of interest in the property itself as distinguished from personal claims against others relative thereto) are by themselves clear enough. It must, however, be remembered that "such property" is property sold in execution of a decree. It is only the judgment-debtor's interest in any property or the interest therein of any other person bound by the decree that *can* be sold in execution of a decree.(2) A question therefore arises whether the rule applies only to persons whose interests are affected by the execution sale: the point is not clear, as the word "*sold*" may refer, not to what can, in law, be sold and passes, but what, in fact, is sold in the sense of purported to be sold. Perhaps the latter is the case, for the Select Committee say "words have been added so as to make it clear that a purchaser acquiring a title before the sale in execution can claim the benefit of the sale. In other respects the Committee consider it advisable to adhere to the wording of the section."

The date of sale is the date when the property is actually sold.(3)

"**Depositing.**"—If the applicant does not make the deposit within the prescribed period the Court has no jurisdiction to set aside the sale.(4) If the judgment-debtor has been misled by a mistake of the Court the consequences of that mistake ought not to fall upon him; as where the amount was fixed by an order of the Munsif himself in the presence of and with the assent of the pleaders of both parties,(5) but an application has been refused where the Court did not declare the amount to be paid, and it did not appear that the officer of the Court from whom the applicant was said to have received certain information in regard to the amount to be deposited, was the officer who was charged by the Court with the duty of supplying that information.(6) When the petitioner, owing to the fact that the presiding officer left the Court earlier than usual, could not make the deposit that day, it was held that the deposit was made validly on the following day.(7) Where the owner of immoveable property applies he is under a liability to deposit a sum equal to 5 per cent. on the purchase-money, for payment to the purchaser, even where the land has been purchased by the decree-holder.(8) An applicant who had fulfilled the requirements of

(1) In Poresh Nath Singha *v.* Nabagopal Chattopadhya, 29 C. 1, at p. 13 (1901); Dulhin Mathura *v.* Bansidhar, 16 C. W. N. 904 (1911).

(2) Ram Chandra Dhondo *v.* Rakhmabai, 23 B. 450, 451 (1898)

(3) Chowdhry Kesha Sahay *v.* Giani Roy, 29 C. 626; s. c., 6 C. W. N. 776 (1902). This is now enacted by sect. 65; but in another case under the former Code, Banko Behary *v.* Krishna Chandra, 18 C. L. J. 170 (1913), it was recently held by Chatterjee, J., that the words "date of sale" in the Bengal Tenancy Act mean the date on which the sale is confirmed. But see Yusuf Gazi *v.* Payaranessa Bewa, 16 C. L. J. 131 (1912).

(4) Chundi Charan Mandal *v.* Banko Behary Mandal, 26 C. 449, 452 (1899), ordinarily at least, for see also at p. 457.

(5) Makbool Ahmed Chowdhry *v.* Bazle Sabhan Chowdhry, 25 C. 609 (1898).

(6) Chundi Charan Mandal *v.* Banko Behary Mandal, 26 C. 449, 459; s. c., 3 C. W. N. 283 (1899).

(7) Dulhin Mathura *v.* Bansidhar, 16 C. W. N. 904 (1911); 15 C. L. J. 83; and see Mahomed *v.* Sukhdeo, 13 C. L. J. 467 (1911).

(8) Tirumal Rai *v.* Syed Dastaghir Miyah, 22 M. 286 (1898); and see Chundi Charan Mandal *v.* Banko Behary Mandal, 26 C. 449, 451 (1899)

clauses (*a*) and (*b*) of this section of the last Code, was held (1) entitled to have the sale set aside even though something more on account of the poundage was recoverable from him, under the head of costs provided for in the last clause of that section. A deposit under this rule must be unconditional.(2) Where the applicant prayed that the money should be kept in deposit until the disposal of an appeal, and the money therefore could only be received on the condition expressed in the application, the deposit was held not to be good under sect. 174 of the Bengal Tenancy Act.(3) But where money was duly deposited under the former section, and a petition which might have been refused was made later, it was held a good deposit.(4) A mere application without an actual deposit is not sufficient compliance with the law.(5) Where there was only an offer to pay, but no actual deposit, and the prayer to set aside the sale was joint with another which could not be entertained under the Proviso, it was held that no second appeal lay.(6) A mortgagee making payments to save the mortgaged property from being sold in execution of a rent decree has an additional lien on the property for the sums so paid by him.(7)

The deposit under this rule must be made within thirty days from the date of the sale. But it is not necessary that the notice under r. 92 should be made within that time.(8)

"**For payment to the purchaser.**"—It has been said that 5 per cent. is given partly as a solatium to the purchaser for the loss of his bargain.(9) It makes no difference that the purchaser is also the decree-holder.(10)

"**For payment to the decree-holder.**"—These words mean that the decree-holder is the person solely entitled to the money paid into Court.(11) Sect. 295 (now 73) does not apply to a deposit made by a judgment-debtor under this rule.(12) It was also, therefore, held that it was sufficient to deposit only the amount of the decree for the satisfaction of which the sale was proclaimed and took place.(13) In this rule the term decree-holder means only the person for satisfaction of whose decree the sale has been ordered, and does not include other persons who would have a right to claim rateable distribution out of the sale proceeds under sect. 73.(14)

Under the rule, the amount deposited is that "*specified in the proclamation*

(1) Mutha Ayyar *v.* Ramasami Sastrial, 20 M. 158 (1896).

(2) Dulhin Mathura *v.* Bansidhar, 16 C. W. N. 904 (1911); 15 C. L. J. 83.

(3) Mt. Shakoti *v.* Jotindra Mohun Tagore, 1 C. W. N. 132 (1896).

(4) Hanooman Singh *v.* Luchman Sahoo, 8 C. W. N. 355 (1904).

(5) Mahomed Akbar *v.* Sukhdeo, 13 C. L. J. 467 (1911).

(6) Narayena *v.* Rasul Khan, 1 Bom. L. R. 33 (1899).

(7) Rakhohari Chattaraj *v.* Bipra Das Dey, 31 C. 975 (1904).

(8) Ganesh *v.* Vithal, 15 Bom. L. R. 244 (1912).

(9) Chundi Charan Mandal *v.* Banko Behary Mandal, 26 C. 449, 451, 452 (1899).

(10) Ib.; Tirumal Rai *v.* Syed Dastaghir Miyah, 22 M. 286 (1898).

(11) Ganesh *v.* Vithal, 37 B. 387 (1912).

(12) Roshun Lall *v.* Ram Lall Mullick, 30 C. 262; s. c., 7 C. W. N. 341 (1903); see Behari Lall Paul *v.* Gopal Lal Seal, 1 C. W. N. 695 (1897), and next note; Harai Saha *v.* Faizlur Rahman, 40 C. 619; 18 C. L. J. 144 (1913).

(13) Hari Sundari *v.* Shashi Bala, 1 C. W. N. 195 (1896).

(14) Ganesh *v.* Vithal, 15 Bom. L. R. 244 (1912).

of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder."

It has been held that the word "*received*" ought to be construed to mean sums of money either actually received by the decree-holder, or which he was in a position to credit to his account, and that this was not the case as regards amounts deposited by other purchasers.(1) It has been held also that the payment to the decree-holder need not be in cash, and that it is enough if he is satisfied with regard to the whole of the amount due to him.(2) The Bombay High Court held that what the former section contemplated was an actual receipt by the decree-holder, and that nothing else would satisfy its requirements.(3)

"**Or prosecute.**"—The addition of the words "*or prosecute*" was intended to give effect to the undermentioned ruling.(4)

Impleading parties.—It was proposed, in order to give effect to two rulings of the Allahabad High Court (5) in applications under the following rule, to enact a clause declaring that an applicant under this rule should be bound to implead the purchaser and decree-holder as parties to the application which should in their absence be dismissed. It had been also held in the Calcutta High Court that an auction-purchaser is entitled to notice before an order is made under this section.(6) The proposed clause has not been enacted.

"**Unless he withdraws.**"—This rule prevents a person who has preferred an application under r. 90 from making or prosecuting an application under this rule, until he has withdrawn the other; but the converse is not provided for.(7) This rule and r. 90 permit of applications by persons who could not have applied under sects. 310 and 311 of the last Code.

Appeal.—Sect. 588 of the Code of 1882 did not provide for an appeal against an order under sect. 310A, corresponding with this rule.(8) It was, however, held that if and when an order under that section fell under sect. 244 (*c*) (now 47) it was appealable,(9) and where it did not fall within that section,

(1) Kripa Nath Pal *v.* Ram Laksmi Dasya, 1 C. W. N. 703, 705 (1897).

(2) Lakshmi Ammal *v.* Sankaran Nair, 24 M. L. J. 205 (1913); Vedala Lakshminara Sinha *v.* Pacha Lakshmia Uma, M. W. N. 756 (1912).

(3) Trimbak *v.* Ramchandra, 23 B. 723; s. c., 1 Bom. L. R. 215 (1899).

(4) Rajendra Nath Haldar *v.* Nilrattan Mitter, 23 C. 958 (1896). As to application under next section after rejection under this section, see Ashruf Ali Chowdhry *v.* Net Lal Saha, 23 C. 682 (1896).

(5) Gauhar Ali Khan *v.* Bansidhar, 15 A. 407 (1893); Karamat Khan *v.* Mir Ali Ahmed, W. N. 1891, p. 121; see next section.

(6) Bungshidhar Haldar *v.* Kedar Nath Mondal, 1 C. W. N. 114 (1896); Nitya Nunda Patra *v.* Hira Lall Karmakar, 5 C. W. N. 63, 64 (1900); *contra*, Bhairab Pal *v.* Prem Chand Ghose, 1 C. W. N. clxi. (1897).

(7) Basiruddin *v.* Faimulla, 17 C. W. N. 476 (1911).

(8) Asimuddi *v.* Pran Mohini, 15 C. W. N. 844 (1911).

(9) Pita *v.* Chunilal, 31 B. 207 (1906); Magan Lal Mulji *v.* Doshi Mulji, 25 B. 631; s. c., 3 Bom. L. R. 255 (1901); Murli Dhar *v.* Anandrao, 25 B. 418; s. c., 3 Bom. L. R. 100 (1900); Pandurang Govind Purandare *v.* Krishnabai, 1 Bom. L. R. 74 (1899); Phul Chand Rani *v.* Nurshing Parshad Missir, 28 C. 73 (1900) [foll. in Imtiazi Begam *v.* Dhuman Begam, 29 A. 275 (1907)]; Kedar

as in the case of an auction-purchaser stranger, the order was subject to revision.(1) It was held that no appeal lay from an order refusing to restore to the file an application dismissed for default of appearance.(2) And it has been recently held that an order on an application to set aside a sale under this rule is not a decree within the meaning of sect. 2.(3) The true nature of the order must be examined and the character of the parties affected by it must be ascertained before it can be determined whether the order falls within the scope of sect. 47.(4)

Application to set aside sale on ground of irregularity *or fraud.*

90. (*1*) *Where any immoveable property has been sold in execution of a decree, the* decree-holder, or any person *entitled to share in a rateable distribution of assets, or whose interests are affected by the sale,* may apply to the Court to set aside the sale on the ground of a material irregularity *or fraud* in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity *or fraud* unless *upon the facts proved the Court is satisfied that* the applicant has sustained substantial injury by reason of such irregularity *or fraud.*

"**May apply.**"—An application under this rule is limited to the grounds set forth in it, and a Court cannot set aside a sale under this rule upon grounds which have not been pleaded by the applicant.(5) The former section, according to a Full Bench of the Madras High Court, applied to sales of mortgaged property in execution of mortgage-decrees.(6) It was held that there was no provision in Act X. of 1859, entitling a party to have a sale set aside on the ground of non-attachment and non-proof of publication of sale-proclamation.(7) Apparently, the application should be made to the Court executing the decree. It was held

Nath Sen *v.* Uma Charan, 6 C. W. N. 37 (1900); Srinavasa Ayyangar *v.* Ayyathorai Pillai, 21 M. 416, 417 (1897); Bungshidhar Haldar *v.* Kedar Nath Mondal, 1 C. W. N. 114 (1896); Kripa Nath Pal *v.* Ram Laksmi Dasya, 1 C. W. N. 703, 705 (1897); Manikka Odayan *v.* Rajagopala Pillai, 17 M. L. J. 291 (1907). In Kuber Singh *v.* Shib Lal, 27 A. 263 (1904), the Allahabad High Court dissented from the view that there was an appeal under s. 244; Hari Har *v.* Rama Pandu, 33 B. 698 (1909); Anandi *v.* Ajudhia, 30 A. 379 (1908).

(1) Kedar Nath Sen *v.* Uma Charan, 6 C. W. N 57 (1900); Bashir-ud-din *v.* Jhori Singh, 19 A. 140 (1896), where the case was held not to fall under s. 244, now 47, the question being between the judgment-debtor and the purchaser; Amir Rai *v.* Basdeo Singh, 5 C. L. J. 204 (1906). See, however, last case but one in last note.

(2) Ghasiti Bibi *v.* Abdul Samad, 29 A. 596 (1907)

(3) Asimuddi *v.* Pran, 15 C. W. N. 844 (1911).

(4) Mahomed Akbar *v.* Sukhdeo, 13 C. L. J. 467 (1911).

(5) Harbans Lal *v.* Kundan Lal, 21 A. 140 (1898).

(6) Mallikarjunadu Setti *v.* Lingamurti Pantulu, 25 M. 244 (1900).

(7) Patil Shahu *v.* Hari Mahanti, 27 C. 789 (1900); Bibi Sharifan *v.* Mahomed, 13 C. L. J. 535 (1911); 15 C. W. N. 685; Lakshmi *v.* Sris, 13 C. L. J. 162 (1910); Livinia *v.* Madhobmoni, 11 C. L. J. 489 (1910).

that where execution of the decree had been transferred to the Collector, application had to be made to him ; (1) but that decision had reference to the Rules of the N.W.P. and was not followed in Bombay.(2) A beneficial owner is not a necessary party to a proceeding for setting aside an execution-sale. It is competent to the Court to set aside the sale finally and conclusively, as against the beneficial owner, although his *benamdar* only and not he is made a party to the proceeding.(3) The decree-holder is a necessary party to an application under this rule,(4) as also the auction-purchaser (5) and judgment-debtor.(6) The issue which arises when a petition is referred under this rule is a judicial proceeding and ought to be carried out with regularity ; the Court fixing a day for the hearing of the matter of the petition, and giving reasonable notice to all parties, *i.e.*, such as would afford to each party fair and reasonable opportunity of bringing the necessary evidence on or before that day.(7) If an application is made within time it must be dealt with, and cannot be summarily rejected on the ground that it might have been made earlier.(8) When the application has been duly presented, framed and heard, each objection should be taken up separately and determined. Specifically distinct findings should be come to on each point, and the reasons for the findings duly recorded.(9) Where there has been no fraud, application to set aside a sale under this rule must, under Art. 166 of the Limitation Act, be made within thirty days of the date of sale. Where, however, irregularities affecting the sale have by the fraud of the judgment-creditor or other parties to the sale been kept concealed from the judgment-debtor, he is entitled, whether the sale has been confirmed or not, to apply ; the time for making the application being computed from the date when the fraud first became known to him.(10) But if proceedings to set aside a sale were under sect. 47 (formerly 244), then the period of thirty days does not apply, but the three years' limitation.(11) Fraud with regard to the knowledge of the

(1) Keshabdeo *v.* Radho Prasad, 11 A. 94 (1888).

(2) Narayan *v.* Rasul Khan, 23 B. 531 (1899).

(3) Baroda Kanta Bose *v.* Chunder Kanta Ghose, 29 C. 682 ; s. c., 6 C. W. N. 706 (1902).

(4) Ali Gauhar Khan *v.* Bansidhar, 15 A. 407 (1893).

(5) Karamat Khan *v.* Mir Ali Ahmed, All. W. N. (1891), p. 121, cited ib. ; see Gopal Singh *v.* Dular Kuar, 2 A. 352 (1879) ; Kanti Ram *v.* Bankey Lal, 2 A. 396 (1879) ; Gangathara *v.* Ruthabai, 6 M. 237, at p. 238 (1882).

(6) Ali Gauhar Khan *v.* Bansidhar, *supra.*

(7) Brojo Mohun Thakoor *v.* Shah Ameenooddeen, 20 W. R. 424 (1873) ; see Sanaril Singh *v.* Makhun Pandey, 2 A. H. C. R. 143, 144 (1870) [necessity of allowing evidence in support of injury] ; Rethbunjun Singh *v.* Mitturjeet Singh, 4 W. R. Misc. 9 (1865) [same as to irregularity] ; Khodeja Bibee *v.* Ram Narain Dass, 12 W. R. 511 (1869) [same] ; Sookh Raj Singh *v.* Mooftee Tuffozzool, 2 A. H. C. R. 142 (1870) [the Court should take evidence, and not merely rely on report of the Nazir]

(8) Syud Nujmooddeen Ahmed *v.* Abdool Azeez, 15 W. R. 95 (1871) ; Kalee Sahoy *v.* Makoond Lal, 24 W. R. 216 (1875).

(9) Sookh Raj Singh *v.* Mooftee Tuffozzool, 2 A. H. C. R. 142 (1870) ; Mt. Parbutty *v.* Girdharee Lall, 6 W. R. 125 (1866).

(10) Mohendro Narain Chaturaj *v.* Gopal Mondul, 17 C. 769, 776 (1890), F. B. [diss. from Gobind Chundra Majumdar *v.* Charan Sen, 14 C. 679 (1887)] ; followed in Raj Chandra De *v.* Badiar Rahaman, Rule 1249 of 1914 ; 7th May, 1915 [Woodroffe, J., and Mullick, J.] ; Kailash Chandra Halder *v.* Bissonath Paramanic, 1 C. W. N. 67 (1896).

(11) Luchmipat *v.* Mt. Mandil Koer, 3 C. W. N. 333, 336 (1899).

judgment-debtor may be before the sale, for fraud is a continuing influence.(1) As to sect. 153 of the Bengal Tenancy Act, see cases cited.(2) An application to set aside a sale on the ground that no notice had been served as required by O. XXI. r. 22, cannot be made under this rule but must be made under sect. 47.(3)

Immoveable property.—The section is limited to sales of immoveable property. It has been held that a decree upon a mortgage is incapable of being so described and regarded, and an application under the former section with regard to the sale of such a decree was incompetent.(4)

Who may apply.—As to this, the section in the last Code ran, "*the decree-holder, or any person whose immoveable property has been sold under this Chapter.*" There was a conflict upon the meaning to be attached to the term "*decree-holder,*" as also as to the meaning of the other words. As regards the first term, the question was whether it was limited to the decree-holder, at whose instance the lands were first attached; the decree-holder who brings the property to sale; (5) or any decree-holder entitled to share in the assets, and also having an interest, to see that the sale which produces those assets was regularly conducted.(6) The present rule adopts a series of decisions to the effect that a person entitled to share in a rateable distribution of assets (and presumably his representative) is entitled to apply under this provision.(7) The phrase italicized obviously included the judgment-debtor or his representative.(8) A question, however, arose as to who else was included, it being admittedly not restricted to the judgment-debtor. It was held that any person might apply to set aside a sale if his interests were affected by the sale in the sense that it would pass by the sale; (9) and, therefore, a person claiming to be beneficial owner was held to have a *locus standi*,(10) as also the mortgagee of the judgment-debtor,(11) and a transferee of portion of an occupancy holding,(12) but not a

(1) Raj Chandra De *v.* Badiar Rahaman (Rule 1249 of 1914; 7th May 1915), following Narayan Sadhu *v.* Mohareth Damodar Das, 16 Cun. 894.

(2) Kali Mandal *v.* Ram Sarbasya, 1 C. L. J. 476 (1905); s. c., 9 C. W. N. 721; Safar Ali *v.* Raj Mohun Guha, 1 C. L. J. 454 (1902); Ganga Charan Bhattacharya *v.* Sashi Bhusan Roy, 1 C. L. J. 255 (1905).

(3) Kumed Bewa *v.* Prasanna, 40 C. 45 (1912); Lakshmi *v.* Sris, 13 C. L. J. 162 (1910).

(4) Baij Nath Lohea *v.* Binoyendra Nath Palit, 6 C. W. N. 5 (1901).

(5) Matungini Dassi *v.* Monmotha Nath Bose, 4 C. W. N. 542 (1900).

(6) See *post.*

(7) Lakshmi *v.* Kuttunni, 10 M. 57 (1885); Sorabji Edulji *v.* Govind Ramji, 16 B. 91, 101 (1891); Ajudhia Prasad *v.* Nand Lal Singh, 15 A. 318 (1893); Chattrapat Singh *v.* Jadukul Prosad Mukerjee, 20 C. 673 (1892) [person not so entitled cannot come in]; Bijoy Singh Dudhuria *v.* Hukum Chand, 29 C. 548 (1902); Chakrapani Chettear *v.* Dhanje Settee, 24 M. 311, 315 (1900).

(8) Sheo Prosad *v.* Hira Lal, 12 A. 440 (1889); followed in Bepin Behary Bera *v.* Sosi Bhusan, 18 C. L. J. 628 (1913). For the case of a judgment-debtor whose right in the property in dispute was put up for sale under a previous execution, see Baboo Reet Bhunjun *v.* Baboo Meeturjeet Singh, 6 W. R. Misc. 31 (1866).

(9) Abdul Gani *v.* Dunne, 20 C. 418, at p. 425 (1892); Timmanna Banta *v.* Mahabala Bhatta, 19 M. 167 (1895).

(10) 1b In this case the applicant's contention was that the name of the person against whom the rent-decree was obtained was really another name for himself.

(11) Rakhal Chunder Bose *v.* Dwarka Nath Mitter, 13 C. 345 (1885); Asmutunnissa Begum *v.* Ashruf Ali, 15 C. 488 (1888), F. B. at p. 492.

(12) Azgar Ali *v.* Asaboddin, 9 C. W. N. 134 (1904).

person claiming by title paramount to the judgment-debtor inasmuch as his title to the property is not affected by the sale, whether it be regular or irregular.(1) A plaintiff who has attached immoveable property before the judgment has no present interest in such property and therefore cannot apply under this rule.(2) It was, of course, held that persons whose property had not been sold could not apply,(3) such as a co-sharer in undivided property where the share of his co-sharer was sold,(4) or purchaser.(5) Though an auction-purchaser cannot directly apply, yet he may, and, indeed, should, be made a party to the proceedings after an application has been made,(6) and then, if an order is made against him, he can appeal.(7) It was held under the last Code that where an occupancy holding was sold in execution of a decree for arrears of rent, obtained against the raiyat, a person who claimed to have purchased the holding from the latter could not apply (as the representative of the judgment-holder) to have the sale set aside under sects. 244 or 311 of that Code (now represented by sect. 47 and this rule) if the holding was not transferable by custom or usage.(8)

Material irregularity.—An application under this rule is limited to the ground set forth in it.(9) Where a Court has no jurisdiction to make a decree, then any sale which takes place under such decree is void, and a nullity.(10) Where, again, the Court of execution has no jurisdiction the sale is void.(11) This rule, however, assumes that a valid decree is being executed by a Court of competent jurisdiction. It assumes regularity in this respect.(12) The words "*set aside*" show that the section is inapplicable to the case of a sale which is by reason of want of jurisdiction null and void, as distinguished from a sale which is merely voidable for irregularity. That which is a nullity cannot from its very nature

(1) Asmutunnissa Begum *v.* Ashruf Ali, 15 C. 488 (1888), F. B. [overruling Abdul Huq Mozumdar *v.* Mohini Mohun Shaha, 14 C. 240 (1887); foll. in Sheo Prosad *v.* Hira Lal, 12 A. 140 (1889)]; Subbarayadu *v.* Pedda Subbarazu, 16 M. 476, 478 (1892). See Ram Chandra *v.* Rakhmabai, 23 B. 450 (1899), the first case was distinguished in Abhoya Dassi *v.* Pudmo Lochun, 22 C. 802, where a tenure itself was sold for its own arrears. A stranger whose property is sold behind his back without authority does not need to have a sale set aside: Narasimha Naidu *v.* Ramasami, 18 M. 478 (1895).

(2) Jogendra *v.* Monmotho, 17 C. W. N. 80 (1912); Sewdut *v.* Sreecanto, 33 C. 639 (1906); 10 C. W. N. 634; Basiram *v.* Kattyani Debi, 38 C. 448 (1911); 15 C. W. N. 795.

(3) Bisheshar Kuar *v.* Hari Singh, 5 A. 42 (1882); Man Kuar *v.* Tara Singh, 7 A. 583 (1885); Brij Mohun Thakur *v.* Rai Uma Nath Chowdhury, 20 C. 8 (1892).

(4) Bisheshar Kuar *v.* Hari Singh, *supra*. As to sale of undivided shares, see Mathura Das *v.* Fatima Ulka, 5 B. H. C. R. A. C. J. 63 (1868).

(5) Brij Mohun Thakur *v.* Rai Uma Nath Chowdhury, *supra*; Bhagabati Churn Bhuttacharjee *v.* Bisheshwar Sen, 8 C. 367 (1882), *supra*.

(6) *Ante*.

(7) Kanthi Ram *v* Bankey Lal, 2 A. 396 (1879). See notes to s. 189.

(8) Prosunno *v.* Bamacharan, 13 C. W. N. 654 (1909).

(9) Harbans Lal *v.* Kundan Lal, 21 A. 140 (1898).

(10) Lalla Goondur Lall *v.* Hubeeboonissa, 15 W. R. 311 (1871).

(11) Sukhdeo Rai *v.* Sheo Ghulam, 4 A. 382 (1882); Sant Lal *v.* Umrao-un-nissa, 12 A. 96 (1889); Maijha Singh *v.* Jhow Lall, 6 A. H. C. R. 354 (1874); Nonidh Singh *v.* Sohun Koer, 4 A. H. C. R. 135 (1872); Moulvee Abdool Hye *v.* Macrae, 23 W. R. 1 (1874); Badri Prasad *v.* Saran Lal, 4 A. 359 (1882); Aghore Nath *v.* Shama Sundari, 5 A. 15 (1883); Raja Thakur Barmha *v.* Jiban Ram (P. C.), 19 C. L. J. 161 (1913).

(12) Net Lall Sahoo *v.* Sheikh Kareem Bux, 23 C. 686, at p. 689 (1895).

be set aside, while in the cases to which the rule does apply the sale is merely voidable at the instance of the party affected thereby, and, therefore, can be set aside. A plea, therefore, to the jurisdiction of the executing Court is not admissible on an application under this rule.(1) The rule is thus confined to irregularities in the particular incidents of execution following a valid decree, which are mentioned in it. Where the whole suit is attacked another suit is maintainable, notwithstanding unsuccessful applications under O. IX. r. 13 (formerly sect 108) and this rule, and omission to appeal against orders on such applications; for the existence of a real suit is assumed.(2) 'A Court, however, may, to use the language of sect. 115 (formerly 622), act illegally, or with material irregularity, in the exercise of a jurisdiction which it does possess. The present rule refers in express terms to irregularity only. It has, however, been said (3) that though the term "illegality" does not include "irregularity," the latter word as used in this section is wide enough to include illegality. The question is not one of importance unless the illegality is held to be of such a character as to affect the validity of a sale in a manner making it absolutely void. This has been held to be the result in the case of certain illegalities.(4) The view taken in some of

(1) Shirin Begam *v.* Agha Ali Khan, 18 A. 141, 145 (1895), ref. Behari Singh *v.* Mukat Singh, 28 A. 273 (1905), dissenting from Sukhdeo Rai *v.* Sheo Ghulam, 4 A. 382 (1882). In Moulvee Abdool Hye *v.* Macrae, 23 W. R. 1 (1874), and other cases cited in last note other than Sant Lal *v.* Umrao-un-nissa (where the case was held to be without the section), and Badri Prasad *v.* Saran Lal (where the Court interfered in revision), the question of jurisdiction appears also to have been dealt with under this section.

(2) Khagendra Lath Mahata *v.* Pran Nath Roy, 29 C. 395 (1902) P. C.; s. c., 6 C. W. N. 473; 4 Bom. L. R. 363; and see Radha Raman *v.* Pran Nath Roy, 5 C. W. N. 757 (1901).

(3) *Per* Brodhurst, J., in Ganga Prasad *v.* Jag Lal Rae, 11 A. 333, at p. 342 (1889). A distinction is drawn between illegality and irregularity, at p. 337; see remarks in Narayana Kothan *v.* Kalianasundaram, 19 M. 219, at p. 207 (1895). The distinction has not always been kept to. A sale has been set aside on the ground of irregularity, where it was held to be null and void: Maijha Sing *v.* Jhow Lall, 6 A. H. C. R. 354 (1874); Nonidh Singh *v.* Sohun Kooer, 4 A. H. C. R. 135 (1872); Radha Charan Das *v.* Sharfuddin Hosain, 17 C. W. N. 1135 (1913).

(4) Fida Husain *v.* Kutub Hosain, 7 A. 38 (1884); Ram Chand *v.* Pitam Mal, 10 A. 506 (1888); foll. Mahadeo Dubey *v.* Bhola Nath Dichit, 5 A. 86 (1882) F. B., where it was held that as an attachment is an essential preliminary to sale, a sale of property without a previous attachment is void; cf. Raja Thakur Barmha *v.* Jiban Ram, P. C., 19 C. L. J. 161 (1913) (only the attached property can be sold) [*contra* Kishory Mohun Roy *v.* Mahomed Mujaffar Hossein, 18 C. 188 (1890); Tincouri Debya *v.* Shib Chandra Chowdhury, 21 C. 639 (1894); Sheodhyani *v.* Bhola Nath, 21 A. 311 (1899)]; Velayutha Muppan *v.* Subramanian, 24 M. L. J. 70 (1912); also where no notice was given to legal representative: Ramessuri Dassee *v.* Doorga Dass Chatterjee, 6 C. 103 (1880), where property was sold before the advertised time; Chedami Lal *v.* Amir Beg, 7 A. 676 (1885), and where sale took place before expiry of thirty days; Bakshi Nand Kishore *v.* Malak Chand, 7 A. 289 (1885); Ganga Prasad *v.* Jag Lal Rai, 11 A. 333 (1889) [*contra* Venkata *v.* Sana, 14 M. 227 (1890); Tassaduk Rasul *v.* Ahmad Husain, 20 I. A. 176 (1893)]; Sathuvayyan *v.* Muthusama, 12 M. 325 (1888) [sale contrary to the provisions of the Transfer of Property Act]. The Privy Council have, however, pointed out that a sale is a sale and not a nullity, whether there be an irregularity or a direct contravention of express provisions: Gobind Lal Roy *v.* Ram Janam Missir, 21 C. 70 (1893); Kokil Singh *v.* Edal Singh, 31 C. 385, 391 (1904); Radha Charan Das *v.* Sharfuddin Hosain, 17 C. W. N. 1135 (1913).

these cases that the act or omission was an illegality vitiating the sale was dissented from in others. In certain cases there was probably nothing more than an irregularity. It is clear that where a party professes to apply under this rule, then by such application he admits that the case must be treated as one of material irregularity to be redressed pursuant to its provisions only upon proof of injury.(1) Ordinarily at least such irregularity will make the sale voidable only. Assuming, however, that there may be an illegality, which *ipso facto* renders the sale void, then it must be held either that the rule covers such a case, in which event injury must be established, or the case is one without the rule. In the latter case it has been held that the Court has, apart from the former section, an inherent right to set aside all illegal proceedings provided that the interests of third parties are not affected,(2) or it might have refused to confirm a sale on grounds other than those on which a party may apply to set it aside under this rule.(3) The case being *ex hypothesi* outside the section it has been held that no proof of injury is necessary.(4) The tendency, however, of modern decisions is to check judgments holding sales to be nullities on account of what are really mere irregularities in procedure.(5) And unless it can be established that the sale is for want of jurisdiction or other cause absolutely void, the case will, when there is an irregularity of the kind described, fall within and be subject to the provisions of the rule.

As the former section was confined to cases of mere irregularity of the nature described, it did not apply where the sale was sought to be set aside on another ground such as fraud.(6) Where, however, fraud in the execution-proceedings was alleged and attempted to be substantiated and the question arose between parties,(7) an application lay under sect. 47 (formerly 244), and

(1) See Tassaduk Rasul *v.* Ahmad Husain, 20 I. A. 176, at p 182 (1893); Venkata *v.* Sama, 14 M. 227, at p. 228 (1890).

(2) Ramessuri Dassee *v.* Durgadas Chatterjee, 6 C. 103, at p. 106 (1880); see Nana Kumar Roy *v.* Golam Chunder Dey, 18 C. 422, at p. 423 (1891); Birj Mohun Thakur *v.* Roy Uma Nath Chowdhry, 20 C. 8, at p. 9 (1892); Sant Lal *v.* Umrao-un-nissa, 12 A. 96 (1889).

(3) Sant Lal *v.* Umrao-un-nissa, *supra;* Ganga Prasad *v.* Jag Lal Rai, 11 A. 333, at p. 337 (1889).

(4) Ram Chand *v.* Pitam Mal, 10 A. 506 (1888) [it was also inconsistently held that there was a "material irregularity"]; Ganga Prasad *v.* Jag Lal Roy, 11 A. 333 (1889); Bakshi Nand *v.* Malak Chand, 7 A. 289 (1885). The judgment in Harbans Lal *v.* Kundan Lal, 21 A. 140 (1898), misses the point. The earlier decisions referred to did not hold that a sale could be set aside under s. 311 without proof of loss, but that illegality of the character referred to was outside the section, and therefore not affected by its limitations.

(5) See Malkarjun *v.* Narhari. 25 B. 337, 346 (1900); ref. Khiarajmal *v.* Daim, 32 C. 296 (1904); dist. case of want of jurisdiction, s. c., 5 C. W. N. 10; 2 Bom. L. R. 927; Tassadduk Rasul Khan *v.* Ahmad Husain, 21 C. 66 (1893); the principle of Gobind Lal Roy *v.* Ram Janam Misser, 21 C. 70 (1893), equally applies to execution sales: Kokil Singh *v.* Edal Singh, 31 C. 385, at pp. 391, 392 (1904); Bepin Behary *v.* Sosi Bhusan, 18 C. L. J. 628 (1913).

(6) Umbika Churn *v.* Dwarka Nath Ghose, 8 W. R. 506 (1867); Subbaji Rau *v.* Srinidasa Rau, 2 M. 264 (1880); Nund Lall *v.* Dilawar Ali, 11 W. R. 244 (1869); Virsingappa *v.* Shadashivappa, 7 B. H. C. R. Ac. 974 (1820); Raghubans Sahai *v.* Phool Kumari, 32 C. 1130, 1140 (1905); or that the decree itself has been set aside, Ramyad Sahu *v.* Bindeswari, 6 C. L.-J. 102 (1907).

(7) See Roy Luchmeeput Singh *v.* Adoyto Churn Mullick, 24 W. R. 452 (1875), where the application was by a third person not a party.

no separate suit would lie.(1) And an application was held maintainable under that section after a sale had been confirmed.(2) A purchas by the decree-holder *benami* at a price less than that at which he was permitted to bid constitutes fraud.(3) If the decree itself which is the real basis of the title was fraudulently and collusively obtained, the sale at which a purchase was made never became absolute.(4) See, however, now as to fraud the next paragraph.

The following have been considered material irregularities :—

Delay in making the deposit required by sect. 300 of the last Code ; (5) the adjournment of the sale from time to time without sufficient ground ; (6) non-publication or improper publication of sale-proclamation,(7) such as an omission to state the amount of revenue,(8) or to put up a copy of the proclamation in the Collector's office ; (9) a sale subsequent to insanity of the judgment-debtor ; (10) omission to state or misstatement of Government revenue in notification of sale ; (11) misstatement of the value of the property in the sale-proclamation calculated to mislead intending bidders,(12) selling before thirty days have expired after notice of proclamation,(13) or without a fresh proclamation where there has been a postponement,(14) or after a portion of the property has been released to a third party ; (15) or issuing a sale-notification without notifying in it that the property would be sold on a day named or as soon thereafter as it

(1) Kokil Singh *v.* Edal Singh, 31 C. 385 (1904) ; Rojoni Kanta Bagchi *v.* Hossain Uddin Ahmed, 4 C. W. N. 538 (1899). See notes to s. 4 ; as to pleading fraud, see Mahomed Mira Ravuthar *v.* Savvasi Vijaya Raghunadha, 23 M. 227 (1894) ; and as to the necessity of the auction-purchaser being a party to it, Abbubaker *v.* Mohidin, 20 M. 10 (1896) ; and effect of fraudulent sale on rights of third parties : Sidhee Nazeer Ally *v.* Ojoodhyaram Khan, 10 M. I. A. 540 (1866).

(2) Golam Ahad Chowdhry *v.* Judhister Chundra Shaha, 30 C. 142 (1902) ; s. c., 7 C. W. N. 305.

(3) Sm. Sarat Kumari *v.* Nimali Churn Dey, 5 C. W. N. 265 (1900).

(4) Banke Lal *v.* Jagat Narain, 22 A. 168, 179 (1900) ; Nanda Kumar *v.* Ram Kishore, 19 C. L. J. 457 (proof of fraud vitiating decree).

(5) Venkata *v.* Sama, 14 M. 227 (1890).

(6) Venkata *v.* Sama, *supra*.

(7) Macnaghten *v.* Mahabir Pershad Singh, 9 C. 656 (1882) ; Krishna Prasad *v.* Motichand, 40 I. A. 140 (1913) ; 17 C. L. J. 573.

(8) Ib.

(9) Nana Kumar Roy *v.* Golam Chunder Dey, 18 C. 422 (1891).

(10) Narayan Kothan *v.* Kalliana Sundaram, 19 M. 219 (1895).

(11) Madarsah Maracayar *v.* Palaniappa Chetti, 23 M. 628 (1900) ; Gridhar Singh *v.* Hurdeo Narain, 3 I. A. 230 (1876) ; s. c., 26 W R. 44 ; Olpherts *v.* Mahabir Pershad, 10 I. A. 25 (1882) ; 9 C. 656.

(12) Saadatmand Khan *v.* Mt. Phul Kuar, 2 C. W. N. 550 (1898) ; 25 I. A. 146 ; 20 A. 412, Cal. H. C. Appeal from order 439 of 1901, 17 March, 1903 ; Siradurga *v.* Rajonohan, 15 C. W. N. 577 (1910) ; Pran Singh *v.* Janardan, 14 C. L. J. 541 (1911) ; dissenting from Abdul Kashim *v.* Benode, 12 C. W. N. 757 (1908).

(13) Tasadduk Rasul Khan *v.* Ahmad Husain, 21 C. 66 (1893) ; Abdul Nossia *v.* Doolal Doss, 11 C. L. R. 303 (1882) ; Hurbuns Sahai *v.* Bhairo Pershad, 4 C. L. R. 23 (1879) ; Venkata *v.* Sama, 14 M. 227 (1890).

(14) Goopee Nath Dobey *v.* Roy Luchmeeput Singh, 3 C. 542 (1877) ; Shoshee Mukhee *v.* Dwarka Nath Biswas, 6 W. R. Misc. 84 (1866) ; Kishen Prosunno *v.* Nurduma Dossee, 17 W. R. 339 (1872) ; Mohunt Megh Lall *v.* Shib Pershad, 7 C. 34 (1881) ; Sanwal Singh *v.* Makhun Pandey, 2 A. H. C. R. 143 (1870) [no order of postponement or fresh proclamation] ; see Jamini Mohan Nundy *v.* Chandra Kumar Roy, 6 C. W. N. 44 (1901).

(15) Shib Prokash Singh *v.* Sardar Doyal Singh, 3 C. 544 (1878).

might come up in the list; (1) or advertising property of A and B for sale, and subsequently and without fresh proclamation selling A's rights and interes only; (2) omission to beat drum at time of sale; (3) notifying that the decree holder held a charge for a greater amount than was the fact; (4) sale of half th property after whole was proclaimed; (5) or not affixing copy of sale-proclama tion; (6) selling a debt secured by a mortgage of immoveable property under th provisions applicable to moveable property; (7) or selling without fixing a hour for the sale; (8) or when the proclamation is not issued in the prescribe form, and does not state the extent of the property and the revenue assesse on it or the amount of income derived from it, and omitting an order of the Hig Court containing directions for the sale; (9) or selling after proclamation o sale five days prior to date of sale, particulars of a mortgage not being given; (10 selling after notice wrongly served upon person not legal representative of judg ment-debtor's estate; (11) selling upon a notification so vague in its descriptio of the property as to be misleading; (12) publication of sale-proclamation upo decree-holder's property at a distance of some half-mile from the judgment debtor's property; (13) non-specification of adjourned hour of sale; (14) absenc of specification in sale-proclamation of incumbrances and statement of valu of property in such proclamation; (15) the omission to specify the hour c sale; (16) selling on day previous to that fixed in the order of postponement; (17 or at an hour not mentioned in the notification; (18) changing the specified orde of sale without notice; (19) selling properties in one lump advertised to be sol in lots; (20) selling without previous attachment; (21) refusal by the Court upo waiver of fresh proclamation by judgment-debtor to issue such proclamatio if applied for by the judgment-creditor; (22) omission to bring on the recor

(1) Bykunt Nath Sandyal *v.* Juggut Mohun Shaha, 24 W. R. 240 (1875).

(2) Mohiny Mohun Dass *v.* Bhoobunjoy Shah, 6 C. L. R. 237 (1880).

(3) Trimbak Ravji *v.* Nana, 10 B. 504 (1886).

(4) Kanji Mal *v.* Bibi Sailo, 8 A. 116 (1886).

(5) Pannah Lal *v.* Sri Ram Bannerjee, 1 Shome 10.

(6) Kalytara Chowdhrani *v.* Ramcoomar Goopta, 7 C. 466 (1881).

(7) Srinath Dutt *v.* Gopal Chundra Mittra, 9 C. 511 (1883), dist. Sami Ayyar *v.* Krishnasami, 10 M. 169 (1886).

(8) Surno Moyee Debi *v.* Dakhina Ranjan Sanyal, 24 C. 291 (1896).

(9) Athappa Chetti *v.* Rama Krishma Nayakan, 21 M. 51 (1897).

(10) Mohunt Megh Lall *v.* Shib Proshad Maiti, 7 C. 34 (1881).

(11) Malkarjun *v.* Narhari, 25 B. 337 (1900).

(12) Banke Lal *v.* Jagat Narain, 22 A. 168, 170 (1900).

(13) Jamini Mohun Nundy *v.* Chandra Kumar Roy, 6 C. W. N. 44 (1901).

(14) Bhikari Misra *v.* Rani Surja Moni, C. W. N. 48 (1901).

(15) Moti Laul Roy *v.* Bhawani Kuma Debi, 6 C. W. N. 836 (1902).

(16) Mahabir Pershad Singh *v.* Dhanukdha Singh, 8 C. W. N. 686, 687 (1904); s. c., 3 C. 815, 818.

(17) Jhoomuck Chowdhry *v.* Rajah Radh Persad, 25 W. R. 328 (1876).

(18) Khodeja Bibee *v.* Johad Roheen, 1 W. R. 320 (1870).

(19) Pokhraj Singh *v.* Gossain Munr Pooree, 12 W. R. 281 (1869).

(20) Sreekunt Dass *v.* Ramjeebun Roy, 1 W. R. 342 (1873); Urquhart *v.* Nundeepu Mahaputtur, 12 W. R. 492 (1869); as t selling property in lots though attached an proclaimed in its entirety, see Abdool Hye Macrae, 23 W. R. 1 (1874).

(21) Sheodhyan *v.* Bhola Nath, 21 A. 31 (1899).

(22) Chakrapani Chattiar *v.* Dhanji Sett 24 M. 311 (1900).

the legal representative of a judgment-debtor who has died after attachment and before sale; (1) basing a decision on evidence not taken in accordance with the law.(2)

The irregularity, however, if any, must be material.(3)

The following have been held to be either not irregularities or material irregularities :—

Issuing notices of attachment and sale together; (4) holding a sale for a larger sum than was actually due; (5) omission to deposit 25 per cent. of purchase-money at date of sale; (6) entering the wrong pergunnah in the proclamation if it be served in the right village and the estate has been identified; (7) publishing the notification of the sale at an inferior *cutcherry*, the *sudder cutcherry* of the zemindar being beyond the Court's jurisdiction; (8) omitting to state the rent of a tenure brought to sale; (9) selling at an inadequate price; (10) sub-dividing one of the lots advertised for sale; (11) a District Judge postponing a sale in obedience to an injunction issued by a Subordinate Judge; (12) sale of immoveable property on a close holiday; (13) or without issue of fresh proclamation; (14) selling portion of estate within jurisdiction, although the greater part falls within another district.(15)

"Or fraud."—These words have been added. Under the previous law fraud was not within the rule. (See page 1016.) As to this amendment, the Select Committee said, "We think that the existing law as contained in sect. 311 of the Code is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application under sect. 311, a decree and open to second appeal.(16) This result, which often involves a considerable prolongation of these proceedings, is in our opinion

(1) Bepin Behary Bera *v.* Sosi Bhusan, 18 C. L. J. 628 (1913).

(2) Peary Lal Das *v.* Peary Lal Dawn, 18 C. L. J. 646 (1913).

(3) Dakshina Mohun Roy *v.* Sm. Basumati Debi, 4 C. W. N. 474, at p. 477 (1900).

(4) Huro Soonduree Debee *v.* Brojo Gobind Shaha, 4 W. R. Misc. 12.

(5) Chuttur Singh *v.* Dhurrum Koonwur, 1 A. H. C. R. 61 (1869).

(6) Ahmad Baksh *v.* Lalta Prasad, 28 A. 238 (1905).

(7) Nooral Hossein *v.* Ram Coomar Sahee, 25 W. R. 326 (1876).

(8) Hubeebool Hossein *v.* Allender, 14 W. R. 44 (1870).

(9) Mohendro Coomar Dutt *v.* Ishaneswary Dasee, 7 C. 723 (1881).

(10) Lakshmi *v.* Krishnabhat, 8 B. 424 (1884).

(11) Sami Pillai *v.* Krishnasami Chetti, 21 M. 417 (1897).

(12) Amir Dulhin *v.* Administrator General, 23 C 351 (1895).

(13) Bisram Mahton *v.* Sahib-un-nissa, 3 A. 333 (1880); *sed qu.* the observation was *obiter*, as no inquiry was proved. *Contra* Haro Jemadar *v.* Jadub Chunder Haldar, 3 W. R. Misc 24 (1865); as to proceedings on closed holidays, see Ram Das Chakarbati *v.* Official Liquidators, 9 A. 366 (1887).

(14) Gajrajmati Teorain *v.* Akbar Husain, 29 A. 196 (1906).

(15) Shib Narain Singh *v.* Gobind Dass Bhukut, 23 W. R. 154 (1875). See notes to s. 110, and Kalee Prosunno Bose *v.* Dinonath Bose Mullick, 19 W. R. 435 (1873).

(16) When an application to set aside a sale on the ground of fraud was made before the present Code came into force, but the order on the application was passed after it came into force, it was held that there was no second appeal under the provisions of the last Code: Raj Mohan *v.* Gobinda, 17 C. W. N. 524 (1912).

undesirable. We think that applications for the setting aside of sales should, so far as the procedure applicable to them is concerned, stand on the same footing, whether they are based on the ground of irregularity or on the ground of fraud." (1)

"**In publishing or conducting.**"—It was proposed to amend the section by adding irregularity in attachment, as to which there was previously doubt.(2) But this has not been done, as such irregularity cannot affect the price. The expression "*conducting the sale*" was held not to include any proceedings unconnected with the actual carrying out of the sale, but to refer to the action of the officer who makes the sale, and not to anything done antecedent to the sale. Therefore an objection that the property attached and sold was not by law saleable, was held not to be an objection contemplated by this section, but one which the judgment-debtor might have taken at the time of attachment prior to the sale.(3) So again, an objection by a representative of a judgment-debtor that he had inherited nothing from him must be raised before the sale in execution.(4) So, too, an objection that execution is barred must be taken before the sale.(5) All that the Court can decide under this rule is whether the sale shall be set aside upon the ground of irregularity in publishing or conducting it—not whether execution was granted after the judgment had been satisfied,(6) or should go at all.(7) The words "*conducting the sale*" embrace all acts which the Court is required to perform down to the close of the sale, which terminates when the lot is knocked down to the highest bidder. The irregularity must not, therefore, be anything which takes place after the sale, such as the receipt of payment by the Court after the fifteenth day from the date of sale.(8) The irregularity must be in conducting the sale, and the whole responsibility of conducting the sale is in the Court. An agreement between parties not to bid or dissuading others from bidding is not an irregularity within the meaning of the section: and unless the acts done amount to fraud is no ground for otherwise setting aside a sale.(9)

Substantial injury.—Under the present, as under the last, Code there must have occurred substantial injury, that is, loss which is wrongful,(10) by reason of the irregularity complained of. There has, however, been considerable conflict as to the manner in which the connection between the two had to be established and inferred. The Privy Council held that there must be

(1) Benode *v.* Ram Sarup, 16 C. W. N. 1015 (1912).

(2) See MacNaghten *v.* Mahabir Pershad Singh, 9 C. 656, at p. 660 (1882); Patil Shahu *v.* Hari Mahaati, 27 C. 789, 792 (1900).

(3) Ramchhaibur Misr *v.* Bechu Bhagat, 7 A. 641 (1885).

(4) Chowdhry Wahed Ali *v.* Jumaye, 6 W. R. Misc. 116 (1866).

(5) Gangathara *v.* Rathabai Ammal, 6 M. 237 (1882).

(6) *In re* Digumburee Dabee, B. L. R., F. B. 938, at p. 945 (1868).

(7) Hubhal *v.* Kanhai Lal, 7 A. 365 (1885).

(8) Binda Debee Dossee *v.* Gopee Soondree Dossia, 6 W. R. Misc. 82 (1866).

(9) Mahomed Mira Ravuthar *v.* Savvasi Vijaya Raghunadha, 23 M. 227 (1899); s. c., 4 C. W. N. 228; nor of course are disparaging remarks of bystanders "irregularities": Lalmohun Chowdhuri *v.* Nunu Mohamed, 17 C. 152 (1889); but see Rukhinee Bullubh *v.* Brojonath Sircar, 5 C. 308 (1879).

(10) Shosi Bhusan Sadhu *v.* Ahmed Hussein, 7 C. W. N. 439 (1903).

evidence,(1) and that that evidence must be direct,(2) and that a Court could not without evidence, and upon a mere supposition, find that an irregularity did cause an injury by causing an inadequate price to be bid at the sale. The amount or nature of the evidence required in any case depended upon its own circumstances.(3) Difficulty was felt as to what was meant by "direct" evidence. Sometimes it was considered that this meant that persons should be called to testify that had it not been for a particular set of circumstances they would have done so and so; would have given a greater price; that they were willing to bid but were deterred and misled; and so forth. In other cases it was considered sufficient that there should be evidence of circumstances which would warrant the necessary, or at least the reasonable, inference that the sale was the result of the irregularity complained of.(4) The Select Committee stated that the language of the rule has been altered in order to meet the doubts raised as to the evidence upon which the Court can act, and they refer to the Privy Council decision, Tasadduk Rasul Khan *v.* Ahmad Husain. Apparently it is intended to affirm that ruling; but the difficulty hitherto has been as to its construction. Proof, of course, will be required, and this proof may, it is submitted, on a true construction of the Privy Council decisions, consist of "direct" evidence in the narrow sense stated, or of evidence of facts which warrant an inference that the irregularity was the cause of the inadequate price. It has been held that where the property is sold at an inadequate price owing to irregularities in the conduct and publication of the sale there is substantial injury within the meaning of this rule.(5)

Appeal.—An order dismissing an application under this rule on the ground of the non-appearance of the applicant is appealable.(6) If a judgment-debtor has made an application under this rule, he can (if he withdraws it) apply under sect. 174 of the Bengal Tenancy Act.(7)

91. The purchaser at any such sale *in execution of a decree* may apply to the Court to set aside the sale, on the ground that the *judgment-debtor* had no saleable interest *in the property sold.*

Application *by purchaser* to set aside sale on ground of judgment-debtor having no saleable interest.

Application by an auction-purchaser.—The rule is limited to the case stated. Therefore a purchaser cannot apply to set aside a sale on the ground of deficiency in area in the land sold,(8) or of misrepresentation or concealment in the sale-notification inducing purchase at a price more than the property is really worth.(9) If the purchaser knew that the debtor had no saleable

(1) Olpherts *v.* Mahabir Pershad Singh, 10 I. A. 25, 30 (1882); s. c., 9 C. 656.

(2) Tasadduk Rasul *v.* Ahmad Husain, 21 C. 66; s. c., 20 I. A. 176 (1893).

(3) See Ismail Khan *v.* Abdul Aziz Khan, 32 C. 502 (1905).

(4) Mohabir Pershad Singh *v.* Dhanukdhari Singh, 8 C. W. N. 686 (1904); s. c., 31 C. 815; Bhikari Misra *v.* Rani Surja Moni, 6 C. W. N. 48 (1901), where earlier cases will be cited.

(5) Santo Prosad *v.* Shew Narain, 16 C. W. N. 1022 (1912).

(6) Braja *v.* Moti, 14 C. W. N. 573 (1910).

(7) Sital Rai *v.* Nanda Lal, 13 C. W. N. 591 (1909).

(8) Ram Narain *v.* Dwarka Nath Khettry, 27 C. 264; s. c., 4 C. W. N. 13 (1899).

(9) Durga Sundari Devi *v.* Govinda Chandra Addy, 10 C. 368 (1883), where at p. 372 the remedy was said to be by suit.

interest the sale should not be set aside.(1) The second paragraph of sect. 313 of the last Code, which this rule replaces, has been transposed to the next rule.

"**No saleable interest.**"—The words "*no saleable interest*" have been said to refer to cases where a purchaser buys a property which turns out to have no existence at all or to be of no saleable value whatever.(2) It may be questioned whether the substitution here of the word "value" for interest is correct. The words mean "nothing to sell," and are not intended to confine the cases in which the application may be made to those in which the judgment-debtor though having an interest such interest is by prohibition of law or otherwise unsaleable.(3) After a vesting order the debtor has no interest.(4) The rule does not apply where the judgment-debtor has no saleable interest in a portion only of the property,(5) nor is the fact that the property is subject to a mortgage sufficient to support an application,(6) or the fact that one of two judgment-debtors has no interest if the other debtor owns the entire interest.(7) Although default has been made in the payment of revenue, ownership of the property continues in the defaulter until a revenue sale takes place. A purchaser, therefore, of an estate in execution of a decree, after default has been made in paying revenue for it, cannot, in the event of a subsequent revenue sale, seek to set aside the sale under which he had made the purchase on the ground that the judgment-debtor had no saleable interest.(8) See also notes to r. 93, *post*. Under the Code of 1859 a sale under a second attachment was valid and would prevail over a sale subsequently held under a prior attachment and passed all the interest of the judgment-debtor.(9) Now, however, when property is sold in execution it cannot be sold again, and when a judicial sale takes place all previous attachments effected upon the property sold fall to the ground.(10)

Sale when to become absolute or be set aside.

92. (*1*) *Where* no application *is* made *under rule 89, rule 90 or rule 91*, or *where* such application *is* made and disallowed, the Court shall *make* an order confirming the sale, *and thereupon the sale shall become absolute.*

(1) Mahabir Prasad *v.* Dhuman Das, 3 A. 527 (1881).

(2) Durga Sundari Devi *v.* Govinda Chandra Addy, 10 C. 368 (1883). In Kunhi Moidin *v.* Torayil Moidin, 8 M. 101 (1884), the judgment-debtor was found to have no interest. In Sant Lal *v.* Ramji Das, 9 A. 167 (1889), it was pointed out that the fact that the property may fetch little or nothing if sold does not affect the question.

(3) Munna Singh *v.* Gajadhar Singh, 5 A. 577 (1883).

(4) Ram Soondur Dey *v.* Shoshi Mohun Pal Chowdhry, 11 C. L. R. 389 (1882); Dinobundhoo Pal *v.* Shoshee Mohun Pal, 9 C. 217 (1882).

(5) Ram Coomar Dey *v.* Shushee Bhooshun Ghose, 9 C. 626 (1883); Muhammad Rahmatullah *v.* Bachcho, 27 A. 537 (1905).

(6) Protab Chunder Chuckerbutty *v.* Panioty, 9 C. 506 (1883), even if the incumbrance covers the probable value of the property; Sant Lal *v.* Ramji Das, 9 A. 167 (1889).

(7) Faizuddin Ali Khan *v.* Tincouri Saha, 22 C. 565, 573 (1895).

(8) Hari Charan Bose *v.* Haridas Roy, 2 C. L. J. 508 (1905).

(9) Obhoy Churn Coondoo *v.* Golam Ali, 7 C. 410, 413 (1881); Narharmul Marwari *v.* Sadut Ali, 8 C. L. R. 468, 470 (1881); doubted in Durga Sundari Devi *v.* Govinda Chandra Addy, 10 C. 368, at p. 373 (1883).

(10) Kashi Nath Roy Chowdhry *v.* Surbanand Shaha, 12 C. 317 (1885).

(*2*) *Where* such application *is* made and allowed, *and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale*, the Court shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(*3*) No suit to set aside an order *made* under this *rule* shall be brought by any person against whom such order *is* made.

"**Where no application is made.**"—The Court is bound in such case to confirm the sale.(1) The former section was held inapplicable to proceedings in execution of certificates under the Public Demands Recovery Act.(2)

"**Disallowed.**"—This word has no reference to an order passed on an appeal, but refers to the disallowance of the objections by the Court before which the proceedings under sect. 311 (now r. 90) are taken.(3)

"**Absolute.**"—Though a proposal was made for its abolition, it will be observed that the Court is still required to pass an order confirming the sale (4) :—an order which was held to be more than a mere ministerial Act, and which was a judicial determination that none of the objections on which it could have been sought to set aside the sale existed.(5) It is also to be observed that whereas sect. 312 of the last Code referred only to applications under sect. 311, the present rule deals with applications under all the three preceding rules. The words "*as regards the parties to the suit and the purchaser*" have been omitted, probably as being unnecessary.

Thirty days.—The period of thirty days under this rule will not begin to run against a person applying under r. 89 if for any reason the final bid remains for a time unaccepted by the sale-officer.(6)

"**Order setting aside.**"—If the conditions of the rule are fulfilled, the sale will be set aside unless the applicant has by his conduct of waiver or estoppel

(1) Umesh Chandra Dass *v.* Shib Narain Mandal, 31 C. 1011, 1013 (1904); s. c., 9 C. W. N. 193.

(2) Girish Chandra Changdar *v.* Golam Karim, 33 C. 451 (1906); s. c., 3 C. L. J. 235; but see Hari Charan Singh *v.* Chandra Kumar Dey, 34 C. 787 (1907); s. c., 11 C. W. N. 745; followed in Bangachandra *v.* Tara Kinkar, 16 C. W. N. 973 (1912).

(3) Mahomed Hossein *v.* Purundur Mahto, 11 C. 287 (1885).

(4) S. 312 of the last Code ran after the word "*disallowed*," "*the Court shall pass an order confirming the sale*," and s. 314, which is embodied in the present rule, enacted that no sale was absolute until it was confirmed. See Mahomed Hossein *v.* Purundur Mahto, 11 C. 287, at p. 292 (1885); Tota Ram *v.* Khub Chand, 7 A. 253, 255 (1884); Baldeo Singh *v.* Kishen Lal, 9 A. 411 (1887); Broj Mohun Thakur *v.* Rai Uma Nath Chowdhury, 20 C. 8 (1892); Hardeo Narain *v.* Girdharee Singh, 19 W. R. 227 (1873); Shirin Begam *v.* Agha Ali Khan, 18 A. 141, 145 (1895); Khetter Nath Biswas *v.* Faizuddin Ali, 24 C. 682 (1897).

(5) Narayana Kothan *v.* Kalianasundaram Pillai, 19 M. 219, at p. 228 (1895).

(6) Munshi Lal *v.* Ram Narain, 35 A. 65 (1912); and see Dulhin Mathura *v.* Bansidhar, 16 C. W. N. 904 (1911); 15 C. L. J. 83; and Mahomed *v.* Sukhdeo, 13 C. L. J. 467 (1911) (deposits tendered on thirtieth day valid though officer absent). And see also Musst Bhawani *v.* Mathura Prasad, 16 C. W. N. 985, P. C. (1912).

precluded himself from setting up the irregularity.(1) When a sale is set aside the effect of it is to remit the parties to the position in which they stood immediately before the sale, without prejudice to any other proceedings in execution which have legally been performed. Thus an attachment once legally made is revived upon the reversal of the sale in execution.(2) An application by a purchaser to set aside the sale of immoveable property sold by the sheriff, or for compensation on the ground of deficiency in the area of the land sold, is not entertainable under the Code.(3) Before a sale has become absolute, objection can of course be taken under this rule, but after that, and when a certificate has issued, when the defendant is a *bonâ fide* purchaser at a Court sale, any irregularity in the proceedings leading to the sale cannot be relied on to set it aside.(4) If the Court ordering the sale has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution any more than into the correctness of the judgment on which the execution issues.(5) The Limitation Act (Art. 12) protects *bonâ fide* purchasers at judicial sales, who are not required to inquire into their accuracy or legality, by providing a short limit of time within which suits may be brought to set them aside.(6) All irregularities if they existed are cured by the certificate of sale.(7) And if a purchaser who is not a party to the suit satisfies himself as to the jurisdiction of the Court to order a sale, an obligation which continues until the sale is completed,(8) his title is not affected by irregularities of procedure, which are cured by the certificate of sale. The accuracy, therefore, of some decisions (which hold (9) that in certain cases a sale is void against a purchaser) is in question in any case where the illegality complained of does not really amount to an absence of jurisdiction. It cannot, it was held, be laid down as a general proposition, that under no circumstances can a sale be set aside as against a *bonâ fide* purchaser. The Court must determine in each case whether it will be in accordance with the principles of justice, equity, and good convenience, that the sale ought to be set aside or not.(10) The circumstance alone that a decree under

(1) Arunachellam Chetti *v.* Arunachellam Chetti, 15 I. A. 171; 12 M. 19 (1888); Girdharee Singh *v.* Hurdeo Narain Singh, 3 I. A. 230 (1876); dist. in Thakoor Mahatab Deo *v.* Leelanund Singh, 7 C. 613 (1881), which last case was followed in Raman *v.* Kunhayan, 17 M. 304 (1893); Jaganatha *v.* Gang Reddi, 15 M. 303 (1892); Aba *v.* Dhondu Bai, 19 B. 276 (1894); Preo Lall Paul *v.* Radhika Prosad Paul, 6 C. W. N. 42 (1901); Bhikari Misra *v.* Rani Surja Moni, 6 C. W. N. 48 (1901). As to the necessity for drawing up a decree, see Kherode Sundari Debi *v.* Juanendra Nath Pal, 9 C. W. N. 283 (1901); dist. Gopal Chandra Chakravarti *v.* Preonath Dutt, 32 C. 175, 177 (1904).

(2) Thakoor Chund *v.* Muddun Mohun Singh, W. R. Sp., No. 26 (1864).

(3) Ram Narain *v.* Dwarka Nath Khettry, 4 C. W. N. 13 (1899).

(4) Narayana Kothan *v.* Kallianasundaram, 19 M. 219, at p. 222 (1895).

(5) Rewa Mahton *v.* Ram Kishen Singh, 14 C. 18 (1886); s. c., 13 I. A. 106 [execution of cross decrees].

(6) Malkarjun *v.* Narhari, 25 B. 337, 351, 352 (1900); s. c., 5 C. W. N. 10.

(7) Balkrishna *v.* Masuma Bibi, 5 A. 142, 157 (1882); s. c., 9 I. A. 182, at p. 196.

(8) Basappa bin Malappa *v.* Dundaya bin Shivlingaya, 2 B. 540, 541 (1878).

(9) *Vide ante*, p. 1015, and Palani *v.* Sivalinga, 8 M. 6 (1884); and as regards Ram Chand *v.* Pitam Mal, 10 A. 506 (1887), cited *ante*, see remarks in Sheo Charan Lal *v.* Sheo Sewak Singh, 18 A. 469 (1896).

(10) Abdul Hye *v.* Nawab Raj, B. L. R. F. B. 911 (1868); Jungee Lall *v.* Sham Lall Missir, 20 W. R. 120 (1873), where the auction-purchasers had notice, as to which,

which a sale has taken place has itself been set aside is not sufficient.(1) Nor where a stranger to the proceedings purchases property *bonâ fide*, can the sale to him be set aside on the ground that the decree had already been satisfied out of Court at the time the sale was held.(2) Nor is there a distinction between sales in execution of money and mortgage-decrees.(3) Where there is fraud on the part of the plaintiff, the validity of the sale is not affected, if the purchaser is not implicated in the fraud; (4) *aliter* where the purchaser is so implicated.(5) The reason for this rule is that a purchaser is not bound to inquire into the correctness of the order for execution or of the judgment on which it issues. If he were, there would be little inducement to buy.(6) There is, however, a distinction between decree-holders who purchase under their own decree which is afterwards reversed, and *bonâ fide* purchasers at a sale in execution of a valid decree to which they were no parties. As regards the latter the rule is as just stated, but a judgment-creditor who is also a purchaser, purchases subject to the result of the litigation.(7) The reason for this is that the person purchasing is, at the time he purchases, a party to the proceeding which may get rid of the authority for the sale. When he is not a party to such proceeding the sale is not set aside.(8) A sale cannot be set aside because the judgment-debtor has applied to be declared an insolvent.(9)

"**Notice.**"—The second paragraph of sect. 313 of the former Code referred only to the judgment-debtor and decree-holder. Notice must now be given

see also Ram Jewan Lall *v.* Sham Lall Missir, 20 W. R. 123 (1873).

(1) Chunder Kant Sarmah *v.* Bissessar Surmah, 7 W. R. 312 (1867); Pearee Monee Dassee *v.* Collector of Beerbhoom, 8 W. R. 300 (1867); Jan Ali v. Jan Ali Chowdry, 1 B. L. R. A. C. 56 (1868); Jugal Kishor Banherjee *v.* Abhaya Charan Sarma, 1 B. L. R. A. C. 84, 86 (1868); Assamathem Nessa Bibee *v.* Roy Lutchmeeput Singh, 4 C. 142, 171 (1878); Beharee Lall *v.* Rajah Ram, 6 A. H. C. R. 291 (1874); Murari Singh *v.* Pryag Singh, 11 C. 362 (1885); Mackintosh *v.* Kalee Dass Mullick, 19 W. R. 234 (1873); Basappa Malappa *v.* Dundaya Shivlingaya, 2 B. 540 (1878) [where Court's sale under decree reversed in appeal before confirmation; foll. Mul Chand *v.* Mukta Prasad, 10 A. 83 (1887)]; Mahomed Hossein *v.* Kokil Singh, 7 C. 91 (1881); Banke Lal *v.* Jugal Narain, 22 A. 168, at p. 175 (1900); Gonesh Pershad *v.* Fazul Emam Khan, 23 C. 857, 861 (1896). As to sale under decree unreversed, see Kishen Sahai *v.* Bakhtawar Singh, 20 A. 237 (1898).

(2) Yellappa *v.* Ramchandra, 21 B. 463 (1896).

(3) Mukhoda Dassi *v.* Gopal Chunder Dutta, 26 C. 734, 737 (1899).

(4) Mohesh Chunder Bagchee *v.* Dwarka Nath Moitro, 24 W. R. 260 (1875).

(5) Jugal Kishor Bannerjee *v.* Abhaya Charan Sarma, 1 B. L. R. A. C. 84, 86 (1868); Gobind Chunder Mookerjee *v.* Ram Komal Chatterjee, 25 W. R. 364 (1870); Kishore Chunder Sein *v.* Kally Kinkur Paul, 20 W. R. 333 (1873); Lall Bunseedhur *v.* Koonwar Bindeseree, 10 M. I. A. 454, 473, 474 (1866).

(6) Mukhoda Dassi *v.* Gopal Chunder Dutta, 26 C. 734, 737 (1899).

(7) Zain-ul-Abdin Khan *v.* Muhammad Asghar Ali, 10 A. 166, 172 (1873); s. c., 15 I. A. 12; Sadasiva *v.* Sabapathi, 5 M. 106 (1881); Chandan Singh *v.* Ramdeni Singh, 31 C. 499, 501 (1904); as to purchase by creditor with notice of previous proceeding between him and the debtor, see Pettachi *v.* Chinnatambiar, 10 M. 241, 250 (1886); Damoodar *v.* Iswar, 15 C. W. N. 78 (1910).

(8) Gonesh Pershad *v.* Fazul Emam Khan, 23 C. 857, 861 (1896), where the judgment-creditor was held not to be a party as he was not made a party to the appeal.

(9) Ishwar Lakhmidat *v.* Harjivan Ramji, 21 B. 681 (1896).

to all persons affected.(1) In the event of the death of the judgment-debtor application must be on notice to his representative.(2) It is not necessary that the notice under this rule should be given within thirty days of the date of the sale.(3)

Sub-rule (3).—This clause in the last Code ran "*no suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made.*" The words "on the ground of such irregularity" are omitted, as the rule applies to all the three preceding rules. If an application has been made and disallowed under this rule the order subject to appeal under O. XLIII. r. 2 is final, and cannot be the subject of a suit.

The preceding law may be summarized as follows:—A sale of land being a proceeding in execution, a question which arose as to the setting aside of such a sale was a question relating to execution, which, if it arose between the persons mentioned in sect. 244 (now sect. 47), had to be determined by order of the Court executing the decree, and not by a separate suit.(4) As to the procedure to be followed in such cases in execution, that depended upon the grounds which were put forward to impeach the sale. If the sale was impugned on the ground of irregularity,(5) then the decree-holder, judgment-debtor, or other person whose property was affected by the sale applied under sect. 311 (now r. 90). If the sale was sought to be set aside for any other cause than irregularity, such as fraud (6) or want of jurisdiction,(7) in the executing Court,(8)

(1) Surendra Mohini *v.* Amaresh Chandra, 39 C. 687 (1912); Bibi Sharifan *v.* Mahomed, 13 C. L. J. 535 (1911); Menajuddi *v.* Toam Mandal, 39 C. 881 (1911).

(2) Bala Kadar *v.* Gulam Mohidin, 7 B. 424 (1883), and generally as to notice to judgment-debtor: Kuppayyan *v.* Ramasami Ayyan, 6 M. 197 (1883).

(3) Ganesh Bab *v.* Vithal Vaman, 15 Bom. L. R. 244 (1912).

(4) Saroda Churn Chuckerbutty *v.* Mahomed Isuf Meah, 11 C. 376, 378 (1885); Mohendro Narain Chaturaj *v.* Gopal Mondal, 17 C. 769 (1890); Siva Pershad Maity *v.* Nundo Lall Kar, 18 C. 139 (1890); Verasaghava *v.* Venkata Charyar, 5 M. 217 (1882) [all cases of fraud]. But see Ganga Pershad Sahu *v.* Gopal Singh, 11 C. 136 (1884); Chunni *v.* Lala Ram, 16 A. 5 (1893).

(5) See Raghubar Dayal *v.* Ilahi Baksh, 7 A. 450, 452 (1885) [suit only lies if sale invalid for cause other than irregularity]; Abdul Haye *v.* Nawab Raj, B. L. R. F. B. 911, 913 (1868).

(6) See cases in last note but one. In Prangour Mozoomdar *v.* Hemanta Kumari Debya, 12 C. 597, 600, a separate suit was held to lie as it was not possible to raise the question in execution-proceedings; Raghubans Sahai *v.* Fulkumari, 1 C. L. J. 542, 549 (1905) [the only suit barred by s. 312 is one to set aside a sale on the ground of irregularity].

(7) Chunni *v.* Lala Ram, 16 A. 5 (1893); Prem Chand Dey *v.* Mokhoda Debi, 17 C. 699 (1890); Gopi Mohan Roy *v.* Doybaki Nundun Sen, 19 C. 13 (1891); Tincouri Debya *v.* Shib Chandra Pal, 21 C. 639 (1894); Sukhai *v.* Daryai, 1 A. 374, at p. 376 (1877).

(8) An order for sale and a sale under such order by a Court of execution which has no jurisdiction is void; Chunni *v.* Lala Ram, 16 A. 5 (1893) [order for sale under decree previously satisfied, and see Digamburee Debia *v.* Eshan Chunder Sein, 15 W. R. 372 (1871)]; Balwant Rao *v.* Mahammad Husain, 15 A. 324 (1893) [no court-fees due for which sale held]; Subbaya *v.* Yellamma, 9 M. 130 (1885) [order for possession made after order in appeal]; Sant Lal *v.* Umrao-un-Nissa, 12 A. 96 (1889) [sale held after order of postponement]; Narayanasawmy Naick *v.* Saravana Mudaly, 6 M. H. C. R. 58 (1871) [territorial jurisdiction, and see cases in last note].

or non-liability of property to sale,(1) or other ground, then an application lay under sect. 244 (now 47). If objection came from the purchaser on the ground of want of saleable interest in the judgment-debtor, then he applied under sect. 313 (now r. 91). Though the auction-purchaser could not apply under sect. 311 (now sect. 90), if the sale was confirmed under the following section the order of confirmation bound both the parties and the purchaser.(2) The result of this was that these persons could not, alleging irregularity, sue to set aside an order of confirmation whether such order was passed without (3) or after an application under sect. 311. An auction-purchaser might, however, alleging that there was no irregularity, have sued to set aside an order setting aside and refusing to confirm a sale.(4) While, therefore, a suit would not lie to set aside a sale on the ground of existence of irregularity, a suit would lie to confirm a sale on the ground that there was no irregularity. Suits also lay to impeach the validity of sales on a ground other than that of mere irregularity, provided that the question did not arise between parties within the meaning of sect. 244 (now 47). Subject to the remarks made in this and the allied sections, the law appears to be the same now. In cases where sales are sought to be impeached on grounds other than those of mere irregularity, proceedings under sect. 47 must be taken. As regards irregularities, if no application has been made under r. 90, then this rule applies. If an application has been made to set aside a sale and refused, then, subject to an appeal against such order, the same result would seem *à fortiori* to follow. If, on the other hand, the sale is set aside, then the auction-purchaser may appeal, but subject to such appeal the order would appear to be final. The same rule applies to orders made on applications under r. 91. As regards orders under sect. 47 they are decrees,(5) and subject to appeal. A separate suit can only lie in such cases as are outside the scope of sect. 47.

Appeal: Revision.—An appeal lies against an order on an application under this rule, O. XLIII. r. 1 (*g*), setting aside or refusing to set aside a sale.(6) No appeal lies from an order refusing an application to restore to the file an application which has been dismissed for default.(7) No second appeal lies.(8)

(1) Durga Churan Mandal *v.* Kali Prosonno Sircar, 3 C. W. N. 586 (1899); s. c., 26 C. 721; Basti Ram *v.* Fattu, 8 A. 146 (1886).

(2) Azim-ud-din *v.* Buldeo, 3 A. 554, 559 (1881).

(3) Damodar Bhanshet *v.* Vinayak Trimbak, 26 B. 40 (1901); s. c., 3 Bom. L. R. 463.

(4) Azim-ud-din *v.* Buldeo, 3 A. 554 (1881); Sukhai *v.* Danjai, 1 A. 374 (1877); Bandi Bibi *v.* Kalka, 9 A. 602 (1887); Mathura Das *v.* Panhalal, 19 B. 216 (1894); and in Amrit Missir *v.* Gurda Parvan, 7 A. H. C. R. 183 (1875).

(5) Murari Singh *v.* Pryag Singh, 11 C. 362 (1885).

(6) As to the question whether the only order appealable is that confirming the sale, see Tota Ram *v.* Khub Chand, 7 A. 253 (1884); Girdhari Singh *v.* Hurdeo Narain Singh, 31 A. 230, at p. 233 (1876); or as to the point mentioned in Ganga Prasad *v.* Jag Lal Rai, 11 A. 333, at p. 337 (1889).

(7) Suja-uddin *v.* Reazuddin, 27 C. 414 (1899). See Jang Bahadur *v.* Mahadeo Pershad, 8 C. W. N. 160 (1903); Raja *v.* Srinivasa, 11 M. 319 (1888); Ningappa *v.* Gangawa, 10 B. 433 (1885).

(8) S. 104; Narayan *v.* Rasul Khan, 23 B. 531 (1899); Luchmipat *v.* Mt. Mandal Koer, 3 C. W. N. 333 (1899); Nana Kumar Roy *v.* Galam Chunder Dey, 18 C. 422 (1891); Gopi Koeri *v.* Gopi Lal, 21 C. 799 (1894); Aubhoya Dassi *v.* Pudmo Lochun Mondul, 22 C. 802 (1895); Asimuddi *v.* Pranmohini, 15 C. W. N. 844 (1911); 14 C. L. J. 224.

If, as he should be, the auction-purchaser is made a party to the proceedings he can appeal if the sale is set aside.(1) Where a sale is sought to be set aside on some ground other than those mentioned in these rules, and the matter is dealt with under sect. 47 (as in the case of fraud (2)), the order under that section is a decree and appealable as such, and a second appeal lies.(3) An objection cannot be allowed for the first time in appeal.(4) Where a Court wrongfully sets aside or refuses to set aside a sale its order may, if the circumstances fall within the terms of sect. 115, be the subject of revision.(5)

Return of purchase-money in certain cases.

93. *Where* a sale of immoveable property is set aside under *rule 92*, the purchaser shall be entitled to *an order for repayment of* his purchase-money, with or without interest as the Court may direct, *against* any person to whom *it* has been paid.

"**Where a sale.**"—The corresponding section in the last Code was "when a sale of immoveable property is set aside under sects. 312 or 313, *or when it is found* that the judgment-debtor had no saleable interest, etc., and the purchaser is for that reason deprived of it." (6) The auction-purchaser under the last Code might have applied under sect. 313 (now r. 91), and the Court might have set aside the sale under the same section (see now r. 92), adjudicating upon the question raised, viz., the absence of all saleable interest. The section was enabling and not prohibitive of an independent action.(7) Such an application might not, however, be made, and it might yet become known and found (8) either by the Court of execution (9) or in another suit (10) that the property did not belong to the judgment-debtor. In this case also the purchaser was upon the fact being found entitled to recover back his purchase-money. It was held that the words in sect. 315 of the last Code "*when it is found*," etc., must be taken in connection

(1) Gopal Singh *v.* Dular Kuar, 2 A. 352 (1879); Kanthi Ram *v.* Bankey Lal, 2 A. 395 (1879).

(2) Provided an attempt is made to substantiate the allegation: Umakanto Roy *v.* Dino Nath Sanyal, 28 C. 4 (1900); s. c., 5 C. W. N. 124.

(3) Kokil Singh *v.* Edal Singh, 31 C. 385 (1904); Rajani Kant Bagchi *v.* Hossain Uddin Ahmed, 3 C. W. N. cclxxxviii (1899). In Sami Pillai *v.* Krishnasami Chetti, 21 M. 417 (1897), the case was held not to be within s. 115, as the question was not between parties to the suit.

(4) Macnaghten *v.* Mahabir Pershad, 9 C. 656 (1882).

(5) See Birj Mohun Thakur *v.* Rai Uma Nath Chowdhry, 20 C. 8, 11 (1892); distinguished in Shew Prosad Bungshidhur *v.* Ram Chunder Haribux, 41 C. 323 (1913); Lakshmana *v.* Najimuddin, 9 M. 145 (1884); Chakrapani Chettian *v.* Dhanji Settu, 24 M. 311, 315 (1900); Ishvar Lakhmidat *v.* Harjivan Ramji, 21 B. 681 (1896); Sookoomar Singh *v.* Kashee Singh, 13 W. R. 250 (1870) [cl. 15, charter]; Radhasyam Kar *v.* Dinobundhoo Biswas, 18 C. L. J. 535 (1913)

(6) See as to purchaser being unable to obtain possession, Surama *v.* Rama, 8 M. 99 (1884); and see Nityanund Roy *v.* Juggut Chandra Guha, C. W. N. 105 (1902).

(7) Surendra Nath Ghose *v.* Beni Madhab Missa, 10 C. W. N. 274 (1905).

(8) See Munna Singh *v.* Gajadhar Singh, 5 A. 576, 583, 586 (1883) [*i.e.* found in some previous proceeding or "when it has been ascertained or become known"].

(9) Sivarama *v.* Rama, 8 M. 99 (1884).

(10) See Benode Bihary Nundi *v.* Mohesh Chunder Ghose, 12 C. L. R. 331 (1883) [found in suit to which decree-holder was a party].

with a finding in a separate suit to mean "*when it is found in some proceeding by which the judgment-creditor is bound.*" For to compel the judgment-creditor to refund merely because in some proceeding between other parties a Court had decided that the judgment-debtor had no saleable interest would be contrary to principles of justice.(1) The finding must have been in some proceedings to which a judgment-creditor was a party or at any rate of which he had notice.(2) It is to be observed that the present rule omits "*where it is found,*" etc., as also the last paragraph of the former section. Nothing has been said as to the reason for the first omission, but as regards the second the Committee stated that they added words at the commencement of the rule, "in substitution of the last paragraph of the section which thus becomes unnecessary." Presumably this observation refers to the italicized words "*an order for repayment.*" Such an order being due for money may be enforced in execution under the rules providing for the execution of decrees and orders for money.

As regards absence of saleable interest in private sales there is under sect. 55 (2) of the Transfer of Property Act, in the absence of a contract to the contrary, an implied covenant for title by the vendor. In the case of execution-sales there is no warranty of title either by the decree-holder or by the Court. The purchaser buys the property with all risks and defects in the judgment-debtor's title. In the absence of fraud his only remedy is to apply to set aside the sale and to recover back his purchase-money when the judgment-debtor had no saleable interest at all. He cannot obtain a refund in proportion to the extent to which the judgment-debtor had no interest.(3) The right of the purchaser is absolute even though he himself caused the property to be put up for sale, provided that he was not guilty of fraud or misrepresentation or did not guarantee the validity of the sale.(4) See notes to r. 91, *ante*.

"**Is set aside.**"—See notes to preceding sections.

"**The purchaser shall be entitled.**"—When a sale is set aside the purchaser's right to recover the purchase-money is not limited to an application under this rule to the Court executing the decree, but he may bring a suit for the purpose.(5) He may sue to cancel the sale; (6) to establish his claim to the

(1) Nilakanta *v.* Imam Sahib, 16 M. 361, 363 (1892).

(2) Vithoba *v.* Esat, 18 B. 594 (1893), and S. C S. 189, provides in the case of an application under s. 188 for notice to the judgment-creditor and the decree-holder.

(3) Shanto Chandar Mukerji *v.* Nain Sukh, 23 A. 355, 356, 357 (1901); Sundara *v.* Venkata Verada, 17 M. 228 (1894); in private sales the buyer is recouped for any loss he may have sustained: Munna Singh *v.* Gajadhar Singh, 5 A. 577, 580 (1883). See Rustomji *v.* Vinayak, 35 B. 29 (1910) (he may sue the judgment-creditor for recovery of possession of the property and in the alternative for return of the purchase-money on the footing of total failure of consideration).

(4) Brojendra Roy Chowdhry *v.* Jugur Nath Roy, 6 W. R. 147 (1866).

(5) Nityanund Roy *v.* Juggat Chandra Guha, 7 C. W. N. 105 (1902); Hari Doyal Singh *v.* Sheikh Samsuddin, 5 C. W. N. 240 (1900) [in which it was also held that s. 244 (now 115) did not apply]; followed in Ram Kumar *v.* Rani Gour, 13 C. W. N. 1080 (1909); Shanto Chandar Mukerji *v.* Nain Sukh, 23 A. 355, 356 (1901), and cases there cited, and in following notes as to suit for interest. See Raghubar Dayal *v.* Bank of Upper India, 5 A. 364 (1883), *sed qu.*, and jurisdiction of Small Cause Court; Prasanna Kumar Khan *v.* Uma Charan Hazra, 1 C. W. N. 140 (1896); Pachayappan *v.* Narayana, 11 M. 269 (1887).

(6) Virasiam *v.* Athi, 7 M. 595 (1884).

land where possession has not been obtained,(1) and to recover the purchase-money.(2) A person was not a party precluded from suing because an order under sect. 313 of the last Code was refused where, subsequent to such refusal, it appeared that the judgment-debtor had no saleable interest.(3) If the judgment-debtor has any saleable interest in the property, the Court has no jurisdiction to order a refund, and an order made can be set aside on revision.(4) The former section was held to empower the auction-purchaser to require repayment of the purchase-money, but did not impose upon the decree-holder the duty of tendering the money as soon as the sale was set aside. He was bound to pay the purchase-money only if called upon to do so, but not otherwise ; and until he was so compelled to refund the purchase-money, he had no right to call upon the judgment-debtor to pay his debt a second time.(5) In a recent case under sect. 315 of the last Code, it was held that an auction purchaser seeking to recover the purchase-money on the ground that he has been deprived of the property owing to the failure of the debtor's title had no remedy outside the provisions of the Code, and the remedy given is not a suit for money had and received under Art. 62 of Schedule I. of the Limitation Act of 1908, but is a suit within Art. 120 of that Act.(6)

"**Interest.**"—Thus the Court may refuse interest (7) as when a person claims more than he is found entitled to ; (8) or if it is proved that the purchaser has contributed to the loss he has sustained.(9) He should not, however, be charged with the expenses of the sale.(10) Where a sale has been set aside the purchaser has been allowed the money laid out by him for the benefit of the property, accounting for the rent and profits.(11)

Certificate to purchaser.

94. *Where* a sale of immoveable property has become absolute, the Court shall grant a certificate *specifying* the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date *the day on which the* sale *became absolute.*

(1) Kunhi Moidin *v.* Terayil Moidin, 8 M. 101 (1884).

(2) Kishun Lal *v.* Muhammad Safdar Ali, 13 A. 383 (1891) ; Gurshidawa *v.* Gangaya, 22 B. 783 (1897) ; Nityanund Roy *v.* Juggat Chandra Guha, 7 C. W. N. 105 (1902) ; Premraj *v.* Javarmal, 15 Bom. L. R. 41 (1913).

(3) Pachayappan *v.* Narayana, 11 M. 269 (1887):

(4) Kunhamed *v.* Chathu, 9 M. 437 (1886).

(5) Venkata appa Row *v.* Ayanna, 17 M. L. J. 194 (1906).

(6) Sideshawar Prasad Narain Singh *v.* Goshain Mayanand, 35 A. 419 (1913) ; following Mohiuddeen Ibrahim *v.* Mahomed Mura Lowai, 23 M. L. J. 487 (1912) ; and Munna Singh *v.* Tajadhar Singh, 5 A. 577 (1883).

(7) See Moulvie Abdool Hye *v.* Macrae, 23 W. R. 1, 5 (1874) [rate] ; Nafar Chandra *v.* Gopal Chandra, 19 C. L. J. 358 (1914).

(8) Kishun Lall *v.* Muhammad Safdar Ali, 13 A. 383, 386 (1891).

(9) Kunhi Moidin *v.* Terayil Moidin, 8 M. 101, 103 (1884).

(10) Hurdie Beebee *v.* Surjoo Pershad, 6 A. H. C. R. 309 (1864) ; Hulse *v.* Luchmun Das, Agra Misc., 1.

(11) Morjan *v.* Moulvie Abdool Hye, 23 W. R. 393 (1875) ; see Maharajah Mitterjeet Sing *v.* Heirs of Widow of Juswunt Sing, 3 M. I, A. 42 (1841).

"**Immoveable property.**"—See notes.(1)

"**Has become absolute.**"—See notes to sect. 65 and r. 92, *ante*.(2)

Sale certificate.—See notes to sect. 65, *ante*. It was held that when a sale had become absolute the Court would grant a certificate to the representative of a deceased purchaser.(3) A Court should not make an *ex parte* order amending a certificate ; (4) and there is no appeal from an order amending a certificate on review inasmuch as the decree having been already executed the matter is not one relating to execution under sect. 244 (now 47), *ante*.(5)

Stamp. Registration.—Under sect. 35 of the Indian Stamp Act (II. of 1899) a sale certificate cannot be registered unless it has been duly stamped. The sale certificate should not be granted until the auction-purchaser has furnished the requisite stamp paper for its engrossment. Attention is directed to the circumstance, which is often overlooked, that the stamp duty is payable, not by the deposit of the sum required to purchase stamps, but by the stamps themselves.(6) Under the provisions contained in the second paragraph of sect. 89 of the Registration Act (III. of 1877), a copy of the certificate is to be sent by the Court to the Registering Officer. Although sects. 17, 32, 58, 61, and 89 of that Act except sale certificates from the ordinary procedure in Registration, it was said in the Notes accompanying the first draft of the Bill that, "They leave it doubtful whether the action of the Court does or does not complete the registration of the certificate. The procedure laid down in the case of sale certificates would seem sufficiently to meet the requirements contemplated by registration." It was accordingly proposed in the first draft to declare by an addition to sect. 89 of the Registration Act on the lines of sect. 81 of that enactment, that the "filing of such copy or copies shall have the same force and effect as registration." But this proposal has not been adopted.(7) The stamp is required for the sale certificate itself. The Court does not require an application for a certificate in writing, and if in writing it need not be stamped.(8)

"**Property sold.**"—Property not attached and not advertised for sale cannot be sold.(9) No property can be sold except that which belongs to the defendants in the suit.(10) What interest of the defendant passes is a mixed

(1) Hari Govinda Ramchandra, 9 B. H. C. R. 64 (1872); and see M. M. Maharana Fatch Sangi *v.* Desai Kallinrayaji, 10 B. H. C. R. 281 (1873) (Hindu Law as to immoveables).

(2) Musst Bhawani *v.* Mathura Prasad, 16 C. W. N. 985 (P. C. 1912).

(3) Vinayak Narayan *v.* Dattatraya Krishna, 24 B. 120 (1899).

(4) Rajah Rughoo Nundan *v.* Wilson, 23 W. R. 301 (1875).

(5) Boojha Roy *v.* Ram Kumar Pershad, 3 C. W. N. 374 (1899).

(6) See *In re* Ram Krishna, 9 B. 47 (1884).

(7) It was formerly a question of doubt whether a sale certificate was compulsorily registrable under sect. 17 of the Registration Act. See Prokash Chunder Dass *v.* Tara Chand Dass, 9 C. 82 (1882); Shivram Narayan *v.* Ravji Sakharam, 7 B. 254, 255 (1882); *In re* Lakshman, 9 B. 472 (1885). That section now exempts sale certificates which, however, have to be dealt with by the Court under sect. 89 of the Registration Act.

(8) Hira Ambaidas *v.* Tekchand Ambaidas, 13 B. 670 (1889).

(9) Ram Onoogroho *v.* Mt. Montorun, 6 W. R. 222 (1866).

(10) Kishen Chunder *v.* Annooran, Marsh, 647 (1863).

question of law and fact depending on the questions what could be sold and what was in fact sold. To ascertain this the decree and the whole execution proceedings must be looked at. The question what legally passed by a sale cannot depend altogether upon the form of the sale certificate.(1) See the notes to sect. 65, *ante*, where this matter is more fully considered,(2) as also the question whether any title to the thing sold is warranted. Sect. 316 of the last Code dealt with the date of the vesting of the title, a matter which is now governed by sect. 65, to which refer. This provision replaces that in the old Code, that the title should vest from the date of the certificate.

Delivery of property in occupancy of judgment-debtor.

95. *Where* the *immoveable* property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under *rule* 94, the Court shall, on *the* application *of* the purchaser, order delivery to be made by putting *such* purchaser, or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

Delivery of possession.—This rule corresponds with sect. 263 of Act VIII. of 1859. The words "*and a certificate in respect thereof has been granted under sect.* 316," and "*on application by the purchaser*," were added by sect. 318 of Act X. of 1877. The present Code altered "*sect.* 316" to "*rule* 94" and made the additions noted in italics, the words "*the application of the purchaser*" being substituted for "*application by the purchaser.*" As to trespass on land of which actual possession has been given to the purchaser under this rule, see case cited.(3)

"**Subsequently to the attachment.**"—A purchaser cannot get summary possession under this rule from the lessee *pendente lite* of the judgment-debtor and must bring a suit for possession.(4)

"**On the application of the purchaser.**"—A judgment-debtor in spite of confirmation of sale may oppose an application for possession on the ground that the sale was illegal, his occupancy holding not being transferable by

(1) Assamathem Nessa *v.* Lutchmeeput Singh, 4 C. 142, at p. 154 (1878). As to discrepancy between sale notification and sale certificate, see Uma Churn Sen *v.* Gobind Chunder Mozumdar, 1 C. L. R. 460 (1878); Gowree Kumal *v.* Sarat Chunder Dass, 22 W. R. 408 (1874); and Raja Thakur Barmha *v.* Jiban Ram (P. C.), 19 C. L. J. 161 (1913).

(2) And see O'Kinealy, C. P. C., notes to sect. 316, where some cases on Hindu Law will be found collected. As the matter involves a discussion of the substantive law it is not dealt with.

(3) Kailash Ghose *v.* Jugal Lohar, 1 C. L. J. 104 (1905).

(4) Santomoney Dossee *v.* Kedar Nath, 3 C. W. N. xii. (1898).

custom; (1) but he cannot oppose on the ground that the sale of a permanent tenure was confirmed without previous payment of the landlord's fee under sect. 13 of the Bengal Tenancy Act.(2)

"Order delivery."—A purchaser of an undivided share of a Hindu estate acquires only a right to sue for partition and for delivery of what may be allotted as that share. Such proceedings cannot be taken under this rule, and the dismissal of such an application under this rule will not bar a purchaser's suit for partition.(3) For form of order, see the First Sched. App. E. No. 24.

Putting the purchaser in possession.—A purchaser can obtain *khas* possession although in the first instance he obtained possession under r. 96; (4) and a plaintiff obtaining symbolical possession can maintain a fresh suit for real possession,(5) so can the assignee of the purchaser whose possession has been resisted by the judgment-debtor; (6) as also a purchaser whether legal delivery has been given or not; (7) but he must have endeavoured to get possession under this rule first.(8) By a later decision it was held a suit was maintainable even if he had not applied for possession under this rule; the remedies by suit and under this rule being concurrent.(9) Possession being given fifteen years after the sale does not entitle the judgment-debtor to recover possession by suit unless he shows twelve years' possession before he was dispossessed.(10)

Limitation.—An application for possession must be within three years of the grant of the sale certificate under Art. 178 of Act XV. of 1877 (Limitation Act),(11) even where the assignee of the purchaser applies; (12) the date being reckoned from when the certificate has been granted, that is, when it has been issued to him. (13) The Madras High Court, however, held that in respect of a suit for possession the date from which time begins to run is that of the sale, and the Article applicable being 138.(14) This rule now expressly provides that in respect of an application for possession the three years run from the date of the certificate. A purchaser may sue for possession within twelve years of symbolical possession being given him.(15) Symbolical possession as against

(1) Durga Charan *v.* Kali Prasanna, 26 C. 727 (1899); Arman Sardar *v.* Satkhira Joint Company, 18 C. L. J. 564 (1913).

(2) Mohim Chandra *v.* Ram Lochan, 7 C. W. N. 591 (1903).

(3) Yelumalai *v.* Srinivasa, 29 M. 294 (1906). For case where judgment-debtor resisted taking possession of a house jointly owned by him, see Sarvi Begam *v.* Taj Begam, 36 A. 181 (1914).

(4) Hur Kishore *v.* Sudoy Chunder, 17 W. R. 80 (1872).

(5) Shankar *v.* Narsingrav, 22 B. 667 (1897).

(6) Nagireddi *v.* Ramanna, 7 M. 594 (1884); Sera Mohun *v.* Bhagoban, 9 C. 602 (1882).

(7) Sevu *v.* Muttusami, 10 M. 53 (1886).

(8) Iswar Pershad *v.* Jai Narain, 12 C. 169 (1885).

(9) Kishori Mohun *v.* Chunder Nath, 14 C. 644 (1887); Krishna Satapasti *v.* Sarasvatula 31 M. 177 (1908).

(10) Attotram *v.* Balunkee Doss, 14 W. R. 357 (1870).

(11) Hanmantrav *v.* Subaji, 8 B. 257 (1884).

(12) Arumuga *v.* Chockalingam, 15 M. 331 (1892); Pullayya *v.* Ramayya, 18 M. 144 (1894).

(13) Kashinath *v.* Duming Zuran, 17 B. 228 (1892); see also Asudoollah *v.* Akbur Ali, 7 W. R. 60 (1867).

(14) Venkatalingam *v.* Veerasami, 17 M. 89 (1893).

(15) Joggobundhu *v.* Purnanund, 16 C. 530 (1889); Hari Mohan *v.* Baburali, 24 C. 715 (1897); Nasiruddin *v.* Sayudur Rahman, 19 C. L. J. 209 (1913).

the grantors of a perpetual lease will not be effective against the lessee, so as to save limitation on a suit for possession.(1) The Allahabad Court have, however, held that a purchaser cannot bring a suit for possession, even if his application for possession under this rule is barred, as the matter comes under sect. 47.(2) In another case the same Court has held that the fact that an application under this rule has been rejected as being made beyond time is no bar to a suit by the auction-purchaser for the property purchased.(3) And there are other decisions holding that sect. 47 is inapplicable.(4)

Appeal.—An appeal was held to lie from an order rejecting the application of the purchaser, who was the decree-holder, the order being appealable as one under sect. 244 (now 47) for possession.(5) But the Allahabad and Calcutta High Courts have held otherwise, sect. 244 of the last Code not being applicable;(6) but where the application for possession was resisted by the legal representative of the judgment-debtor on the allegation that portions of the property belonged to him and not to the judgment-debtor, the Calcutta High Court held the application to be one within that section and therefore appealable.(7)

Delivery of property in occupancy of tenant.

96. *Where* the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under *rule 94*, the Court shall, *on the application of the purchaser*, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

Delivery of possession.—This rule corresponds with sect. 264 of Act VIII. of 1859, with the exception of the words "*and a certificate in respect thereof has been granted under sect.* 316," which were added by sect. 319 of Act X. of 1877, and the words in italics by the present Code, which also altered "*sect.* 316" into "*rule* 94." This rule does not prevent the purchaser obtaining possession, if he can, without the intervention of the Court.(8)

"**Certificate in respect thereof.**"—It was not incumbent on the Court

(1) Gossain Dalmar *v.* Bepin Behary, 18 C. 520 (1891); Nasiruddin *v.* Sayudur Rahman, 19 C. L. J. 209 (1913).

(2) Kalyan Singh *v.* Thakur Das, 3 A. L. J. 234 (1906).

(3) Sheo Narain *v.* Nur Muhammed, 29 A. 463 (1907); Bhagwati *v.* Banwari Lal, 31 A. 82 (F. B.) (1908).

(4) Bhimal *v.* Ganesh Koer, 1 C. W. N. 658 (1897); Mahomed Mosraf *v.* Habil Mia, 6 C. L. J. 749 (1904); Ghulam *v.* Dwarka Prasad, 18 A. 36 (1895).

(5) Muttia *v.* Appasami, 13 M. 504 (1899).

(6) Bhimal *v.* Ganesh Koer, 1 C. W. N. 658 (1897) [dissenting from Muttia *v.* Appasami, 13 M. 504 (1899)]; Mahomed Mosraf *v.* Habil Mia, 6 C. L. J. 749 (1904); and see Kastura Kunwar *v.* Gaya Prasad, 29 A. 207 (1906); Bhagwati *v.* Banwari Lal, 31 A. 82 (F. B.) (1908).

(7) Madhusudan *v.* Gobinda, 27 C. 34 (1899).

(8) Obhoya Churn *v.* Rajendro Coomar, 22 W. R. 406 (1874).

under Act VIII. of 1859, to put a purchaser into possession until he had his certificate of sale.(1)

"**Order delivery.**"—The Courts in this country do not give possession by removing the possession of one who is in possession under an apparent *bonâ fide* title. If the debtor can assert his title in possession by suit only, the purchaser can have no higher claim.(2) Formal possession under O. XXI. r. 36 given by a Court in execution operates as between the parties in point of law and fact, as a complete transfer of actual possession from one party to another; (3) and where land which had been given by a father to his son, a minor, was subsequently attached and sold in execution of a decree against the father, formal possession under this rule to the purchaser completely dispossessed the father, whether he held on his own account or that of his son; (4) but such possession will not take effect as actual possession as against persons who are not parties to the suit,(5) nor against a purchaser, in execution of the rights of the judgment-debtor, who had previously obtained actual possession.(6) The delivery of possession to the purchaser under this rule does not cause dispossession of a person, not the judgment-debtor, found in possession by receipt of rent from tenants, so as to entitle the latter to complain under O. XXI. r. 99.(7) Symbolical possession as against the grantors of a perpetual lease, without reservation to the grantors and with no rights reserved and only a nominal rent, will not be effective against the lessee to save limitation against a plea of adverse possession.(8) The rightful owner dispossessing the other is not a trespasser, and may rely for the support of his possession on the title vested in him.(9) An order under this rule can only be made by the presiding officer of the Court and is a judicial Act.(10)

Limitation.—The period of limitation for an application under this rule, viz. three years under Art. 178, Sched. I. of the Limitation Act, is reckoned from the date when the sale becomes absolute. If formal possession be infructuous, a suit against the judgment-debtor for possession is good within twelve years of the sale under Art. 138 of Sched. I. of the Limitation Act.(11) It has been held that Art. 138 of the Limitation Act only applies to suits in which the auction-purchaser is the plaintiff and the judgment-debtor, or a person claiming through him, the defendant.(12) Where a purchaser is resisted in obtaining possession by a person claiming under a mortgage from the judgment-debtor and sues for possession, the suit is governed by the same article, even though he alleges the

(1) Tukaram *v.* Satvaji, 5 B. 206 (1881).

(2) Tarakant *v.* Puddomoney, 10 Moo. I. A. 483 (1866).

(3) Lokessur *v.* Purgun, 7 C. 418 (1881); but see Mahadeo *v.* Janu, 36 B. 376 (1912); 14 Bom. L. R. 115.

(4) Devu *v.* Ramamurti, 18 M. 405 (1894).

(5) Runjit Singh *v.* Bunwari, 10 C. 993 (1884); Juggobundhu *v.* Ram Chunder, 5 C. 584.

(6) Narain Das *v.* Lalta Prasad, 21 A. 269 (1899).

(7) Kisori Lal *v.* Lala Shib Lall, 1 C. W. N. 343 (1897).

(8) Gossain Dalmar *v.* Bepin Behary, 18 C. 520 (1891).

(9) Bandu *v.* Naba, 15 B. 238 (1890).

(10) Prem Krishna *v.* Juramoni, 13 C. W. N. 694 (1909).

(11) Krishna Lall *v.* Radha Krishna, 10 C. 402.

(12) Bhagwant Singh *v.* Bholi Singh, 35 A. 432 (1913).

mortgage to be collusive and fraudulent,(1) and sues to set it aside.(2) It has been held that if the purchaser be dispossessed by a third party subsequent to formal possession he has twelve years from dispossession to bring a suit; (3) while, if the judgment-debtor be in possession and formal possession be given under this rule instead of under r. 95, a suit for possession against him lies within twelve years of the date of formal possession,(4) as formal possession under either r. 95 or this rule forms a fresh starting point for limitation as against the judgment-debtor,(5) whether actual possession be obtained or not.(6) But a Full Bench of the Bombay High Court has recently held that a mere formal possession of immoveable property by a purchaser at a Court-sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession; for symbolical possession is neither real possession nor equivalent to it under this Code except where the Code expressly or by implication so provides.(7)

Appeal.—It was held that no appeal lay from an order for possession under the former section.(8)

Resistance to delivery of possession to decree-holder or purchaser.

97. (1) *Where the holder* of a decree for the possession of immoveable property *or the purchaser of any such property sold in execution of a decree* is resisted or obstructed by any person *in obtaining possession of the property, he* may *make an application* to the Court complain*ing* of such resistance or obstruction.

Resistance or **obstruction to** *possession of immoveable property.*

(2) The Court shall fix a day for investigating the *matter* and shall summon the party against whom the application is made to appear and answer the same.

98. *Where* the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some *other* person at his instigation, *it shall direct that the applicant be put into possession of the property, and where the applicant* is still resisted or obstructed in obtaining possession, the Court may

Resistance or obstruction by judgment-debtor.

(1) Uma Shankar *v.* Kalka Prasad, 6 A. 75 (1883).

(2) Ikram Singh *v.* Intizam, 6 A. 260 (1884).

(3) Juggobundhu *v.* Ram Chunder, 5 C. 584 (1880); Juggobundhu *v.* Purnanund, 16 C. 530 (1889); Nasiruddin *v.* Sayudur Rahman, 19 C. L. J. 209 (1913).

(4) Gopal *v.* Krishnarao, 25 B. 275 (1900); Mahadeo *v.* Parashram, 25 B. 359 (1900); Hari Mohan *v.* Baburali, 24 C. 715 (1897); the two former cases have recently been overruled in Mahadeo *v.* Janu, 36 B. 376 (1912), *post.*

(5) Mangli *v.* Debi Din, 19 A. 488 (1897)

(6) Umbicka Churn *v.* Madhub Ghosal, 4 C. 870 (1879); 4 C. L. R. 55.

(7) Mahadeo *v.* Janu, 36 B. 376 (F B.) (1912); 14 Bom. L. R. 115.

(8) Ghulam *v.* Dwarka, 18 A. 36 (1895).

also, at the instance of the *applicant*, *order* the judgment-debtor, or *any* person *acting at his instigation, to be detained in the civil prison* for a term which may extend to thirty days.

Obstruction of decree holder or purchaser.—These and the following rules have been remodelled. These two rules applied under the last Code to applications made by the decree-holder (1) only, but now to applications both by decree-holder and purchaser, thus embodying the provisions of sect. 334 of the last Code. The preceding Code did not make it obligatory on a decree-holder who was obstructed to pursue his remedies under these provisions. And it was accordingly held that the failure on the part of plaintiff to avail himself of this summary remedy did not bar a suit.(2) Moreover, it was held that there was nothing to prevent the decree-holder or purchaser who had been obstructed from making a fresh application for delivery.(3) The omission to have recourse to the provisions of the former Code did not, it was held, preclude a person from instituting a suit to recover possession or making a fresh application for delivery. An order under the former section passed against a person who had at the instigation of the judgment-debtor obstructed a decree-holder has been held not to bar a suit.(4) A decree for partition is a decree for possession, and the rule is not rendered inapplicable by the fact that the person obstructing claims to be a *mulgeni* tenant.(5) Every obstruction must be caused either by the judgment-debtor or claimants at his instigation, by persons who have no real interest in the property, or by third parties claimants. The present rules deal with the first two cases and the next with the third.(6) The effect of the remodelling of the rules is as follows: Sects. 328–330 of the last Code applied to decree-holders only, and sect. 334 to obstruction of purchasers. The provisions of these sections are incorporated in rr. 97 and 98, which apply in favour both of the decree-holder and purchaser and against the judgment-debtor. R. 99 applies in favour of the same persons, but against persons other than the judgment-debtor. This rule, which incorporates the portion of sect. 335 which dealt with the purchaser, modifies sect. 331. The provisions as to trying the claim as a suit with the resultant appeal are omitted. But all parties except the judgment-debtor have a right of suit under r. 103. Lastly, rr. 100, 101, and 103, which incorporate sects. 332 and 335, deal with the dispossession of third parties. The former section dealt with dispossession at the instance of the decree-holder and the latter with dispossession by the purchaser. Both are now dealt with together. The Judge should fix a day, make an inquiry on taking evidence, and if he directs that the property should be delivered in whole or in part, should order that posses-

(1) *In re* Bibee Mahtab Koomaree, 19 W. R. 62 (1873).

(2) Balvant Santaram *v.* Babaji Naick, 8 B. 602 (1884); see Jugmohun Tewaree *v.* Baldeo Naick, 3 Agra 162; Trimbak *v.* Narayan, 8 B. 481 (1884).

(3) Muthia *v.* Appasami, 13 M. 504, 506 (1890), which also deals with the subject of appeal, as to which, see also Govinda Nair *v.* Kesava, 3 M. 81, 84 (1880).

(4) Bishen Dyal Singh *v.* Sagar Singh, 2 C. W. N. 311 (1896).

(5) Gopala *v.* Fernandes, 16 M. 127 (1892).

(6) Govinda Nair *v.* Kesava, 3 M. 81, 84 (1880); approved in Radha Gobind *v.* Raghunath, 18 C. L. J. 138 (1913); Salamva *v.* Martyava, 16 B. n. 711 (1887); Preonnath Roy *v.* Chowdhry, 8 W. R. 398 (1867).

sion be given in one or other of the ways mentioned in the Code.(1) It has been held that this rule should be read with r. 95.(2) These and the following sections in the former Code have been held not to apply to proceedings under the Mamlatdar's Act.(3)

"**Is resisted.**"—There is of course no indication as to the nature of the resistance or obstruction, but there must be some overt act of opposition to the Court's officers on the part of some one who is actually present.(4)

"**Possession.**"—This term in this and the next rule has been held to include constructive and symbolical as well as actual physical possession. Possession of immoveable property is not the less real or actual because it is enjoyed through tenants, servants, or members of one's family.(5) The same was held as regards sect. 335 of the last Code,(6) the provisions of which are incorporated in rr. 97, 99, and 100.

Limitation.—The resistance or obstruction referred to is that mentioned as forming the subject of the complaint, and limitation is not necessarily to be computed from the date of first obstruction.(7) For the limitation is one which governs a cause of action arising out of a particular resistance or obstruction.(8) Further, the period mentioned is important only as the limit prescribed within which the judgment-creditors may by virtue of this rule bring what is in effect an action of ejectment against a stranger without the expense of a regular suit. Other proceedings may be taken against a judgment-debtor in execution within the period prescribed from the last application of the kind, even though not instituted within thirty days after a wrongful obstruction.(9) An application must be brought within thirty days of the obstruction, but where, according to the former procedure under sect. 331, the application was converted into a suit, the rights of the parties had to be decided as if an ordinary suit for possession had been instituted by the decree-holder against the defendant.(10) When litigation under that section was pending, the proceedings in execution were suspended.(11) When the litigation was unsuccessful, the period during which they had been pending could not be excluded in computing the period of limitation for execution of the decree.(12) An order rejecting an application as being barred,

(1) See Brojo Mohun Sutputty *v.* Shooda Monee, 8 W. R. 79 (1867); Shadhoo Saran *v.* Bhuggoo Lall, 12 W. R. 98 (1869).

(2) Kuppana *v.* Kumara, 34 M. 450 (1910).

(3) Kasam Sahib *v.* Maruti, 13 B. 552 (1888).

(4) Mancharam *v.* Fakirchand, 25 B. 478, 485, 486 (1901). See Mahabir Prasad *v.* Parma, 14 A. 417 (1892).

(5) Mancharam *v.* Fakir Chand, 3 Bom. L. R. 58 (1900), *per cur.* Whitworth, J., dissent., holding possession in the next rule is limited to actual physical possession, and does not extend to the possession of a landlord through his tenants.

(6) Brajabala Devi *v.* Gurudas Mundle, 33 C. 487 (1906).

(7) Ramasckara Pillai *v.* Dharmasaya, 5 M. 113 (1881); as to the meaning of term "month" and exclusion of days of dispossession, see Dadu *v.* Balganda, 5 Bom. H. C. R. A. C. J. 39 (1868).

(8) Narain Das *v.* Hazari Lall, 18 A. 233 (1895).

(9) Hunkur Singh *v.* Madho Lall, 21 W. R. 147 (1874).

(10) Namdev *v.* Ramchandra, 18 B. 37 (1892).

(11) Narayan *v.* Sono, 24 B. 345 (1899); s. c., 1 Bom. L. R. 846.

(12) Shivram *v.* Sarasvatibai, 20 B. 175 (1894). As to adverse possession, see Krishnaji *v.* Kashibai, 30 B. 115 (1905); and dismissal for default, Sarat Chandra *v.* Tarini Prasad Pal, 24 C. 491 (1907); Kunj Behari *v.* Kandh Prashad, 6 C. L. J. 362 (1907).

did not, it was held, prevent the losing party from bringing a regular suit.(1) As regards, however, the present amended procedure, see next rule. A suit lies under r. 103, *post*.

"**Detained in the civil prison.**"—It was thought that the previous expression, "*commit the judgment-debtor or such other person to jail*," was misleading as raising questions of diet money as in the case of civil imprisonment for debt. The language has, therefore, been altered to render it clear that the provision relates to conviction of an offence in contempt of justice. The words "without prejudice to any proceedings," etc., in the former sect. 330, have been omitted, though presumably the law remains the same in this respect.

Resistance **or obstruction by** *bonâ fide* **claimant.**

99. *Where the Court is satisfied that* the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall *make an* order *dismissing the application.*

Object of rule.—The object of the corresponding and similar provisions in the last Code was, so far as possible, to prevent the originating of a succession of suits. It was desired that a right should be determined finally in continuation of an original proceeding and not by fresh proceedings.(2) This section, as the last, was limited to application by the decree-holder; (3) but now includes orders made on the application of a purchaser against a person other than the judgment-debtor.(4) A person in whose favour an order under sect. 335 had been made could not claim the benefit of the former section.(5) As to the amendments, *vide post*.

"**Court.**"—A Superior Court might, it was held, for sufficient cause transfer a claim registered under the former section to a Subordinate Court for trial.(6)

"**In possession.**"—See next paragraph.

"**An order dismissing the application.**"—Under the last Code the claim was registered as a suit, and the Court investigated the claim as such. It then ordered or stayed execution of the decree. The order had the force of a decree, and was appealable as such. No question of title between the plaintiff and his

(1) Boni Prasad *v.* Lachman Prasad, 4 A. 131 (1881).

(2) Sithalakshmi *v.* Vythilinga, 8 M. 548 (1884). In Gonesh Pershad *v.* Jykeskun, 1 A. H. C. R. 218, the section was held inapplicable to the case of a person put in possession of land under a decree.

(3) Buhal Sing Chowdhry *v.* Bihari Lal, 1 B. L. R. 206 (1868). See Mahabir Pershad *v.* Parma, 14 A. 417 (1892), in which the scope of the section is commented upon.

(4) See as to this and s. 47, Jathavedan *v.* Kunchu, 30 M. 72 (1906); and as to the same section and the former s. 335, Narayanasawmi *v.* Seshappariyer, 17 M. L. J. 321 (1907); for meaning of "in good faith and in his own account," see Jugol Kishore *v.* Ambika Debi, 16 C. W. N. 882 (1912).

(5) Srinath Ghosh *v.* Annoda Prosad Roy, 1 C. W. N. 192 (1896).

(6) Sithalaksmi *v.* Vythilinga, 8 M. 548 (1884).

judgment-debtor requiring the decree against them to be reopened could be adjudicated upon. The issues which properly arose in an inquiry were whether the person obstructing was in possession on his own account or on account of some person other than the judgment-debtor.(1) The word "possession" was not limited to actual physical possession, but included also constructive, such as by a tenant.(2) The issue which arose was one between the decree-holder as plaintiff and the claimant, that is, a person other than the judgment-debtor.

Under the Code of 1877 the claim had to be investigated as if a suit had been instituted under sect. 9 of the Specific Relief Act. The powers of the Court were thus strictly limited to an inquiry into the question of possession.(3)

The Code was amended by sect. 52 of Act XII. of 1879, the provisions of which were re-enacted in the Code of 1882, and the power of investigation was enlarged. The investigation was not limited to the fact of possession. Any question of title arising between the contending parties in connection with their right of possession might be finally determined in such investigation as in an ordinary action of ejectment. The order, whether for executing or for staying execution, had the force of a decree determining the title and the right of possession. The plaintiff was not forced to a fresh suit or had a right to bring a fresh suit if the decree was against him.(4) Where possession was shown to have been with the plaintiff the defendants were not, without showing title in themselves, at liberty to impeach the plaintiff's title or to set up a *jus tertii*. The onus of proving a better title than the plaintiff's rested with them, and they might prove their title as a defence.(5) A Court executing a decree was thus given a special jurisdiction which enabled it to try a claim of which the value of the subject-matter fell below the pecuniary limits of its ordinary jurisdiction.(6)

It will be observed that considerable amendments have been made in the present rule. Under the first paragraph of the former sect. 331 the claim was to have been "numbered and registered *as a suit* between the decree-holder as plaintiff and the claimant as defendant." Paragraph 2, under which the Court had power in investigation of "the like powers," as if a *suit* for the property had been instituted by the decree-holder against the claimant, is omitted; as also the third and fourth paragraphs, under which the Court passed an order executing or staying execution which had the force of a *decree*, and was subject to the same conditions as to *appeal*. The words "with the like powers" were

(1) Mahomed Isub *v.* Bahotappa, 27 B. 302 (1903); s. c., 5 Bom. L. R. 201, dist. Moulakhan *v.* Gori Khan, 14 B. 627 (1890), which was a case between a decree-holder and a person resisting execution claiming under a title *adverse* to the judgment-debtor, where obviously the question of title as between those parties necessarily required decision in that case.

(2) Mancharam *v.* Fakirchand, 25 B. 478; s. c., 3 Bom. L. R. 58. As to nature and terms of tenancy, see Talib Hossein *v.* Gooroo Pershad, 20 W. R. 57 (1873).

(3) Moula Khan *v.* Gori Khan, 14 B. 627, 632 (1890); Chinnasami Pillai *v.* Krishna Pillai, 3 M. 104 (1881).

(4) Mahip Rai *v.* Dwarka Rai, 27 A. 453 (1905); Moula Khan *v.* Gori Khan, *supra*; Bapujirao *v.* Fatesing Shahaji, 22 B. 967 (1896); Mancharam *v.* Fakirchand, 25 B. 478, 481 (1901).

(5) Bapujirao *v.* Fatehsing, 22 B. 967 (1896). See as to onus, Rakhal Chunder Mundul *v.* Watson, 10 C. 50 (1883); Mancharam *v.* Fakirchand, 25 B. 478 (1901).

(6) Sithalaksmi *v.* Vythilinga, 8 M. 548 (1884). See Kalima *v.* Naman Kutti, 13 M. 520, 522 (1890).

held to mean that the Court has the same powers for enforcing the attendance of parties and witnesses, etc., as it has in a suit (1) as regards appeal. A refusal to number and register the claim was held to amount to the rejection of a plaint, and was, therefore, appealable,(2) though these decisions have been dissented from.(3) Where a claim was registered out of time no appeal lay, but the order could be objected to in an appeal from the final order which had the force of a decree.(4) Proceedings taken after a decree for possession under sect. 9 of the Specific Relief Act, were in the nature of a fresh suit, and, therefore, an appeal lay.(5) The Court to which an appeal lay depended on the value of the claim and not that of the original suit.(6)

Now the Court, under the second clause of r. 97, *ante*, is to investigate "*the matter.*" If the obstruction is caused by the judgment-debtor, the order under r. 98 is that the applicant be put in possession. If the obstruction is due to the *bonâ fide* claim of a third party, the application is dismissed under this rule. It is not stated what the scope of the inquiry in the latter case is to be. Presumably, however, it is to be of a summary character, even if it is not limited to the question of possession. For now a right of suit is given by r. 103 to persons against whom orders are made under the present rule. Their position is therefore assimilated to that of parties against whom orders are made under rr. 98, 100, and 102, to whom a right of suit is given by r. 103 of this Order.

Dispossession by decree-holder or purchaser.

100. (1) *Where* any person other than the judgment-debtor is dispossessed of *immoveable* property *by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.*

(2) *The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.*

Bonâ fide claimant to be restored to possession.

101. *Where the Court is satisfied that the applicant was* in possession *of the property* on his own account or on account of some person other than the judgment-debtor, *it shall direct that the applicant be put into possession of the property.*

Scope of rules.—The preceding rules refer to a resistance offered in the course of delivery of possession in execution, whilst these rules refer to a subse-

(1) Sithalaksmi *v.* Vythilinga, 8 M. 548, 580 (1884).

(2) Fonindro Deb Raikut *v.* Rani Jugodishwari, 14 C. 234 (1886); Gopala *v.* Fernandes, 16 M. 127 (1892); Baranagore Jute Factory, Ltd. *v.* Raj Kumar, 13 C. W. N. 724 (1909).

(3) Vishnu *v.* Ramchandra, 9 Bom. L. R. 936 (1907).

(4) Lala *v* Narayan, 21 B. 392 (1895).

(5) Nasir Ali Fakir *v.* Meher Ali, 22 C. 830 (1895).

(6) Moulakhan *v.* Gori Khan, 14 B. 627 (1890); Kalima *v.* Nainan Kutti, 13 M. 520 (1890).

quent stage, viz. to the event which may arise as to the result of the delivery of possession; (1) and give an applicant a right of contesting, without instituting a separate suit, the decree-holder's or purchaser's right to dispossess him.(2) As to dispossession by purchaser, the rule thus incorporates that portion of sect. 335 of last Code. It was held that if in execution of decree a claim made by a third party in possession is rejected, he should either bring a regular suit or wait until he is dispossessed, and then apply under the former section or bring a separate suit, or he might do both.(3) See as to regular suit, which is now dealt with by r. 103, *post*, of this Order, cases cited.(4) In a suit instituted under that rule the judgment and the decree in the original suit are not admissible in evidence.(5) Where the judgment-creditor obtained an order for possession prior to the death of the judgment-debtor, it was held that there was no necessity for him to bring any other person on the record between the date of that order and the date on which the order was executed.(6) The rule applies to possessory actions.(7) Where in execution a person not a party to the suit is dispossessed, his dispossession does not give him a cause of action within the jurisdiction of the mamlatdar. This rule applies.(8) This rule does not apply where sect. 47 does.(9) It does not apply to a case where the execution of the decree has been transferred to the Collector and he has acted under the powers conferred on him by the Local Government Board under sect.70.(10) A person is none the less a judgment-debtor because he may have acquired an interest subsequent to the date of the decree passed against him.(11)

Procedure.—The Court should first examine the applicant in order to determine whether proceedings under this rule will lie or not;(12) and if it appears that the applicant was a party to the decree,(13) or that he is still in

(1) Bishen Dyal Singh *v.* Sagar Singh, 2 C. W. N. 311, 314 (1896). See Ram Chandra Subrao *v.* Ravji, 20 B. 351, 353 (1895), which deals with the subject of dispossession, as also does Mancharam *v.* Fakir Chand, 3 Bom. L. R. 58 (1900).

(2) Mahomed Ansur *v.* Prokash Chunder Sha, 8 W. R. 8 (1867). As to limitation, see Art. 165, Sch. II., Act XV. of 1877; and transfer where the Court is deprived of jurisdiction pending proceedings, Kalee Doss Neogy *v.* Huro Nath Roy Chowdhury, 3 W. R. 5 (1865); and withdrawal of application, Sabbaramien *v.* Ponunsawmny Chetty, 5 M. H. C. R. 298 (1870).

(3) Fergusson *v.* Nilkomul Lahiree, 23 W. R. 270 (1875); Kishen Sundur *v.* Fukeerooddeen, 1864 W. R. 61 (1864); Gulabhai *v.* Jinabhai, 13 B. 213 (1888).

(4) Ayyasami *v.* Sarmiya, 8 M. 82 (1884) [limitation]; approved in Maindi Sardar *v.* Gorachand, 16 C. W. N. 971 (1912); and Maula Baksh *v.* Bhaba Sundari Dasya, 19 C. L. J. 187 (1913); Ram Narain Dutt *v.* Annoda Prosad Joshi, 14 C. 681 (1887) [misjoinder].

(5) Dhani Kalwar *v.* Birj Bhukan Roy, 1 C. W. N. clxxxv. (1897).

(6) Biyyakka *v.* Fakira, 12 M. 211 (1889).

(7) Brohmo Moyee Dabee *v.* Burkut Sirdar, 13 W. R. 264 (1870).

(8) Ram Chandra Subrao *v.* Ravji, 20 B. 351 (1895).

(9) Imdad Ali *v.* Jagin Lal, 17 A. 478, 481 (1895).

(10) Ragho *v.* Hanmati, 15 Bom. L. R. 389 (1913); 37 B. 488.

(11) Shripati *v.* Piraji, 9 Bom. L. R. 1018 (1907).

(12) Obhoy Churn Dey *v.* Rajendro Coomar Ghose, 16 W. R. 288 (1871).

(13) Ram Gopal Chuckerbutty *v.* Poorno Chunder Bannerjee, 12 W. R. 475 (1869). See Huree Kishore *v.* Kalee Kishore, 8 W. R. 114 (1867).

possession,(1) or in receipt of rent from the judgment-debtor,(2) the application should be rejected; but not on the ground of possession if the parties are agreed that the applicant has been dispossessed,(3) nor on the ground that the applicant had not originally obtained possession in a strictly legal manner.(4) It is sufficient if it should appear that the party, though not in personal occupation, was in possession by receipt of rent; (5) or as mortgagee, or as mortgagor through a mortgagee in possession,(6) and has been dispossessed under the decree or under colour of it. A mortgagee from a tenant is in possession on his own account.(7) A member of a joint Hindu family, however, cannot say that he is in possession of any particular portion of the joint family on his own account, his possession being that of the family.(8) A party dispossessed under colour of a decree to which he was no party is entitled to an investigation and to an order if his title is established.(9) If the claimant was in possession, though without a good title, he cannot be dispossessed in execution of a decree against a third party to which he was no party. On the other hand, if the party against whom the decree was obtained was in possession, though without a good title, no person not in actual possession or receipt of rent can resist execution.(10) The onus is on the applicant.(11) The order under r. 101 decides the question of possession, and is made dependent on the result of the suit to establish the right. It is therefore unnecessary to sue to have it cancelled.(12) If there are several applications each application should be tried separately.(13) It is incumbent on the applicant to prove whether or not the judgment-debtor was in possession at the date of the sale; and the onus is not discharged by mere proof that he was in possession at some time antecedent to twelve years before the suit.(14)

(1) Kalee Narain Singh *v.* Protap Chunder Burooah, 12 W. R. 231 (1869); Ruttun Kooer *v.* Tussuduck Hossein, 22 W. R. 103 (1874).

(2) Brajabala *v.* Gurudas, 33 C. 487 (1906).

(3) Judoo Kapalee *v.* Issur Chunder Roy, 17 W. R. 375 (1872).

(4) Obhoya Churn Dey *v.* Rajendro Coomar Ghose, 22 W. R. 406 (1874).

(5) Bhyrab Sircar *v.* Sham Manjee, 15 W. R. 70 (1871); Banee Madhub Dutt *v.* Nund Lall Mojoomdar, 22 W. R. 123 (1874).

(6) Asgur Ali *v.* Asgur Ali, 20 W. R. 373 (1873); distinguished in Kedar Nath *v.* Saday Chandra, 19 C. L. J. 13 (1914), *post*; Shafi-ud-din *v.* Lochan Singh, 2 A. 94 (1878); as to recovery of possession by mortgagee, see Bhikaji *v.* Vallabh Das, 2 Bom. H. C. R. 209 (1864); and dispossession by mortgagee of *jotedar* in execution, Tarakant Bannerjee *v.* Puddomoney Dossee, 10 M. I. A. 476, 485 (1866).

(7) Kedar Nath *v.* Saday Chandra, 19 C. L. J. 13 (1913).

(8) Cooverji Hirji *v.* Dewsey Bhoja, 17 B. 718 (1893); Sankar *v.* Madan, 14 C. W. N. 298 (1909). The former case has been recently distinguished in Radha Gobind *v.* Raghunath, 18 C. L. J. 138 (1913); following Govinda Nair *v.* Kesava, 3 M. 81 (1880). And see Sheik Abdul *v.* Jadunandan, 18 C. L. J. 344 (he cannot alienate a particular share).

(9) Hassan Ali *v.* Naib Ahmed, 11 W. R. 146 (1869).

(10) Sharada Moyee *v.* Nobin Chunder, 11 W. R. 255 (1869).

(11) Mahomed Ansur *v.* Prokash Chunder Sha. 8 W. R. 8 (1867); Woodoy Tara Chowdhrani *v.* Khajah Abdool Gunee, 12 W. R. 16 (1869); Judoo Nath Singh *v.* Kalee Pershad, 14 W. R. 358 (1870); Brindabun Chunder Roy *v.* Tara Chand Bannerjee, 20 W. R. 114 (1873); as to objection that decree is barred, see Mohesh Chunder *v.* Chundra Monee, 9 W. R. 486 (1868).

(12) Ayyasami *v.* Samiya, 8 M. 82, 83 (1884).

(13) Sharoda Moyee *v.* Nobin Chunder, 11 W. R. 255 (1869).

(14) Nasiruddin *v.* Sayudur Rahman, 19 C. L. J. 209 (1913); Mohima Chunder *v.* Mohesh Chunder, P. C., 16 C. 473 (1888).

No question of title can be investigated in a proceeding under r. 101.(1) It has been recently held that O. IX. r. 13 is not applicable to a proceeding under these rules.(2)

Rules not applicable to transferee lite pendente.

102. Nothing in *rules 99 and 101 shall apply* to *resistance or obstruction in execution of a decree for the possession of immoveable property by* a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was *passed or to the dispossession of any such person.*

Orders conclusive subject to regular suit.

103. *Any* party *not being a judgment-debtor* against whom *an* order is *made under rule 98, rule 99 or rule 101* may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be *conclusive.*

Object and scope of rules.—Rule 103 is the second paragraph of sect. 335 of the last Code. The disposition of the rest of the section is as follows: Obstruction of the purchaser is dealt with by rr. 97 and 99, and dispossession of a claimant other than the judgment-debtor by r. 100, *ante*. A power is thus given where an attempt has been made to deliver possession,(3) and there is obstruction or resistance,(4) to give, after inquiry,(5) a summary decision which shall protect the public peace, prevent obstruction, and terminate the execution proceedings by determining what should be immediately done, subject, as regards claimants other than the judgment-debtor, to the result of a regular suit.(6) The rules are designed for the protection and assistance of decree-holders, purchasers,(7) and third parties dispossessed; (8) rr. 97 and 98 dealing with resistance by the judgment-debtor (as to which, see r. 97, *ante*); r. 99 with resistance by third parties; and rr. 100 and 101 with third parties dispossessed. A person, it has been held, is not bound to proceed under the former sect. 335. He might if he chose at once bring a regular suit within the ordinary period of limitation. But if he did choose to apply for a summary decision and it was against him, he had to sue within one year from the time of the order.(9) It was also held there

(1) Kedar Nath *v.* Saday Chandra, 19 C. L. J. 13 (1913).

(2) Hari Charan Ghose *v.* Manmotha Nath Sen, 41 C. 1 (1913).

(3) Sharoda Proshad Mullick *v.* Roy Dhunput Singh, 19 W. R. 219, 221 (1873).

(4) Mt. Zahoorun *v.* Syad Mahomed, 18 W. R. 87 (1872), for if the purchaser has been put in possession peaceably the Court has nothing more to do in execution; Sevu *v.* Muthusami, 10 M. 53, 56 (1886); Srinath Ghosh *v.* Annoda Prosad Roy, 1 C. W. N. 192 (1896).

(5) See Huro Prosad Roy *v.* Ramessur Missry Malia, 24 W. R. 461 (1875); Mt. Zahoorun *v.* Syad Mahomed, *supra*.

(6) Mt. Zahoorun *v.* Syad Mahomed, 18 W. R. 87 (1872).

(7) Heera Lall Bannerjee *v.* Rajah Buroda Kant, 13 W. R. 466 (1870).

(8) See Govind Balvant *v.* Lakshman, 18 B. 522 (1893) [application for restoration of possession by joint manager].

(9) Protap Chunder Chowdhry *v.* Brojolall Shaha, B. L. R. F. B. 638 (1867); Sevu *v.* Muttusami, 10 M. 53 (1886); Madaree *v.*

was nothing to prevent a decree-holder or purchaser who has been obstructed or resisted from making a fresh application for delivery without making any complaint under sects. 328–330, 334.(1) That case was, however, subsequently distinguished on the ground that it was one in which the purchaser was resisted not by a third party but by the judgment-debtor.(2) The application must be made within thirty days of the resistance or obstruction.(3) The Court was held not bound under sect. 335 to pass any particular order, but only such order as may be proper in the circumstances of the case.(4) A purchaser at a Court sale of the interest of one member of an undivided Hindu family ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one co-parcener only,(5) but only in joint possession with the others.(6) It has been held that symbolical possession does not amount to dispossession within the meaning of the former section.(7)

"**May institute a suit.**"—See note, *post*, "Conclusive;" and as to limitation (8) for such a suit, which is one year, and Court-fee,(9) see cases cited.

"**Conclusive.**"—The rule contemplates an order against one party or the other, and if an application is withdrawn, an order allowing the withdrawal is not an order under this rule.(10) The order is one which becomes final and conclusive unless the party against whom it is passed institutes a suit within a year and obtains an adjudication in his favour. Where the Court declined to pass an order, deeming it best that the purchaser should be referred to a separate suit to enforce his purchase, Article 11 of the Limitation Act had no application.(11) If a regular suit is not brought within a year the order acquires the form of a final decree.(12) Though an order under this section is not appealable,(13) it may be made the subject of revision.(14)

Bulloo Kooerçe, 2 A. H. C. R. 450 (1870); Muttia *v.* Appasami, 13 M. 504, 506 (1890). Where the purchaser has merely obtained formal possession he may sue for possession within twelve years: Joggobundhu Mitter *v.* Purnanund Gossami, 16 C. 530 (1889).

(1) Muttia *v.* Appasami, 13 M. 504, 506 (1890) [and see also same case where purchaser is decree-holder].

(2) Kesri Narain *v.* Abul Hasan, 26 A. 365 (1904); Knox, J., *dubitante*.

(3) Limitation Act, Art. 167; Vinayakrao Amrit *v.* Deorao Govind, 11 B. 473 (1887) [minor].

(4) Zahooran *v.* Mahomed Wajid, 18 W. R. 87 (1872).

(5) Kallapa *v.* Venkattesh, 2 B. 676 (1878).

(6) See Dugappa Shetti *v.* Venkatramnaya, 5 B. 493 (1880) [explained in Balaji Anant *v.* Ganesh Janardan, 5 B. 499 (1881)]; Patil Hari Premji *v.* Hakam Chand, 10 B. 363 (1884).

(7) Ibrahim Mullick *v.* Ramjadu Rakshit, 30 C. 710 (1903); Kisori Lall Goswami *v.* Lala Shib Lall, 1 C. W. N. 343 (1897).

(8) Bhiku *v.* Shujat Ali, 29 C. 25 (1901); Mahadev *v.* Bali, 26 B. 730 (1902) [assignee from minor]; Bhimappa *v.* Irappa, 26 B. 146 (1901); s. c., 3 Bom. L. R. 594; Meerudin Saib *v.* Ratesa Bibi, 27 M. 25 (1903); Rango Vithal *v.* Rikhivadas, 11 B. H. C. R. 174 (1874).

(9) Priya Das *v.* Vilayat Khan, 22 A. 384 (1900).

(10) Bhikha *v.* Sakarlal, 5 B. 440 (1881).

(11) Meerudin Saib *v.* Ratesa Bibi, 27 M. 25 (1903).

(12) Achuta *v.* Mammavu, 10 M. 357 (1886).

(13) In Ram Narain Sahoo *v.* Bandi Pershad, 31 C. 737 (1904), at p. 741, the matter was held to fall under s. 244 (now 47), and was therefore appealable.

(14) Sheoraj Singh *v.* Banwari Das, 6 A. 172 (1884); Sabhajit *v.* Sri Gopal, 17 A. 222 (1894); Mt. Zahoorun *v.* Syud Mahomed, 18 W. R. 87 (1872) [delay].

ORDER XXII.

Death, Marriage and Insolvency of Parties.

No abatement by party's death, if right to sue survives.

1. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

Abatement.—It has been pointed out (1) that the practice in respect of abatement under the Code is different from that which prevailed in the English Courts. A suit, though perfect in its institution, became defective by the death, marriage, or transmission of interest or liability of some of the parties. In such case the suit was said to have abated or become defective, and as a general rule no proceeding could be taken in it until an order to revive the suit or carry on the proceedings had been made. When the abatement was total—that is, caused by the death, bankruptcy, or insolvency of a single plaintiff or the marriage of a single female plaintiff—the case was completely suspended, and could not be proceeded with until it had been revived or the defect cured. Where the abatement was partial merely, as when it was caused by the death of the defendant, it prevented those proceedings only by which the interest of the deceased might be affected, for the death of a defendant made an abatement *quoad* himself alone. Thus abatement, though it suspended the proceedings in a case, did not put an end to them. But it had not the effect of being a bar to a further suit upon the same cause of action: one of the essentials of *res judicata* being that the matter must have been determined, and when a suit abated before judgment nothing had been determined in such suit. Under, however, r. 9 of this Order (formerly sect. 371), when a suit abates no fresh suit can be brought upon the same cause of action unless and until the order of abatement is set aside. The provisions of this Order are substantially those of the last Code. Rules 6 and 12 have been added, and sub-rule (2) has been added to r. 10 (formerly sect. 372). The last paragraph of sect. 582 of the last Code has been made r. 11. The provisions of this Order apply to appeals, and the words "plaintiff," "defendant," and "suit" include an appellant, a respondent, and appeal respectively.(2) They did not, however, under the last Code apply to proceedings in execution between the judgment-creditor and judgment-debtor; (3) nor to proceedings in a Mamlatdar's Court.(4) As regards execution proceedings, see now r. 12, *post*.

(1) Benode Mohini Choudhrani *v.* Sharat Chunder Dey Chowdhury, 8 C. 837, at pp. 892, 893 (1882).

(2) R. 11, *post*.

(3) Hira Chand *v.* Kastur Chand, 18 B. 224 (1894).

(4) Ganpatram Jebhai *v* Ranchod Haribhai, 17 B. 645 (1893).

Applicability.—This rule is the same as sect. 99 of Act VII. of 1859, save that the words "*right to sue*" was substituted for "*cause of action*," by sect. 60 of Act XII. of 1879. See also Rules of Supreme Court, 1883, O. 17, r. 1. The rule is the same as under the last Code. The illustrations have, however, been omitted. Illustrations (*a*) and (*b*) to sect. 361 of the last Code have been omitted as founded upon an antiquated decision (Anderson *v.* Martindale, 1 East, 497) which is not very intelligible to practitioners in this country. Illustration (*d*) of the section was correct only under the Dayabhaga system, and the word "minor" was not of the essence of the example. The Select Committee expunged also the other illustrations, considering them too obvious to serve any useful purpose. This rule applies to proceedings on appeal; (1) to cases where under an order of Court a reference has been made to arbitration; (2) even after an award has been made but before decree; (3) and under the Dekhan Agricultural Relief Act to proceedings in respect of a conciliation agreement.(4)

"**Right to sue.**"—Under the Code of 1859 "Cause of action" in the corresponding section was held to mean the right to bring an action.(5) "*Right to sue*" means the right to seek relief by means of legal proceedings.(6) It is a vested right.(7) The cause of action in the original and revived suits must be the same.(8)

"**Survives.**"—All demands whatsoever, and all rights to prosecute or defend any action or special proceeding in favour of or against a person at the time of his decease, survive to and against his executors or administrators, save certain causes of action mentioned below; (9) and promises bind the representatives of the promisor in case of the death of such promisor before performance, unless the contrary intention appear from the contract.(10) A suit for malicious prosecution does not survive on the death of the plaintiff,(11) but after a decree for damages for defamation it does survive on appeal after the death of the appellant to whose estate injury has occurred, for where a claim has been perfected by a judgment, the nature of the relief claimed on appeal stands on a different footing, and it does not follow that the right to appeal against a decree partakes of the nature of the original decree.(12) So also on second appeal.(13) The position in such cases has been enunciated as follows:—"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property,

(1) R. 11, *post*.

(2) Perumalla *v.* Perumalla, 27 M. 112 (1903).

(3) Denomoyee Dassee *v.* Chooney Money, 4 C. W. N. 280 (1899).

(4) Narayandas *v.* Kondi, 19 B. 202 (1894).

(5) Chandramohan Dutt *v.* Biswambhar Laha, 1 B. L. R., O. C. J. 42 (1868).

(6) Gopal *v.* Ram Chandra, 26 B. 587 (1902); 4 B. L. R. 325.

(7) Gopeswar Pal *v.* Jiban Chandra (F. B.), 19 C. L. J. 549 (1914).

(8) Sham Chand Giri *v.* Bhayaram Panday, 22 C. 92 (1894).

(9) S. 268 of Act X. of 1865.

(10) S. 37 of Act IX. of 1872.

(11) Krishna Behary *v.* Corporation of Calcutta, 31 C. 406 (1904); Josiam *v.* Sawmi Iyengar, 34 M. 76 (1910).

(12) Gopal *v.* Ram Chandra, 26 B. (1902); 4 B. L. R. 325.

(13) Paramen Chetty *v.* Sundara Raja, 26 M. 499 (1902).

or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his estate or moneys. In such cases, whatever the original form of the action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance: in such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrong-doer, would have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrong-doer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property or its proceeds in value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby.(1) The right to sue will survive to an executor on an action on breach of contract or a tort if on the face of the proceedings it is shown an injury has accrued to the personal estate.(2) It will survive when a Hindu widow sues to recover her husband's estate; (3) to the sons of a Hindu mother who sued to restrain encroachment on the share allotted to her on partition and agreed to sell her interest to the defendants at the value to be found on arbitration, and then died after the award but before the decree; (4) and for the purposes of appeal to the mother of a Mitakshara son who obtained a decree setting aside his father's alienations; (5) to the representatives of a minor who, on attaining majority, sued to have his rights declared respecting property which by a consent decree and conveyance to which he was no party, his grandmother, father, and uncle conveyed to the defendants, and who died pending suit.(6) It also survived against the other defendants when a defendant's interest ceased before he died, without his representatives being added.(7) Where an agent suing on behalf of an undisclosed principal dies pending the suit, the suit should after the death of the agent be continued, if it can be continued at all, by the agent's representatives, and not by the principal.(8)

Not survive.—Causes of action in respect of defamation, assault as defined by the Indian Penal Code, and other personal injuries, not causing the death of the party, and cases where after the death of the party the relief sought could not be enjoyed or the granting of it would be nugatory, *e.g.* (*a*) where a passenger was injured but not fatally in a railway collision and died without

(1) Phillips *v.* Homfray, 24 C. D. 439, p. 454. See also Haridas *v.* Ramdas, 13 B. 677, and Peek *v.* Gurney, L. R. 6 H. L. 377.

(2) Twycross *v.* Grant, 4 C. P. D. 40.

(3) Parbutty *v.* Higgin, 17 W. R. 475; 8 B. L. R. App., 98.

(4) Denomoyee Dassee *v.* Chooney Money Dassee, 4 C. W. N. 280 (1899).

(5) Padarath Singh *v.* Raja Ram, 4 A. 235; but see Muhammad Hussain *v.* Khushalo, 9 A. 131 (1886).

(6) Dharamsi *v.* Narotam, 5 Bom. L. R. 1041 (1903).

(7) Moung Khine *v.* Burn, 6 W. R., Ref. 2 (1866).

(8) Periannan Chettiar *v.* Rengachi Reddy, 17 Mr L. J. 116 (1906).

bringing any action, and (*b*) divorce, do not survive ; (1) nor a suit by a reversioner to set aside alienation by a Hindu widow.(2)

Procedure *where* one of several plaintiffs or defendants *dies and* right to sue survives.

2. *Where* there *are* more plaintiffs or defendants than one, and any of them dies, and *where* the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Applicability.—This rule is the equivalent of sect. 100 of Act VIII. of 1859, save for certain formal amendments made by Act X. of 1877, and the words "*right to sue*" substituted for "*cause of action*" by Act XII. of 1879. Except for three verbal alterations it is the same as that of the last Code. It applies to proceedings on appeal.(3) Thus if one of the appellants dies and the application to revive is dismissed as being time-barred, the appeal should be ordered to abate so far as the deceased is concerned, and may proceed at the instance of the remaining appellants ; (4) it cannot have the effect of causing the whole appeal to abate.(5) Again, on the death of one of the respondents, the proper course is to proceed under r. 4, and either to declare that the appeal has abated as against him, and proceed against the other respondents, or to direct the legal representatives of the deceased respondent to be placed on the record.(6) It has been held that a suit does not abate under this rule until the representative of the deceased plaintiff has failed to apply within the time allowed by law.(7)

"**Right to sue.**"—See notes to last rule. The rule is not limited in its application to cases where the right to sue or appeal survives against the surviving defendants or respondents, not as the legal representatives of the deceased, but by reason of a right vested in them antecedent to the suit.(8)

"**To the surviving plaintiff alone.**"—On the death of one of two joint owners, suing for damages in respect of trespass, the cause of action survives to the other alone ; (9) also where the interest of a defendant ceases in the subject-matter of the suit before his death.(10)

(1) S. 268, Act X. of 1865.

(2) Sakyahani Ingle Rao *v.* Bhavani Bozi, 27 M. 588 (1904) ; see also Ramjun *v.* Lachee, 1 Agra, 49 (1866) ; Chinna Veerayya *v.* Lakshminarasimma, 22 M. L. J. 375 (1912).

(3) R. 13, *post*.

(4) Chandarsang *v.* Khimabhai, 23 B. 718 (1898) ; see also Chintaman Nilkant *v.* Gangabai, 27 B. 284 ; 5 Bom. L. R. 90 (1903).

(5) Ram Sewak *v.* Lambar Pande, 25 A. 27 (1903) (partition suit), overruling Kamlapat *v.* Baldeo, 22 A. 222 (1900).

(6) Chandarsang *v.* Khimabhai, 28 B. 718 (1898).

(7) Goda Coopooramiar *v.* Soondaramall, 33 M. 167 (1909).

(8) Chowdhry Shamanund *v.* Rajnarain Das, 11 C. W. N. 186 (1906).

(9) Chandramohan Dutt *v.* Biswambhar, 1 B. L. R., O. C. J., 42 (1868).

(10) Moung Khine *v.* Burn, 6 W. R., Ref. 2 (1866).

Procedure *in case of death* **of one of several plaintiffs** *or of sole plaintiff.*

3. (1) *Where one of two or* more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, *on an application made in that behalf, shall* cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) *Where* within the time limited by law no application *is* made *under sub-rule (1)*, the suit shall abate *so far as the deceased plaintiff is concerned*, and, on the application of the defendant, the Court *may* award to *him* the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Applicability of clause (1).—This rule amalgamates sects. 363 and 365 of the last Code and a portion of sect. 366. Sect. 363 dealt with the case of several plaintiffs, and sect. 365 with that of a sole plaintiff. These are now dealt with together in the first clause of the rule. The second clause is the first paragraph of sect. 366 of the last Code. The second paragraph has been omitted, as also the Explanation to that section. As to the definition of "legal representative," see now sect. 2, clause (11). The section corresponding with sect. 363 of the last Code, as originally enacted by Act VIII. of 1859, sect. 101 required the legal representative to make the application to revive, but by Act VII. of 1888, this provision and the latter portion of the former section from the words "*the Court may cause*" as it formerly stood, were substituted. The words "*right to sue*" were substituted for "cause of action" by Act XII. of 1879. The rule applies to proceedings on appeal,(1) and on revision,(2) but not under the last Code to proceedings in execution of a decree ; (3) or to the case of a plaintiff dying after decree ; (4) as to execution proceedings, see now r. 12, *post*. Where there is only an application for leave to sue *in formâ pauperis* but no suit pending in Court, and the applicant dies before the leave is granted the right to sue as a pauper, being a personal right, cannot survive in the legal representatives of the deceased applicant.(5)

Sect. 365 in the last Code corresponded with sect. 102 of Act VIII. of 1859 but underwent much modification. Under sect. 102 it was optional with the Court to make an order on the application of the legal representative, and it was not until Act VII. of 1888 that the mandatory form came into force. The words "*where the cause of action survives*" were inserted by Act X. of 1877 ; the words "cause of action" being changed to "*right to sue*" by Act XII. of 1879.

(1) R. 11, *post*.

(2) Anandamoyi Dasi *v.* Rudra Mahanti, 18 C. L. J. 141 (1913) ; Deosaran *v.* Syadunessa, 16 C. L. J. 521 (1912).

(3) Gulabdas *v.* Lakshman Narhar, 3 B. 221 (1879) ; Dulari *v.* Mohan Singh, 3 A. 759 (1881).

(4) Ramanada *v.* Minatchi Ammal, 3 M 236 (1881). It refers to death before decree Bhugwan Das Khettry *v.* Nil Kanta Gangul 9 C. W. N. 171 (1904).

(5) Lalit Mohan Mandal *v.* Satish Chandr Das, 33 C. 1163 (1906).

The former section was held to have reference only to proceedings before decree ; (1) and not to a suit in which a decree had been made ; (2) not, under the last Code, to proceedings in execution of decree ; (3) nor to an application to obtain permission to sue as a pauper.(4) But as to execution proceedings, see now r. 12, *post*.

"**Dies.**"—This refers to death before decree.(5)

"**Survives.**"—See notes to r. 1, *ante*.

"**Legal representative.**"—The legal representative need not, since the passing of Act VII. of 1889, if not under sect. 50 (of the last Code), take out administration to continue a suit, but must do so before decree.(6) An executor under Act V. of 1881 is the legal representative of the deceased before probate has been obtained, but one of several executors cannot carry on a suit without proving the will.(7) The rule presupposes the applicant is the legal representative. If the representative character is denied, or where two or more claim it, the procedure under r. 5 should be followed ; (8) but where a decree has been made in favour of the legal representative of a deceased plaintiff, the Appellate Court should not go into the question of the representative's right to represent the deceased or dismiss the suit on finding that he or she had no right.(9) The words "*Legal representative*" must, where there are more legal representatives than one, be read in the plural ; thus where the appellant died and only one of his three representatives was brought on the record the appeal abated ; (10) but in Bombay it has been held that an application by one of the heirs of the appellant is sufficient, and the respondent is entitled to have the names of the others brought on the record to have them bound by the decree.(11) All the legal representatives must be brought upon the record,(12) as far as is possible ; (13) if any refuse to be joined as appellants they should be made respondents ; (14) or any who cannot or are unwilling to be joined as applicants should be added as defendants : (15) and in such a case the application should not be construed as no application by the legal representative so as to cause an appeal to abate.(16) The sons of a deceased plaintiff, members of a joint Mitakshara family, may apply to revive without obtaining administration or a

(1) Bhugwan Das *v.* Nil Kanta Ganguli, 9 C. W. N. 171 (1904).

(2) Cally Churn Mullick *v.* Bhuggobutty Churn, 5 C. L. R. 108 (1879), decree directing turns of worship and their carrying out ; Ramanada *v.* Minatchi Ammal, 3 M. 236 (1881).

(3) Gulabdas *v.* Lakshman Narhar, 3 B. 221 (1879) ; Dulari *v.* Mohan Singh, 3 A. 759 (1881) ; Abedoonnissa *v.* Ameeroonnissa, 2 C. 327 (1877).

(4) Lalit Mohan *v.* Satish Chandra, 33 C. 1163 (1906) ; 4 C. L. J. 234.

(5) Bhugwan Das *v.* Nil Kanta Ganguli, 9 C. W. N. 171 (1904).

(6) Torregrosa *v.* Pragji, 16 B. 519 (1892).

(7) Moosa *v.* Essa, 8 B. 241 (1884) ; Janaki *v.* Dhanu, 14 M. 454 (1891).

(8) Oula *v.* Beepathee, 17 M. 209 (1893).

(9) Balabai *v.* Ganesh, 27 B. 162 (1902).

(10) Ghamandi *v.* Amir Begam, 16 A. 211 (1894) ; Musala Reddi *v.* Ramayya, 23 M. 125 (1899) ; Haidar Husain *v.* Abdul Ahad, 30 A. 117 (1907).

(11) Bhikaji *v.* Purshotam, 10 B. 520 (1885).

(12) Ghamandi *v.* Amir Begam, 16 A. 211 (1894).

(13) Musala Reddi *v.* Ramayya, 23 M. 125 (1899).

(14) Ghamandi *v.* Amir Begam, *supra*.

(15) See Musala Reddi *v.* Ramayya, *supra*.

(16) Ib.

certificate under Act VII. of 1889.(1) In a suit by a Hindu widow to recover property belonging to her deceased husband, the heirs of the husband are the legal representatives; (2) and not the widow's personal heirs (3) But in the case of a Hindu wife governed by the Vyavakara Mayukha, who obtained a decree for maintenance against her husband, her daughters as heirs of her "*stridhun* improper" are her legal representatives.(4) Again, on a plaintiff who obtained a decree against his father for partition dying pending appeal, his mother is his legal representative entitled to maintain appeal.(5) Where an appellant gave the property in suit by deed of gift, the donee was allowed to carry on appeal as heir but not as donee,(6) but this was before there was any section corresponding to sect. 372 of the last Code, or r. 1 of this, and the deed he set up was post-dated to the deed from the appellant under which the respondents claimed. An executor is the legal representative for the purposes of an appeal of a plaintiff who sued for possession of *tarwad* property, and to set aside an adoption made by the deceased *karnavan*, and, obtaining a decree for possession only, appealed and died.(7) An administrator, however, appointed under sect. 10 of Reg. VIII. of 1827, without leave being granted him to sue, is not the legal representative, nor is he entitled to contiuue an appeal; (8) nor can the representative of a deceased pauper continue an application for leave to sue as a pauper, such right being only a personal one.(9) Again, where the judgment-debtor in a suit for malicious and wrongful conduct sold a share of his property liable to be attached in execution and died, the purchaser could not carry on the appeal as his representative as the purchase deed did not make him liable for the deceased's personal debts.(10) Further, a claim based on personal trust cannot survive to a representative.(11)

"**The Court, on an application.**"—This application is not necessarily confined to all the legal representatives, but one or more may apply and ask that those unwilling to join be added as defendants.(12) This is only imperative where the person is admitted to be the legal representative or where no dispute is raised; (13) but the Court is bound to grant the application, even where an appeal has been heard and decided without the appellant's pleader or the Court being aware of the appellant's death, and the representative applies to have his name placed on the record and the appeal reheard, the decree being a nullity.(14) See now as to this, r. 8, *post*.

(1) Beejraj *v.* Bhyropersaud, 23 C. 912 (1886).

(2) Premmoyi Choudhrani *v.* Preonath Dhur, 23 C. 636 (1896).

(3) Tribhuwan *v.* Sri Narain, 20 A. 341 (1898).

(4) Manilal Rewadat *v.* Bai Rewa, 17 B. 758 (1892).

(5) Subbaraya Mudali *v.* Manika Mudali, 19 M. 345 (1895).

(6) Luteefoonissa *v.* Rajaoor Rahman, 8 W. R. 84 (1867).

(7) Payyath *v.* Thiruthipalli, 20 M. 51 (1896).

(8) Malapa *v.* Devi, 21 B. 102 (1895).

(9) Lalit Mohan *v.* Satish Chandra, 33 C. 1163 (1906): 4 C. L. J. 234.

(10) Macleod *v.* Kunhoje, 9 W. R. 271 (1868).

(11) Gangabai *v.* Khashabai, 23 B. 719 (1899).

(12) Musala Reddi *v.* Ramayya, 23 M. 125 (1899); Ghamandi *v.* Amir Begam, 16 A. 211 (1894).

(13) Balabai *v.* Ganesh, 27 B. 102 (1902).

(14) Janardhan Krishna *v.* Ram Chandra, 26 B. 317 (1901); see Anandamoyi Dasi *v.* Rudra Mahanti, 18 C. L. J. 141 (1913); (a

"**Proceed with the suit.**"—Objection to the applicant being added as a legal representative should be raised at the earliest opportunity, and failure to object precludes the opposing party from raising it at a later stage.(1) So where a decree has been made in favour of the legal representative of a deceased plaintiff, the Appellate Court should not go into the question of the representative's right to represent, or dismiss the suit on finding that he or she had no right.(2)

Applicability of clause (2).—The section in the last Code (366) corresponded with the latter part of sect. 102 of Act VIII. of 1859, with certain slight alterations made by Acts X. of 1877, and XII. of 1879, the explanation being added by the former Act and the words "*within the time limited by law*," and "*shall on the application of the defendant*" by the latter Act. The second paragraph of sect. 366 has been omitted. The Explanation appended to this section in the last Code has been also omitted, having regard to the definition of "legal representative" in sect. 2, *ante*. This rule applies to proceedings on appeal; (3) but it does not apply to a suit in which a decree has been made; (4) nor under the last Code to proceedings in execution of decree; (5) as to this, see now r. 12, *post*.

"**Within the time limited.**"—That is, six months.(6) If no application is made by the legal representative of the deceased plaintiff and the suit is ordered to abate, it may yet be revived under r. 9.(7)

"**No application.**"—Where two defendants appealed against a decree and one died, and no application was made to revive and the decree was reversed, held the decree remained good as against the estate of the deceased defendant.(8) If an application is made within time and is dismissed, the suit cannot be ordered to abate.(9) If an application be made by one of the heirs of the deceased appellant, the respondent is still entitled to have the other heirs put on the record.(10) Where an application for revival has been made, an order rejecting an application that a suit might be declared to abate and that the application for revival is invalid is not an order under this rule.(11) The words "any person" under the former section did not confine the application to an application by all the legal representatives, but for sufficient reasons any one or more might apply.(12)

rule issued at the instance of a person who is dead when the application is made is a nullity).

(1) Meenatchi *v.* Anathanarayana, 26 M. 224 (1902).

(2) Balabai *v.* Ganesh, 27 B. 162 (1902).

(3) R. 11, *post*.

(4) Cally Churn *v.* Bhuggobutty, 5 C. L. R. 108 (1879).

(5) Abedoonnissa *v.* Ameeroonnissa, 2 C. 327 (1876); 4 I. A. 66; Dulari *v.* Mohan, 3 A. 759 (1881).

(6) Art. 175, Sched. I., Act IX. of 1908; Debi Baksh *v.* Habib Shah, P. C., 35 A. 331 (1913); 40 I. A. 151; 17 C. W. N. 829; 18 C. L. J. 9.

(7) Bhoyrub Doss Johurry *v.* Doman Thakoor, 4 C. L. R. 374; 5 C. 139 (1880); Fulvahu *v.* Gocildas, 9 B. 275 (1885).

(8) Natesa Ayyar *v.* Annasami Ayyar, 25 M. 426 (1901).

(9) Subbayya *v.* Saminadayyar, 18 M. 496 (1895).

(10) Bhikaji *v.* Purshotam, 10 B. 220 (1886).

(11) Bhagwan *v.* Maharaja of Bhartpur, 17 A. 286 (1895).

(12) Musala Reddi *v.* Ramayya, 23 M. 125 (1899).

"**Shall abate.**"—The section in the last Code ran, "*The Court may pass an order that the suit shall abate.*" It was proposed to be amended so as to give effect to the principle that abatement results from the operation of law and does not depend upon the making of an order. It was, therefore, suggested that the Court should merely *declare* that the suit had abated. The Select Committee, however, struck out the provisions that the Court might make an order declaring the abatement, as in its opinion it was unnecessary, and was likely to give rise to difficulty. If no application is made by the legal representative of the deceased plaintiff and the suit is ordered to abate, it may yet be revived under r. 9, and the order for revival may be made immediately after the order for abatement.(1)

"**On the application of the defendant.**"—"Defendant" here includes plaintiff respondent and defendant respondent; (2) but a respondent in a special appeal cannot require the legal representative of the deceased appellant to be substituted and the appeal to proceed. He should file a cross appeal; (3) though if one of the heirs of the deceased appellant has applied to revive, the respondent is entitled to have the names of the other heirs put on the record so as to have them bound by the decree.(4) The application must be within six months of the death of the plaintiff.(5)

Appeals.—The Allahabad High Court held that no appeal lies from an order passed under the first paragraph of the former sect. 366 directing a suit to abate,(6) such an order not being a decree; (7) but both the Bombay and Madras High Courts have held such an order to be a decree.(8) No appeal lies from an order rejecting an application for a declaration that a suit had abated by reason of the death of the plaintiff and the invalidity of an application for revival by the representatives of the deceased plaintiff.(9) Where the special appellant dies and no representative applies to be substituted, the respondent cannot require the appeal to proceed. He should file a cross appeal.(10)

Procedure in case of death of one of several defendants or of sole defendant.

4. (1) *Where* one *of two or* more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, *or* a sole defendant or sole surviving defendant *dies and* the right to sue survives, *the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*

(1) Bhoyrub Doss Johurry *v.* Doman Thakoor, 4 C. L. R. 374 (1879); 5 C. 139; Fulvahu *v.* Goculdas, 9 B. 275 (1885); Ram Protap Chowdhury *v.* Lal Chand, 9 C. W. N. 369 (1904).

(2) R. 11.

(3) Jaita *v.* Balu, 3 Bom. H. C. 81 (1866).

(4) Bhikaji *v.* Purshotam, 10 B. 230 (1886).

(5) Art. 177, Sched. I., Act IX. of 1908.

(6) Ahmad Ata *v.* Mata Badal Lal, 3 A. 844 (1881).

(7) Hamida *v.* Ali Husen, 17 A. 172 (1893).

(8) Bhikaji *v.* Purshotam, 10 B. 220 (1885); Subbayya *v.* Saminadayyar, 18 M. 496 (1895).

(9) Bhagwan *v.* Maharaja of Bhartpur, 17 A. 286 (1895).

(10) Jaita *v.* Balu, 3 Bom. H. C. 81 (1866)

(2) *Any* person so made *a party* may make any defence appropriate to his character as *legal* representative *of the deceased defendant.*

(3) *Where* within *the time limited by law no* application is *made under sub-rule* (*1*), the suit shall abate *as against the deceased defendant.*

Applicability.—This rule as originally enacted as sect. 104 of Act VIII. of 1859, was considerably modified and added to. Act X. of 1877, besides making certain verbal alterations, confined the scope to cases of the death of the defendant taking place before decree, and added a paragraph commencing "*Provided that the person so made defendant.*" Act XII. of 1879 added the next clause in the last Code from "*When the plaintiff fails*" to "*the suit shall abate,*" and substituted the words "*right to sue*" for "*cause of action.*" Act XIV. of 1882 added the further words from "*unless he satisfies*" to "*within such period;*" and the last paragraph was added by Act VII. of 1888. New amendments are italicized. See *post.*

The section is applicable to a suit for dissolution of partnership where two of the defendants died, and the plaintiff applied to revive.(1) It also applies to proceedings on appeal.(2) Hence on appeal by the plaintiff against a decree of dismissal the defendant died; on the death being notified to the Court it could not proceed to make a decree against the deceased's estate without revival.(3) It further applies to second appeals.(4) It, however, only applies to the case of a defendant dying before decree, and not to an application of the representatives of the defendant, who died after an *ex parte* decree, to be made parties for the purpose of setting aside the decree.(5)

The section under the last Code did not apply to execution proceedings; (6) as to this, see now r. 12, *post;* nor to investigations *in formâ pauperis* under sect. 407 (7) of the last Code corresponding with O. XXXIII. r. 5 of this Code. Under the proviso to sect. 232 of the last Code (O. XXI. r. 16), the transferee of a decree could not obtain execution without notice to the judgment-debtor, and where the judgment-debtor was dead no such notice could be sent until his representatives were brought on record. There was nothing, it was held, in that section to prohibit the transferee from applying under the former section corresponding with this rule.(8)

"**Defendants.**"—The term here includes a respondent.(9) Where it

(1) Jamna Das *v.* Sorabji, 16 B. 27 (1891).

(2) R. 11; Raj Chunder *v.* Ganga Das, 31 C. 487 (1904); 8 C. W. N. 422; 31 I. A. 71; followed in Imam-ud-Din *v.* Sadarath, 32 A. 301 (1910).

(3) Monee Lall *v.* Fuzul Hossein, 14 W. R. 337 (1870).

(4) Vakkalagadda *v.* Vahizulla, 28 M. 498; 15 M. L. J. 404; Madhuban Das *v.* Narain Das, 29 A. 535 (1907); Upendra Kumar Chuckerbutty *v.* Sham Lal Mandal, 6 C. L. J. 715 (1907).

(5) Sambasiva *v.* Veera Perumal, 28 M. 361.

(6) Stowell *v.* Ajudhia, 6 A. 255 (1884); Krishnayya *v.* Unnissa, 15 M. 399 (1891).

(7) Janardan *v.* Anant, 7 B. 373 (1883).

(8) Mahalinga Moopanar *v.* Kuppanachariar, 30 M. 541 (1907); s. c., 17 M. L. J. 485.

(9) R. 11. As to the law prior to sect. 582 of the last Code being amended, see Rameshar *v.* Bisheshar, 7 A. 738 (1885); Soshi Bhusan *v.* Grish Chunder, 11 C. 694

turned out that the defendant had died before the presentation of the plaint, the Court had no jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed as against them.(1)

"**Right to sue does not survive.**"—In a suit for redemption against two defendants, the second being the sub-mortgagee of the first, on the death of the first, held on second appeal that no cause of action survived to the plaintiff against the second defendant, and the suit had abated, although the suit had been allowed to proceed against the second defendant.(2)

"**On an application.**"—On the death of a respondent, the right to have his representatives added vests jointly and not severally in the appellants.(3)

"**Legal representative of the deceased defendant.**"—In an appeal by contributories against an order dismissing with costs an application against certain officers of a company under sect. 214 of the Indian Companies Act, 1882, on the death of one of the respondents his legal representatives cannot be brought on the record in his place, in view of Explanation 2 to such section.(4) A Hindu defendant died, leaving a will of which no probate was taken, and his property came into the possession of his divided brothers, who were brought on the record as representatives and a decree for the plaintiff made by consent. The mother of the deceased, who apart from the will was the legal representative, sued to set aside decree, having previously obtained a declaration that she was entitled to the property as against the brothers, held she was not entitled to maintain the suit, as the persons in possession were the proper representatives, and the defendant could prove the will to show that she was not the representative.(5) See also the notes to r. 1 under "Legal representative."

"**To be made a party.**"—Though the Court is bound to place on the record the person named by the plaintiff, yet it was held that (acting under sect. 32 of the last Code) it could also add the name of any person who had a good *primâ facie* claim to be considered the legal representative of the deceased.(6) This section as amended by Act VII. of 1888, allowed the legal representative of the defendant to apply, and now the Court may proceed "on an application" by either side, so the question of the applicability of that or the corresponding section has now little practical value, *vide post*. In a recent case under the last Code it was pointed out that sect. 368 (now represented by this rule) did not lay on the Court the duty of choosing the representative, but that it was for the plaintiff to choose against whom he proposed to proceed, and that if some one else with an adverse claim to the nominee wished to be made the representative he should be added as a party.(7)

(1885); Lukshmibai *v.* Balkrishna, 5 B. 654 (1880); Baldeo *v.* Bismillah, 9 A. 118 (1886). This last decision was overruled on another point by Debi Din *v.* Chunna Lal, 10 A. 264 (1888).

(1) Veerappa Chetti *v.* Ponnan, 17 M. L. J. 551 (1907).

(2) Padgaya *v.* Baji, 20 B. 549 (1895).

(3) Paru *v.* Variangattil, 28 M. 359 (1904).

(4) Wall *v.* Howard, 18 A. 156 (1895).

(5) Janaki *v.* Dhanu, 14 M. 454 (1891).

(6) Athiappa *v.* Ayanna, 8 M. 300 (1884); but see Muhammad *v.* Khushalo, 10 A. 223 (1888).

(7) Rameshwar *v.* Janeshwari, 19 C. L. J. 19 (1913), p. 26.

"**And shall proceed.**"—A person whom the plaintiff alleges is the legal representative of a deceased defendant being brought on the record, the decree will bind the estate of the defendant in the absence of fraud on the part of the plaintiff.(1) Where the sole defendant died before decree, a decree passed against him on the supposition he was alive could not, it was held, be executed.(2) So an appeal dismissed in ignorance of the death of the respondent who had lost in the first Court must be heard *de novo* after revival.(3)

"**The suit shall abate.**"—This applies to proceedings on appeal.(4) So when two of the four appellants appeal through a guardian and the respondent dies and the appeal abates, no application for revival being made, the minors cannot apply to revive through another guardian.(5) Where one of four respondents died and no application to revive was made within six months, the appeal, being one for the possession of land to which the four respondents claimed to be jointly entitled and in which the right to appeal did not survive against the surviving respondents alone, abated,(6) but where the liabilities of the respondents are joint and several, the death of respondents without revival cannot exonerate the others from liability, and the appeal abates only so far as the deceased respondent is concerned,(7) and where no application is made to revive, an appeal abates only against the respondents who have died.(8) So on second appeal where two respondents died and no application was made to revive, the appeal did not abate.(9) An appeal does not abate by reason of the failure of an appellant to bring on record the representatives of a deceased respondent if the appeal can proceed in the absence of such representative to a final and complete adjudication.(10) On the contrary, where the decree could not be reversed without the representatives of the deceased being placed on the record, the appeal was held to abate.(11) Again, in a mortgage suit where the second defendant was merely a surety personally, and on his death no application was made to revive, held the plaintiff was not precluded from continuing the suit against the mortgagor and that the suit did not abate.(12) An order for abatement was held to be absolute.(13) The former Code provided that the suit should abate unless the plaintiff satisfied the Court that he had sufficient cause for not making the application within the specified period. Where for want of sufficient information of the grant of probate, the plaintiff obtained substitution of the heirs of deceased defendant and applied beyond time to substitute the executor, held that was

(1) Kadir Mohideen *v.* Muthu Krishna Ayyar, 26 M. 230 (1902); distinguished in Rameshwar *v.* Janeshwari, 19 C. L. J. 19 (1913) (party not bound by the decree when removed from the record on plaintiff's application on the understanding that she would not be so bound).

(2) Roop Narain *v.* Ramayee, 3 C. L. R. 192 (1878).

(3) Shama Puddoo *v.* Dino Nath, 25 W. R. 108 (1876).

(4) Jamnadas *v.* Sorabji, 16 B. 27 (1891).

(5) Paru *v.* Variangattil, 28 M. 359.

(6) Hem Kunwar *v.* Amba Prasad, 22 A. 430 (1900).

(7) Joy Gobind *v.* Monmotha Nath, 33 C. 580.

(8) Bai Full *v.* Adesang, 26 B. 203 (1901).

(9) Alla Baksh *v.* Madho Ram, 23 A. 22 (1900).

(10) Renga Srinivasa *v.* Gnanaprakasa, 30 M. 67 (1906).

(11) Dharanjit Naranyan Singh *v.* Chandeshwar Prosad Singh, 11 C. W. N. 504 (1907).

(12) Mahdi Husain *v.* Sughra Begam, 25 A. 206 (1902).

(13) Paru *v.* Variangattil, 23 M. 359.

sufficient cause for the delay under this section, and that the case came under sect. 32 of the last Code.(1) Some Courts were wont to take a strict view of what was "sufficient cause," excluding a plea of ignorance of the law. It was found by experience that a number of suits and appeals had been held to abate somewhat unfairly through the ignorance of suitors and appellants, as to the fact of the decease of a party and as to the procedure necessary in such a case. It was proposed, therefore, to amend this rule so as to enable the Court in its discretion to allow the plaintiff in a suit to apply to add the name of the legal representative of a deceased defendant at any time before the passing of the decree. But this has not been done, as possibly it was considered that sect. 5 of the Limitation Act as applied by r. 9, met the case.

Legal representative of a deceased defendant may apply.—Before the amendment made by sect. 32 of Act VII. of 1888, it was held that the Court could not act save on the application of the plaintiff or appellant,(2) and the representative of a sole defendant could not apply to be made defendant,(3) unless the application came within sect. 372 (now r. 10).(4) The legal representative can apply under this rule (see sect. 146). If there be two claimants, the Court should decide between them, and not put both on the record.(5) Where a party defended a suit on alternative defences, his legal representative may rely on either.(6)

Limitation.—An application to have the legal representative of a defendant, plaintiff-respondent, or defendant-respondent, placed on the record must be made within six months from the death of the deceased.(7) In a recent case it has been held that sect. 5 of the Limitation Act does not apply to an application under this rule, and that where such an application is made after time the suit or appeal must be declared to have abated, and the remedy for the plaintiff or appellant is to proceed under r. 9 of this Order.(8)

Appeals.—An order of abatement under the penultimate clause of the last Code was held to be an order and not a decree, and appealable under sect. 588 of that Code.(9) See now O. XLIII. r. 1.

Determination of question as to legal **representative.**

5. *Where a question* arises as to *whether any person is or is not* the legal representative of a deceased plaintiff *or a deceased defendant, such question shall be* determined *by* the Court.

Applicability.—This section in the last Code corresponded with sect. 103

(1) Hossein Ali *v.* Abdur Rahim, 7 C. W. N. 529 (1905).

(2) Sadhu Sarun Singh *v.* Dwarka Singh, 12 C. L. R. 45 (1882); Lakshmibai *v.* Balkrishna, 4 B. 654 (1880).

(3) Bai Javer *v.* Hathi Singh, 9 B. 56 (1884).

(4) Rajaram Bhagwat *v.* Jibai, 9 B. 151 (1884).

(5) Muhammad *v.* Khushalo, 10 A. 223 (1888).

(6) Balmukund *v.* Bhagvandas, 15 Bom. L. R. 209 (1912).

(7) Art. 177, Sched. I., Act IX. of 1908.

(8) Secretary of State *v.* Jawahir Lal, 36 A. 235 (1914).

(9) Medhi Husain *v.* Sughra Begum, 25 A. 206 (1902).

of Act VIII. of 1859, save for a mere verbal alteration by Act X. of 1877. Under the former section the words were "the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit, who," etc. Now no alternative is given. The Court must determine the question. As to execution proceedings, see r. 12, *post*.

This rule applies to proceedings on appeal ; (1) and to a case of an agreement to refer a question of partition to arbitration ; (2) but not under the last Code to proceedings in execution of decree.(3)

"**A question.**"—Such as where the representative character is denied by the defendant.(4) It need not be between persons claiming to represent the deceased plaintiff.(5)

"**Legal representative.**"—See notes to r. 1, *ante*.

"**Such question shall be determined.**"—Under the last Code it was held that the adverse claimants to represent a deceased party must not be brought on the record, but the Court should follow one or other of the procedures laid down in the section.(6) And that if the heirship was not established the Court cannot dismiss the suit but should stay it.(7) The Court must now determine the question, *vide ante*, "Applicability." It is irregular to make two adverse claimants co-plaintiffs, but the defect may be cured by the consent of the parties.(8) Two rival claimants should not be placed on the record, and after the hearing, their claims decided in the final decree.(9) The Court has not to decide who is the heir of the deceased plaintiff, but who shall be admitted to be such legal representative for the purpose of prosecuting the suit.(10) The appointing of a legal representative for such purpose does not determine any issue properly raised, such for instance as, in a partition suit, the vital issue whether the deceased plaintiff was joint or separate from the rest of the family.(11)

"**The Court.**"—This must be the Court trying the suit. A District Judge has no power to act under the section when the cause is before a Subordinate Judge, although the latter may not be in Court on the day of the application.(12)

Appeals.—It was held that the order might be set aside on an appeal from the decree even though no appeal has been preferred from the order ; (13) but not if the party complaining was not a party to the decree.(14)

(1) R. 11.

(2) Perumalla *v.* Perumalla, 27 M. 112 (1903).

(3) Abedoonnissa *v.* Ameeroonnissa, 4 I. A. 66 ; 2 C. 327 (1876).

(4) Oula *v.* Beepathee, 17 M. 209 (1893)

(5) Subbayya *v.* Saminadayyar, 18 M. 496 (1895) ; Hanwant Singh *v.* Ram Gopal, 30 A. 348 (1908).

(6) Har Narain *v.* Kharag, 9 A. 447 (1887).

(7) Balabai *v.* Ganesh, 27 B. 162 (1902) ; 4 Bom. L. R. 980.

(8) Parbutty *v.* Higgin, 17 W. R. 475 (1872) ; 8 B. L. R. App. 98.

(9) Vithu *v.* Bhima, 15 B. 145 (1893).

(10) Balabai *v.* Ganesh, 27 B. 162 (1902) ; 4 Bom. L. R. 980.

(11) Parsotam *v.* Janki Bai, 28 A. 109 (1905) ; A. W. N. (1905) 206.

(12) Biproo Chunder *v.* Ramlochun Deb, W. R. 1864, 121.

(13) Har Narain *v.* Kharag, 9 A. 447 (1887) ; Vithu *v.* Bhima, 15 B. 145 (1890) ; Balabai *v.* Ganesh, 27 B. 162 ; 4 Bom. L. R. 980 (1903).

(14) Sankali *v.* Murlidhar, 20 A. 200 (1890).

No abatement by reason of death after hearing.

6. *Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.*

Death of party after hearing.—This is new. It was considered that the legal effect of proceedings taken in ignorance of the death of a party was uncertain, and it has therefore been enacted that the mere circumstance of a death among the parties did not invalidate judicial action. The English practice has been followed as to the validity of a judgment where a party has died between the conclusion of the hearing and the delivery of the decision.(1) The death of a plaintiff before hearing does not justify a dismissal of the suit for default of appearance under O. 9, r. 8.(2)

Suit not abated by marriage of female party.

7. (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) *Where* the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

Husband and wife.—This section corresponded with sect. 105 of Act VIII. of 1859, save for slight amendments made by Act X. of 1877. It is the same now as in the last Code but for one verbal amendment. It applies to proceedings on appeal.(3) Where a person died pending suit and his wife was brought on the record and judgment given against her, which was affirmed on appeal, and between the original and final judgment she married again, the decree, it was held, could not be executed against the second husband.(4)

When plaintiff's insolvency bars suit.

8. (1) The insolvency of a plaintiff in any suit which *the* assignee or receiver might maintain for the benefit of his creditors, shall not *cause* the

(1) Chetan Charan Das *v.* Balbhadra Das, 21 A. 314; Ramacharya *v.* Ananta Charya, 21 B. 314; Surendra Keshub *v.* Doorgasoondery, 19 C. 513.

(2) For case of death of party before hearing, see Debi Baksh Singh *v.* Habib Shah, P. C., 35 A. 331 (1913); 40 I. A. 151; 17 C. W. N. 829.

(3) R. 11.

(4) Bindabun Chunder *v.* Mackintosh, 9 W. R. 442 (1868).

suit *to abate*, unless such assignee or receiver declines to continue the suit *or* (*unless for any special reason the Court otherwise directs*) to give security for the costs thereof within such time as the Court may *direct*.

Procedure where assignee fails to continue suit or give security.

(2) *Where* the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may *make an order* dismiss*ing* the suit and award*ing* to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

Insolvency.—This rule corresponds with sect. 106 of Act VIII. of 1859, as modified by Act X. of 1877, which (*inter alia*) extended the section to receivers appointed under sect. 351 of the last Code, and substituted the last portion of the section as it now stands commencing from the words "*apply for the dismissal.*" The words "*shall not cause the suit to abate*" have been substituted for "*shall not bar the suit,*" and an option is given as to taking security. The rule applies to proceedings on appeal.(1) It does not declare that the assignee shall be made a party to the suit, as the Act does in the case of persons representing a deceased party. The practice in India was to add or substitute the assignee's name, and he might be called upon to deposit the costs of an appeal; (2) but now the Official Assignee should give security before the order is made making him a party.(3) The form of the order should be one giving the Official Assignee a time within which to elect and give security for costs. If that is not done within the time specified the defendant may apply for dismissal.(4) The defendant cannot plead abatement without giving the Official Assignee an opportunity of prosecuting the suit.(5) This rule does not apply to a case where there has only been an application to declare the plaintiff an insolvent, and a vesting order has been made, but the proceedings are subsequently annulled, and the plaintiff is not declared an insolvent.(6) It only applies to the case of an insolvent plaintiff, not to that of an insolvent defendant. The Assignee has no power to continue the defence of a suit pending at the time the vesting order was made, or to get himself made a party to a suit with a view of moving for a new trial, or for any other purpose whatsoever. He may apply to stay the suit under sect. 49 of the Indian Insolvent Act.(7)

Effect of abatement or dismissal.

9. (1) *Where* a suit abates or is dismissed under this *Order*, no fresh suit shall be brought on the same cause of action.

(1) R. 11.

(2) Heeralall Seal *v.* Carapiet, 13 W. R. 431 (1870).

(3) Ibrahim *v.* Abdur Rahiman, 12 B. H. C. 257 (1875).

(4) Lekhraj *v.* Shamlal, 16 B. 404 (1892).

(5) Ibrahim *v.* Abdur Rahiman, 12 B. H. C. 257 (1875).

(6) Amrita Lal *v.* Rakhali Dassi, 27 C. 217 (1899); s. c., 4 C. W. N. 264.

(7) *In re* Hunt, Monnet & Co. *v.* Bholagar, 1 B. H. C. 251, 257 (1864).

(2) *The plaintiff or the* person claiming to be the legal representative of *a* deceased *plaintiff or the assignee or the receiver in the case of an* insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it *is* proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation [s Act, 1877,(1) shall apply to applications under *sub-rule* (*2*).

Effect of abatement or dismissal.—This rule corresponds with sect. 371 of Act X. of 1877, save that the word "*or*" between "*deceased*" and "*bankrupt*" (subsequently "*insolvent*") was inserted by Act XII. of 1879. The present amendments are verbal only. Sect. 372A has, however, been introduced into the rule as sub-rule (3).

This rule applies to proceedings on appeal.(2) Before the amendment of sects. 368 and 370 of the last Code it was thought the corresponding section referred only to orders passed under the last paragraph of sect. 368 and the second paragraph of sect. 370 of that Code.(3) This opinion, however, which was obiter, was no longer correct after the amendment; for sect. 370 of the last Code as amended had no provision for abatement, and under sect. 368 as amended the abatement was under the penultimate clause, while the first clause of sect. 366 also provided for abatement and to such orders of abatement this section was applicable.(4) The former section was not applicable to an application by a plaintiff when the defendant is dead, and his representatives ought to have been brought in; (5) nor to a case where a plaintiff, who after obtaining an order for substitution of the representative of the deceased defendant and issue of summons, took no steps, and the suit was dismissed.(6)

Practice.—A Court may make an order for abatement under r. 3 (formerly sect. 366), and then revive the suit under this rule; (7) and the order for abatement may be coupled with an order under this rule.(8) When applications for abatement and for revival were set down for hearing together, the proper order to pass was held to be to declare the suit to have abated and then at once to pass an order under this section on sufficient cause being shown.(9) The cause of action in the original and revived suits must be the same; no fresh cause of action can be imported into the revived suit.(10)

(1) Now repealed and replaced by Act IX. of 1908.

(2) R. 11.

(3) Bessessur Bhugut *v.* Murli, 9 C. 163 (1882).

(4) Bhoyrub Doss *v.* Doman, 5 C. 139 (1879); 4 C. L. R. 374; Fulvahu *v.* Goculdas, 9 B. 279; Ram Protap *v.* Lal Chand, 9 C. W. N. 369 (1904).

(5) Benode Mohini *v.* Sharat Chunder, 8 C. 842 (1882).

(6) Bessessur Bhugut *v.* Murli, 9 C. 163 (1882).

(7) Bhoyrub Dass *v.* Doman, 5 C. 139 (1879); 4 C. L. R. 374.

(8) Fulvahu *v.* Goculdas, 9 B. 275 (1885).

(9) Ram Protap *v.* Lal Chand, 9 C. W. N. 369 (1904); Goda Coopooramier *v.* Soondaramall, 33 M. 167 (1909).

(10) Sham Chand Giri *v.* Bhayaram Panday, 22 C. 92 (1894).

"**Sufficient cause.**"—Such as the delay caused by the representative taking steps to obtain representation. So where there is difficulty in obtaining probate of a deceased plaintiff's will, the mere neglect to apply for limited administration will not be a bar to an application under this rule.(1)

Limitation.—The application must be made within sixty days from the order of abatement or dismissal.(2)

Appeal.—Formerly, there was no appeal from an order refusing to set aside the abatement of a suit; (3) but this was subsequently provided for by sect. 588 (20), and now by O. XLIII. r. 1 (*k*).

Procedure in case of assignment *before final order in* **suit.**

10. (*1*) In other cases of an assignment, creation or devolution of any interest *during the pendency of a* suit, the suit may, *by* leave of the Court, be continued by or against the person to *or upon* whom such interest has come *or devolved.*

(*2*) *The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule* (*1*).

Applicability.—The former section was introduced by Act X. of 1877, and was not amended until the present Code. In the first paragraph all reference to the consent of, or notice upon, parties has been omitted and the words "*either in addition to*," etc., occurring after the word "*come*," have also been left out. Sub-rule (2) is new. It applies to proceedings on appeals; (4) to a partition suit after decree for partition; (5) but not where the preliminary decree has been completely carried out and the suit determined.(6) It applies to assignment of the rights and interests of a putnidar; (7) to devolution of interest by reason of an adjudication in insolvency; (8) and to the case of assignment by a defendant pending a suit which was decreed, whereupon the assignee filed an appeal; (9) but not on appeal where an assignee applied to be made a party by reason of an assignment executed during the pendency of the original suit; (10) nor to the assignment, creation or devolution of any interest after decree; (11) or occurring

(1) Bhoyrub Dass *v.* Doman, 5 C. 138 (1879); 4 C. L. R. 374; see also Fulchahu *v.* Goculdas, 9 B. 275; and see Debi Baksh *v.* Habib Shah, P. C., 35 A. 331 (1913); 40 I. A. 151; 17 C. W. N. 829.

(2) Art. 171, Sched. I. of Act IX. of 1908.

(3) Benode Mohini *v.* Sharat Chander, 8 C. 837 (1882).

(4) Rajaram *v.* Jibhai, 9 B. 151 (1884); r. 11.

(5) Ram Nath *v.* Uma Charan, 3 C. W. N. 756 (1899).

(6) Cally Churn Mullick *v.* Bhuggobutty, 5 C. L. R. 108 (1879).

(7) Wilson *v.* Government, 12 W. R. 122 (1869) (before this section).

(8) Puninthavelu *v.* Bhashyam, 25 M. 406 (1901).

(9) Moti Ram *v.* Kundun Lall, 22 A. 380 (1900).

(10) Shama Charan Chowdhury *v.* Rani Mina Kumari, Rule No. 1581 of 1900, dated 19th May, 1904 (Cal. unreported).

(11) Goodall *v.* Mussoorie Bank, 10 A. 97 (1887); Raynor *v.* Mussoorie Bank, 7 A. 681 (1885).

between the decree and the filing of the appeal.(1) It was held under the last Code that it did not apply to execution proceedings ; (1) at least it was considered doubtful whether this section applied to execution proceedings.(2) See, however, now r. 12. It was held not to apply to a creditor of a decree-holder who attaches a decree pending appeal ; (3) but see now as to attachment, sub-rule (2). It does not apply to the case of the Official Assignee appointed in insolvency proceedings before the suit was brought against the insolvent.(4)

"**Other cases.**"—That is, cases other than those specifically mentioned in the preceding rules of this Order ; (5) and not confined to cases other than death, marriage, or insolvency ; (6) such as an assignment of a respondent who subsequently died ; (7) but the assignee must be arrayed on the same side as the assignor.(8) A champertor and part assignee of the plaintiff has been made a party defendant on his own application.(9) The rule also applies to an assignment by the defendant pending suit which was decreed, whereupon the assignees filed an appeal.(10)

"**Devolution.**"—This includes devolution of interest by reason of an adjudication in insolvency and the making of a vesting order.(11) Where a Receiver institutes a suit for ejectment and is discharged, the person, who in the suit in which the Receiver is appointed is declared entitled to the property in question, is entitled to continue the suit ; (12) so also where in a pending suit instituted by a manager of an encumbered estate the estate is released and restored to the owners.(13)

"**Any interest.**"—Means interest in the property the subject-matter of the suit.(14) A creditor of a decree-holder, attaching the decree pending an appeal against it, could not (it was formerly held) be made a respondent to the appeal.(15) But see now sub-rule (2).

"**During the pendency of a suit.**"—These words relate to a suit in which no final order has been made, though a preliminary decree has been passed ; (16) such as a suit in which directions to take an account have been given ; (17) or a

(1) Collector of Mozaffarnagar *v.* Husaini Begum, 18 A. 86 (1895); but see Troyluckhanath *v.* Brindaban Chunder, 18 W. R. 438 (1872).

(2) Harish Chandra Tewary *v.* Chandpore Co., Ltd., 30 C. 961 (1903); see also Jamnadas Chhabildas *v.* Torabji Kharsedji, 16 B. 27 (1891); but see Midnapur Zemindary Co., Ltd. *v.* Naresh, 16 C. W. N. 109 (1911); and Arbuthnot's Industrials, Ltd. *v.* Muthu Chettiar, 31 M. 464 (1908).

(3) Chail Behari *v.* Rahmal Das, 20 A. 38 (1897).

(4) Miller *v.* Budh Singh, 18 C. 43.

(5) Bhugwan Das Khettry *v.* Nil Kanta Ganguli, 9 C. W. N. 171 (1904); Benode Mohini *v.* Sharat Chunder, 8 C. 837 (1882).

(6) Bhugwan Das Khettry *v.* Nil Kanta Ganguli, 9 C. W. N. 171 (1904).

(7) Rajaram *v.* Jibai, 9 B. 151 (1884).

(8) Radha Prosad *v.* Rajendro, 5 A. 209 (1882).

(9) Rajaranee Dasi *v.* Debendro Nath, 3 C. W. N. 754 (1899).

(10) Moti Ram *v.* Kundan Lal, 22 A. 380.

(11) Puninthavelu *v.* Bhashyam Ayyangar, 25 M. 406 (1901).

(12) Macleod *v.* Kissan, 30 B. 250 (1906).

(13) Sourindra Mohun Tagore *v.* Siromoni Debi, 28 C. 171 (1900); 5 C. W. N. 307.

(14) Harish Chandra Tewary *v.* Chandpore Co., Ltd., 30 C. 961 (1903).

(15) Chail Behari *v.* Rahmal Das, 20 A. 38 (1897).

(16) Gocool Chunder *v.* Administrator General, 5 C. 731 (1880); Surendra *v.* Khetter, 30 C. 609 (1903).

(17) Surendro Keshub *v.* Khetter Krishto, 30 C. 609 (1903); 7 C. W. N. 517.

suit respecting a will, where a decree for a scheme to be settled was made but was not proceeded with and no scheme settled or final order made; (1) even though it has been struck off for want of prosecution; (2) or a mortgage suit after decree, at least up to the order absolute for sale,(3) and up to the time the property is actually sold,(4) and even after the sale and before payment out of Court.(5) But a purchaser of the plaintiff's interest after a suit is dismissed is not entitled to appeal without joining the original plaintiffs as appellants.(6) The devolution must be either pending suit or pending appeal.(7)

"**By leave of the Court.**"—The application may be made by the person seeking to be added or substituted, or by one of the parties to the suit.(8) In the last Code the leave was to be given either with the consent of, or after service of notice on, the parties. The Court might have revived without consent or notice, where the parties who ought to give consent or get notice were dead.(9) On an application by the appellant to substitute for the original respondent the latter's assignee, under an assignment of which the appellant had two years' notice and made before the filing of the appeal, the assignee's objection to be placed on the record was sustained.(10) The provision as to consent of, or notice upon, parties has been omitted. But it has been held that its omission does not justify the inference that such an order made *ex parte* cannot be recalled, for all orders of this character made *ex parte* are subject to the implication that they may be revoked at the instance of any party prejudiced, and the Court has inherent power to give such directions as the justice of the case may require.(11)

"**Continued by or against.**"—It is not a new suit as against the person added or substituted, and he can only take such pleas as his assignor could have raised, and cannot introduce any new issue.(12) A purchaser of the rights and interests of a *putnidar* during the pendency of the suit acquires his privilege to carry on the suit; (13) so an assignee of an *ex parte* decree for rent can carry on suit after the decree is set aside on the defendant's application.(14)

"**The person to or upon whom.**"—The Offical Assignee in insolvency proceedings instituted before the suit is brought against the insolvent cannot be made a party under the rule.(15) The position of the Official Assignee is not affected by the doctrine of *lis pendens*, and the party seeking to bind him by the result of a suit should apply to make him a party to the suit.(16) A.

(1) Govind Chunder *v.* Rungunmoney, 6 C. 60 (1880); 5 C. L. R. 569.

(2) Gocool Chunder *v.* Administrator General, 5 C. 726 (1880).

(3) Chuni Lal *v.* Abdul Ali, 23 A. 331 (1901).

(4) Bhugwan Das *v.* Nil Kanta, 9 C. W. N. 171 (1904).

(5) Khetter Nath *v.* Manick Lal, 5 C. W. N. cxciii. (1901).

(6) Dhunnoo *v.* Sunnoo, 15 W. R. 106 (1871) (prior to this section).

(7) In the matter of Durga Prosad, 22 A. 231 (1899).

(8) In the matter of Sarat Chandra Singh, 18 A. 285 (1896).

(9) Gocool Chunder *v.* Administrator, 5 C. 726 (1880); 5 C. L. R. 569.

(10) Collector of Muzafarnagar *v.* Husaini Begum, 18 A. 86 (1895).

(11) Tikait Ajant Singh *v.* Christian, 17 C. W. N. 862 (1912).

(12) Chunni Lal *v.* Abdul Ali, 23 A. 331 (1901).

(13) Wilson *v.* Government, 12 W. R. 122 (1869) (prior to this section).

(14) Binode Behary *v.* Beer Narain, 5 W. R., Act X. 52 (1866) (prior to this section).

(15) Miller *v.* Budh Singh, 18 C. 43 (1890).

(16) Puninthavelu *v.* Bhashyam Ayyangar, 25 M. 406 (1901).

attached 24 bank shares as the property of B., C. sued for them as his own property, and gaining, obtained possession of them, and sold to D. On appeal A. succeeded, but held he was not entitled to put D. on the record of the execution case or enforce restitution against him.(1)

"**Such interest.**"—Subject to all liabilities resulting from the application of *lis pendens*.(2)

"**Has come or devolved.**"—In the last Code the words were "*either in addition to or in substitution for the persons from whom it has passed as the case may be.*" Where the whole interest of the sole plaintiff had been transferred with his unqualified assent, and the transferee substituted for him in the inception of the case, and the defendant in his written defence did not demur, it was held not necessary for the original plaintiff to be associated with the transferee on an appeal by the latter.(3) Purchasers or assignees *pendente lite* should be added as parties.(4) A purchaser of the plaintiff's interest after a suit is dismissed is not entitled to appeal without joining the original plaintiffs as appellants.(5) A plaintiff assigned to A. the subject-matter of the suit while pending and gave him power to continue; held that the application of A. to be substituted or added was reasonable and should be complied with, as A. was directly interested in the matters to be settled by the suit.(6) In a mortgage suit where assignee applied after the sale had taken place and confirmed he was added as a co-plaintiff.(7) The alteration in language would appear to have been made with a view to compression only, the sense remaining the same.

Limitation.—The right to apply in a pending suit, *i.e.* a suit in which a preliminary decree but no final order has been made, accrues from day to day, and the periods of limitation provided in Arts. 171, 171A, and 178, Sched. II., Act XV. of 1877, do not apply; (8) but they do if no preliminary decree has been made. When a person is substituted he must be taken to be brought on the record subject to the law of limitation applicable to the case.(9)

Appeals.—Orders disallowing objections were open to appeal.(10) An order for substitution is practically the same as an order disallowing objections and was subject to appeal.(11) But there was no appeal from an order refusing an application to be made a party; (12) or from an order rejecting the application of a person claiming to be brought on the record as assignee of the deceased

(1) Goodall *v.* Mussoorie Bank, 10 A. 97 (1887); Raynor *v.* Mussoorie Bank, 7 A. 681 (1885).

(2) Chunni Lal *v.* Abdul Ali, 23 A. 331 (1901).

(3) Moneeroodeen *v.* Parbutty Churn, 15 W. R. 121 (1871).

(4) Ahmedbhoy *v.* Vuleebhoy, 8 B. 323 (1884).

(5) Dhunnoo *v.* Sunnoo, 15 W. R. 106 (1871) (prior to this section).

(6) Commercial Bank of India *v.* Sabju Saheb, 24 M. 252 (1900).

(7) Khetter Nath Mitter *v.* Manick Lal, 5 C. W. N. cxciii. (1901).

(8) Kedarnath *v.* Harachand, 8 C. 420 (1882); Ram Nath *v.* Uma Charan, 3 C. W. N. 756; Surendro Keshub *v.* Khetter Krishto, 30 C. 609 (1903); 7 C. W. N. 517.

(9) Sheikh Abdul Rahman *v.* Sheikh Amir Ali, 11 C. W. N. 521 (1907), F. B.; s. c., 34 C. 612.

(10) Sect. 588 (21).

(11) Surendro Mohun Tagore *v.* Siromoni Debi, 28 C. 171 (1900); 5 C. W. N. 507.

(12) Lalit Mohan *v.* Shebock Chand, 4 C. W. N. 403 (1900).

sole appellant.(1) No appeal, however, lay from an order allowing a defendant's objections, neither was such an order a decree.(2) See now O. XLIII. r. 1 (*l*). An appeal lies under the Letters Patent from an order dismissing on its merits an application by the assignee of the plaintiff to be added or substituted.(3) An appeal was also held to lie from an order dismissing any application under the former section to be brought upon the record as representative of a deceased party in a case in which a decree under sect. 86 of Act IV. of 1882 had been passed, such order being one under sect. 244 of the last Code, and therefore a decree within the meaning of sect. 2 of that Code.(4) And wherever a matter can be said to fall within sect. 47, *ante*, the order as a decree will be appealable. An application by a respondent, whose interest was at one time represented by a receiver, to replace upon the record of the appeal as a party respondent the name of such receiver, which had been struck off owing to a misrepresentation of fact, may be treated as an application for review of the order striking off the name of the receiver.(5)

Application of Order to appeals.

11. *In the application of this Order to appeals*, so far as may be, the word "plaintiff" shall be held to include *an* appellant, the word "defendant" a respondent, and the word "suit" an appeal.

Appeals.—This, with some alterations, is the second portion of sect. 582 of the last Code, the first portion of which is the second clause of sect. 107, *ante*, to the notes of which section reference should be made. Where in a personal action for an injunction a decree was given for the defendant with costs and the plaintiff appealed, but during the pendency of the appeal the defendant-respondent died, it was held that the right to prosecute the appeal against his legal representative did not survive.(6)

Application of Order to proceedings.

12. (1) *Nothing in rules 3, 4, and 8 shall apply to proceedings in execution of a decree or order.*

Miscellaneous proceedings.—As has been already observed in the notes to the preceding rules the opinion was generally entertained under the last Code that the Chapter which this Order replaces did not apply to the execution of decrees. The original bill, therefore, proposed to except all execution proceedings from the operation of this Chapter. On revision, however, it was considered that only the sections expressly mentioned should not apply to such proceedings, and that otherwise the provisions of the Order should be made equally applicable to suits and to proceedings other than suits.(7)

(1) Jamna Bibi *v.* Jhau, 24 A. 532 (1902), overruling Moti Ram *v.* Kundan Lal, 22 A. 380 (1900).

(2) Commercial Bank of India *v.* Sabju Saheb, 24 M. 252 (1900).

(3) Lalit Mohan *v.* Shebock Chand, 4 C. W. N. 403 (1900); Tej Singh *v.* Chabeli Ram, 2 A. 342 (1902).

(4) Indo Mati *v.* Gaya Prosad, 19 A. 142 (1896).

(5) In the matter of Sarat Chandra Singh, 18 A. 285 (1896).

(6) Josiam *v.* Sawmi Iyengar, 34 M. 76 (1910).

(7) See Manmotha *v.* Rakhal, 14 C. W. N. 752 (1909).

ORDER XXIII.

Withdrawal and Adjustment of Suits.

Withdrawal of suit or abandonment of part of claim.

1. (*1*) At any time after the institution of *a* suit *the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.*

(*2*) *Where* the Court is satisfied—

(*a*) that *a* suit must fail by reason of some formal defect, or

(*b*) that there are other sufficient grounds for *allowing the plaintiff* to *institute* a fresh suit for the subject-matter of *a* suit or part *of a claim*,

it may, on such terms as it thinks fit, grant *the plaintiff permission* to withdraw from *such* suit or abandon *such* part of *a* claim with liberty to *institute* a fresh suit in respect of the subject-matter of *such* suit or *such* part *of a claim*.

(*3*) *Where* the plaintiff withdraws from *a* suit, or abandons part of *a* claim, without *the* permission *referred to in* sub-*rule* (*2*), he shall be liable for such costs as the Court may award and shall be precluded from *instituting any* fresh suit *in respect of such subject-matter or such part of the claim*.

(*4*) Nothing in this *rule* shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

Withdrawal of suit.—Sub-rule (1) is new, save for the first line, which follows the wording used since sect. 373 of Act X. of 1877. Prior to that it was "*at any time before final judgment*," such being the terms of sect. 97 of Act VIII. of 1859. Sub-rule (2) originated in sect. 97 of Act VIII. of 1859. Sect. 373 of Act X. of 1877 added the words, "*that the suit must fail by reason of some formal defect*," "*or to abandon part of his claim*," "*or for the part so abandoned*." These last words were altered to "*or in respect of the part so abandoned*" by Act XII. of 1879. The present Code has substituted "*allowing the plaintiff to institute*" for "*permitting him to bring*," and made the other alterations noted in italics. It has omitted after the words "*on such terms*" the words "*as to costs*

or otherwise" appearing in the earlier Codes. Sub-rule (3) also originated in sect. 97 of Act VIII. of 1859. To it the words "*or abandon part of his claim*" were added by sect. 373 of Act X. of 1877, and the words "*or in respect of the same part*" by Act XII. of 1879. The words in italics were introduced by the present Code, "*instituting any*" being substituted for "*bringing a,*" and "*in respect of such subject-matter or such part of the claim*" for "*for the same matter or in respect of the same part.*" Sub-rule (4) was introduced by the Code of 1877.

The rule does not apply to suits before the Revenue authorities under the Bengal Tenancy Act (X. of 1859); (1) nor to Probate proceedings, before the matter becomes contentious; (2) nor to an order made for arbitration under the Second Schedule, paragraph 1; (3) nor after the award has been made; (4) but it applies to proceedings under paragraph 20 seeking to file an award made without the intervention of the Court.(5) This rule read with sect. 139 applies to insolvency proceedings under the late Code.(6) That portion of the Code was repealed by the Provincial Insolvency Act, 1907. It applies to rent suits in the N.W.P. under Act XII. of 1881.(7) Formerly it was held to apply to proceedings in execution,(8) including claim proceedings; (9) but this is not so now,(10) and execution proceedings are now excluded from the operation of this rule by O. XXIII. r. 4.(11)

This rule is not applicable where the fresh suit is against a different party; (12) or where the cause of action is different.(13) It only applies to cases where the suit is properly proceeding in the Court in which the leave was granted.(14)

"**At any time after the institution.**"—But not after issues have been joined and the plaintiff has failed to produce evidence in support of his claim,(15) nor after the defendant has obtained a decree in his favour.(16) In a recent case where, after all the witnesses had been examined, the Court had given the plaintiff time to produce documents contradicting those produced by the defendant, and on his failure to produce them had granted leave to withdraw and

(1) Radha Madhub *v.* Lukhi Narain, 21 C. 428 (1893); Mokunda *v.* Bhogaban, 21 C. 515 (1894); Jonardan *v.* Barclay, 5 C. W. N. cxl. (1901); Modhoo Soodun *v.* Panch Cowree, 7 W. R. 302 (1867); Beer Chunder *v.* Tarinee Churn, 11 W. R. 46 (1869); Ramanath *v.* Joy Kishen, 11 W. R. 3 (1869); but see Woomanath Roy *v.* Sreenath, 15 W. R. 260 (1871).

(2) Pakiam *v.* Innasi, 19 M. 458 (1896).

(3) Sheoambar *v.* Deodat, 9 A. 168 (1886).

(4) Debi Churn *v.* Bipra Prosad, 7 C. W. N. 186 (1902).

(5) Gauri Shankar *v.* Maida Koer, 31 C. 516 (1904).

(6) Hhidar *v.* Jamna, 17 A. 161 (1895).

(7) Madho Prakash *v.* Murli, 5 A. 406 (1883).

(8) Sarju Prasad *v.* Sita Ram, 10 A. 71 (1887).

(9) Subbaramien *v.* Ponnusawmy, 5 M. H. C. 298 (1870).

(10) Wajihan *v.* Bishwanath, 18 C. 462 (1891); Radha Kishen *v.* Radha Pershad, 18 C. 515 (1891); Bunko Behary *v.* Nil Madhub, 18 C. 635 (1891); Lakshmi *v.* Atchanna, 15 M. 240 (1891); Thakur Prasad *v.* Fakir-ullah, 17 A. 106 (1894 P. C.); 22 I. A. 44.

(11) Lodd Govindas *v.* Ramdoss, 24 M. L. J. 88 (1912).

(12) Mukhoda *v.* Ram Churn, 8 C. 871 (1882); 11 C. L. R. 194.

(13) Gopal Chandra *v.* Purna Chandra, 4 C. W. N. 110 (1898); 2 C. W. N. cclxxxvii.

(14) Ramdeo Dass *v.* Genesh, 35 C. 924 (1908).

(15) Muddun Ram *v.* Israil Ali, 21 W. R. 291 (1874).

(16) Eknath *v.* Ranoji, 35 B. 261 (1911); and see Mata Palat *v.* Beni Madho, 36 A. 173 (1914).

institute a fresh suit on the same cause of action, under this rule, it was held this was a material irregularity, since time should not have been given after the hearing was finished and the failure to produce the documents was not ground for granting leave for a fresh suit.(1) It must be before judgment and preparation of the decree in proceedings, under the Second Schedule, paragraph 20, to file an award made without the intervention of the Court.(2) Under the Code of 1859 permission could not be given in the final judgment.(3). Leave has been given on appeal,(4) and on special appeal; (5) but on appeal, in Madras, an appellant cannot withdraw without leave of the Court, and will in every instance be liable to pay the respondent's costs of appeal.(6) The S.C.C., it was held, might pass an order under the former section corresponding with this rule after granting an application for a new trial; (7) but where it had passed a decree for the plaintiff contingent upon the opinion of the H.C., which decided on the plaint that the plaintiff could not recover, the S.C.C. could not then give leave to withdraw, but must enter up judgment for the defendant.(8)

"**Other sufficient grounds.**"—Such as a misjoinder either of parties,(9) or of the matters in contest; (10) or where only the form of the suit was bad; (11) or where on appeal certain important evidence was rejected; (12) or where a material document has been rejected because it has not been properly stamped;(13) or where the plaintiff had relied on *sudder jummas* and the Court considered the zemindar's collections would be better evidence; (14) or where the plaintiff desired to register the document on which he sued; (15) or where the plaintiff was unable to adduce evidence within the time allowed by the Court; (16) or where there had been an erroneous valuation of the subject of the suit; (13) but not because, after issues have been joined, the plaintiff fails to produce evidence in support of his claim.(17) Query whether it is sufficient ground

(1) Bai Kashibai *v.* Shidapa Annapa, 27 B. 682 (1913).

(2) Gauri Shankar *v.* Maida Koer, 31 C. 517 (1904).

(3) Sheoraj Nundun *v.* Rajcoomar, 24 W. R. 23 (1876).

(4) Gregory *v.* Dooley Chand, 14 W. R. 17 (1868); Ram Pershad *v.* Bhurosa, 9 W. R. 328 (1868); Khatoon Koonwar *v.* Hurdoot Narain, 20 W. R. 163 (1873); Ganga Ram *v.* Data Ram, 8 A. 82 (1885).

(5) Juggunnath *v.* Mohcboolah, 17 W. R. 164 (1872).

(6) Kareem Bee *v.* Begam Bee, 3 M. H. C. 368 (1867).

(7) Jadu Mani *v.* Ram Kumar, 29 C. 239 (1902).

(8) A. Yule *v.* Mahomed Hossain, 24 C. 129 (1896).

(9) Watson *v.* Collector of Rajshahye, 12 W. R., P. C. 43 (1869); 13 Moo. I. A. 160; 3 B. L. R., P. C. 48; Ganeshi *v.* Khairati, 16 A. 279 (1894).

(10) Watson *v.* Collector of Rajshahye, 12 W. R., P. C. 43 (1869); 13 Moo. I. A. 160; 3 B. L. R., P. C. 48.

(11) Juggunnath *v.* Mohcboolah, 17 W. R. O. J. 164 (1872).

(12) Gregory *v.* Dooley Chand, 14 W. R. 17 (1868).

(13) Watson *v.* Collector of Rajshahye, 12 W. R., P. C. 43 (1869); 13 Moo. I. A. 160; 3 B. L. R., P. C. 48.

(14) Khatoon Koonwar *v.* Hurdoot Narain, 20 W. R. 163 (1873).

(15) Misser Debee Pershad *v.* Buldeo Pershad, 5 N. W. P., H. C. R. 116 (1873).

(16) Peresh Narain *v.* Surut Soondaree, 16 W. R. 100 (1871).

(17) Muddun Ram *v.* Israil Ali, 21 W. R. 291 (1874).

that the defence was such that the suit must fail.(1) It has been held that while it is impossible to lay down any exhaustive definition of "sufficient grounds" within the meaning of this rule, it may be generally said that the Court should not allow withdrawal of suit after the parties are ready for trial if it would obviously prejudice the defendant.(2)

"**With liberty to institute a fresh suit.**"—This does not prevent the Court, when such fresh suit is brought, from entering into the question of *res judicata*;(3) but a suit is not barred by the principle of *res judicata* because in the former suit, after evidence had been recorded but before judgment, liberty to bring a fresh suit had been granted.(4) Courts in India have not the power to make a decree of non-suit. So where in a suit for enforcement of a hypothecation against immoveable property it was dismissed, in the form in which it was brought, on the ground that the plaintiff having purchased a part, could not sue for the whole of his claim against the rest of the property, with permission to bring a fresh suit, it was held that such permission ought not to have been granted.(5) In a decree wholly dismissing a suit for possession on the ground that the plaintiff had only made out his claim to one-third of the property claimed, the liberty given to bring a fresh suit for possession of the one-third was a nullity, and the claim was *res judicata* in a suit brought in pursuance of the liberty.(6) If the permission through inadvertence be not recorded, the omission may be rectified on review.(7) The procedure provided in this Order is not the only manner in which a plaintiff can come to Court a second time for adjudication upon the merits of his rights.(8) Limitation applies to the second suit as if it was the first.(9)

"**May . . . grant.**"—The order should not be for the dismissal of the suit, but in terms of this rule.(10) The proper order is one which limits the time in which the payment should be made and which goes on to direct that on failure to pay within that time the original suit is dismissed with costs.(11) Apart from this rule the Courts in this country have no power to dismiss a suit and give a plaintiff leave to bring a fresh suit on the same matter.(12) It has been held that the dismissal of a suit in the form it was brought does not amount to permission to sue again,(13) but this has been dissented from.(14) If the defendant has appeared this order cannot be made *ex parte*,(15) but must

(1) Zahur-un-nissa *v.* Khuda Yar, 3 A. 528 (1881).

(2) Mahipati *v.* Nathu, 33 B. 722 (1909).

(3) Watson *v.* Collector of Rajshahye, 12 W. R., P. C. 43 (1869); 13 Moo. I. A. 160; 2 B. L. R., P. C. 48.

(4) Mona Bibee *v.* Omed Ali, 14 W. R. 276 (1871).

(5) Banwari *v.* Muhammad Mashait, 9 A. 690 (1887).

(6) Sukh Lal *v.* Bhikhi, 11 A. 187 (1888).

(7) Pearee Mohun *v.* Gooroodoss, 20 W. R. 401 (1873).

(8) Muhammad Salim *v.* Nabian Bibi, 8 A. 282 (1886).

(9) Varajlal *v.* Shomeshwar, 29 B. 219 (1904).

(10) Doucett *v.* Wise, 1 W. R. 322 (1864); Gregory *v.* Dooley Chand, 14 W. R., O. J. App. 17. p. 22 (1868).

(11) Shital Prosad *v.* Gaya Prosad, 19 C. L. J. 529 (1914), at p. 532 (Jenkins, C.J., and Woodroffe, J.).

(12) Hira Lal *v.* Udoy, 16 C. W. N. 1027 (1912).

(13) Ganesh Rai *v.* Kalka Prasad, 5 A. 595 (1883).

(14) *Per* Mahmood, J., in Muhammad Salim *v.* Nabian Biri, 8 A. 282 (1886).

(15) Misser Debee Pershad *v.* Buldeo Pershad, 5 N. W. P. H. C. R. 116 (1873).

be made on notice to him.(1) The effect of the order is to leave matters as if no suit had been instituted, and O. II. r. 2 will not debar the plaintiff from seeking relief he did not include in his first suit.(2) Where the order was made so as to enable the plaintiff in the first suit to include a portion of his claim omitted in the original suit and such fresh suit was brought, it was held that the additional portion was not barred by sect. 7 of Act VIII. of 1859.(3) Where an Appellate Court, instead of deciding upon an appeal, refers the appellant to a fresh suit, the order whether right or wrong, if accepted by the parties, is binding upon them.(4) A Special Judge under the Dekkhan Agriculturists Relief Act, in the exercise of his revisional powers, cannot do so, no such application having been made to the Lower Court.(5)

Sub-rule (3).—The original clause was introduced as the effect of the decision cited.(6)

"**On such terms.**"—The only case in which a Court may enforce a condition, *e.g.* that the payment of costs be a condition precedent to withdrawal, upon a plaintiff who seeks to withdraw is where the plaintiff asks not only to withdraw but also liberty to bring a fresh suit.(7) The order that the plaintiff should pay the defendant's costs is almost, if not quite, a matter of course, and an Appellate Court will not interfere with such an order.(8) The plaintiff had to pay the costs incurred by the defendant where he caused the defendant's arrest before judgment and then applied for withdrawal under this rule.(9) If the liberty be to bring a fresh suit on payment of costs, a subsequent suit is not void *ab initio* if the costs are not paid before its institution and subsequent payment cures the irregularity.(10) But if the order be that the costs be paid within a specified time and that is not done, the withdrawal must be taken to be without permission; (11) though the Court has power to extend the time for payment when it is absolutely impossible for the party to pay such costs before the day fixed.(12) In a recent case where permission to withdraw a suit on payment of costs with liberty to institute another had been granted, but the subsequent suit was brought before the costs had been paid, it was held that it was barred because the former suit was still pending, but that on a later payment of the costs the withdrawal became complete.(13)

"**Claim.**"—"Claim" means such a claim as if the allegations on which it

(1) Misser Debee Pershad *v.* Buldeo Pershad, 5 N. W. P. H. C. R. 116 (1873); Kareem Bee *v.* Beegam Bee, 3 M. H. C. 368 (1867); Kalian Singh *v.* Lekhraj, 6 A. 211 (1884).

(2) Behari Lal *v.* Baran Mai, 17 A. 53 (1894).

(3) Ilahi Baksh *v.* Imam Baksh, 1 A. 324 (1876); see also London, Bombay, and Mediterranean Bank *v.* Burjorji, 9 B. 346 (1885).

(4) Rajib *v.* Nil Monee, 20 W. R. 440 (1873).

(5) Muktaji *v.* Manaji, 12 B. 684 (1888).

(6) Aboo Taleh *v.* Abdool Nubee, 20 W. R. 415 (1873).

(7) Haidar Shah *v.* Jamna Das, 17 A. 158, 161 (1895).

(8) Doucett *v.* Wise, 1 W. R. 322 (1864).

(9) Syed Ali *v.* Adib, 15 B. 160 (1890).

(10) Abdul Aziz *v.* Ebrahim Molla, 31 C. 965 (1904).

(11) Harinath *v.* Syed Hassain, 10 C. W. N. 8 (1905); 2 C. L. J. 480; Fisher *v.* Nagappa, 33 M. 258 (1909).

(12) Peria Muthirian *v.* Karappanna, 29 M. 370 (1906).

(13) Shital Prosad *v.* Gaya Prosad, 19 C. L. J. 529 (1914) (Jenkins, C.J., and Woodroffe, J.); approving Abdul Aziz *v.* Ebrahim Molla, *supra*.

is based are true gives the plaintiff a cause of action *quoad* that particular claim, and not a claim which is not a cause of action and which the Court may, in any event in the exercise of its direction, either grant or refuse.(1)

"**Without the permission.**"—On a plaintiff filing a petition unconditionally withdrawing his claim the suit should be struck off. He cannot thereafter apply to set aside his petition on the ground that the defendant has failed to fulfil some private arrangement.(2) But he may recall his petition of withdrawal at any time before final judgment.(3) Where a plaintiff sued for possession and mesne profits and, his suit being dismissed, appealed, reserving his claim for future mesne profits for a separate suit, a future suit for such mesne profits, whether from date of the prior suit or decree, was held not to be barred.(4) And if it was with consent of the defendant, *e.g.* for the purpose of referring the matter to arbitration which fell through, a fresh suit is not barred.(5) Where a settlement had been come to and both parties applied that the case be struck off, it was the plaintiff's duty to see the terms recorded. He having failed to do so a fresh suit on the same matter was barred under this clause.(6) When in a particular suit a defendant had by concession of the plaintiff acquired rights which otherwise could not have existed, the plaintiff cannot by withdrawal of the appeal annul the effect of the concession.(7) If the withdrawal be on appeal the decree appealed against becomes final, and is unaffected by any compromises made at the time of the withdrawal; (8) and only the decree of the Lower Court can be executed.(9) When an appeal is withdrawn after the respondent has filed his answer, no leave to appeal ought to be given to the respondent unless he satisfy the Court he was ready to appeal and would have done so in proper time if the other side had not appealed.(10)

"**Liable for such costs.**"—The Court would dismiss the suit with costs.(11)

"**Such subject-matter.**"—"Matter" means the subject of legal action, consideration, complaint or defence, or the fact or facts constituting the whole or a part of a ground of action or defence.(12) It does not mean property, but the right in property which the plaintiff seeks to enforce.(13) And O. II. r. 2 is a bar to his instituting a fresh suit in respect of any portion of his claim which he may have omitted to include in the suit he has withdrawn.(14) Where a plaintiff sued for ejectment and withdrew his suit without permission to bring

(1) Kuppusamy *v.* Venkataramier, 15 M. L. J. 465.

(2) Rajah Shamshee *v.* Mirza Mahomed Ali, 2 Agra 158 (1867).

(3) Rambhuros Lall *v.* Gopee Beebee, 6 N. W. R., H. C. R. 66 (1874).

(4) Kuppusamy *v.* Venkataramier, 15 M. L. J. 462.

(5) Juggobundo *v.* W. N. Watson and Co., Bourke's Reports, 162 (1865).

(6) Gulkandi Lal *v.* Manni Lal, 23 A. 219 (1901).

(7) Satyabhamabai *v.* Ganish Balkrishna, 29 B. 13 (1904).

(8) Vythilinga *v.* Vejayathammal, 6 M. 43 (1882).

(9) Patloji *v.* Ganu, 15 B. 370 (1890); Chudasama *v.* Mahani Ishwargar, 16 B. 243 (1891).

(10) Gour Hari *v.* Prannath, 12 C. L. R. 395.

(11) Hossaini Bibi *v.* Peri Khanum, 1 B. L. R., O. C. 45 (1868).

(12) Achuta Menon *v.* Achutan Nayar, 21 M. 35 (1897).

(13) Gopal Chunder *v.* Purno Chunder, 2 C. W. N. cclxxxvii. (1898).

(14) Harinath *v.* Syed Hossain, 10 C. W. N. 8 (1905); 2 C. L. J. 480.

a fresh suit, on its being objected that the instrument on which he rested his title was not binding after the death of the granter, the late Zamorin of Calicut, a fresh suit by him after he had obtained a like instrument from the present Zamorin was for the same matter,(1) but where the plaintiff sued to establish his right to sell property in satisfaction of a decree against B, and withdrew his suit without permission, and then sued to sell the same property in satisfaction of another decree against B, it was held not to be for the same matter.(2)

Sub-rule (4).—This does not permit one of the plaintiffs withdrawing without permission to bring a fresh suit, even though his co-plaintiff do not consent.(3)

Appeal.—No appeal lies from an order under sub-rule (2), (4) but an appeal lies if an Appellate Court in making the order for withdrawal adjudicates on the matter of the suit.(5) An order made under this rule is open to revision; (6) thus an order under sub-rule (2) giving the defendant a portion of the costs has been held open to revision; (7) as also where a Court on appeal allowed the plaintiff to withdraw the suit under sub-rule (2) without assigning any reason.(8)

Limitation law not affected by first suit.

2. In any fresh suit instituted on permission granted under the last preceding *rule*, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been *instituted*.

Limitation.—This rule corresponds with a portion of sect. 97 of Act VIII. of 1859, and with sect. 374 of Acts X. of 1877 and XIV. of 1882, save that the word "*instituted*" has been substituted for "*brought*." It applies to a case where, owing to misjoinder of causes of action, one of two plaintiffs was allowed to withdraw with permission to bring a fresh suit.(9) It does not apply to proceedings in execution.(10)

Compromise of suit.

3. *Where it is proved to the satisfaction of the Court that* a suit *has been* adjusted wholly or in part by any lawful agreement or compromise, or *where*

(1) Achuta Menon *v.* Achutan Nayar, 21 M. 35 (1897).

(2) Kamini Kant *v.* Ram Nath, 21 C. 265 (1893).

(3) Mohamaya Chowdhrain *v.* Durga Churn, 9 C. L. R. 332 (1881).

(4) Kalian Singh *v.* Lekhraj, 6 A. 211 (1884); Jogodindro *v.* Sarut Sunduri, 18 C. 322 (1891); Ramakissoor *v.* Sriranga, 21 M. 421 (1898); Jagdesh *v.* Tulshi, 16 A. 19 (1893); Genda Mal *v.* Pirbhu, 17 A. 97 (1895); Abdul Hossein *v.* Kasi Sahu, 27 C. 362 (1899); 4 C. W. N. 41; and also Ram Kanye *v.* Haroo Chunder, 17 W. R. 229 (1872); Omesh Chunder *v.* Thakoor Doss, 23 W. R. 345 (1875). But see Ganga Ram *v.* Data Ram, 8 A. 82 (1885), which held it does not lie.

(5) Satyabhamabai *v.* Ganesh, 29 B. 13 (1904).

(6) Kalian Singh *v.* Lekhraj, 6 A. 211 (1884).

(7) Dick *v.* Dick, 15 A. 169 (1893).

(8) Tirupati *v.* Mutta, 11 M. 322 (1888).

(9) Varajlal *v.* Amratlal, 29 B. 219 (1904); 7 B. L. R. 90.

(10) Tarachand *v.* Kashinath, 10 B. 62 (1885); O. XXIII. r. 4, *contra* Sarju Prasad *v.* Sita Ram, 10 A. 71 (1887, *i.e.* before O. XXIII. r. 4 was enacted).

the defendant satisfies the plaintiff in respect of the whole or any part of the *subject*-matter of the suit, *the Court shall order* such agreement, compromise or satisfaction *to* be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

Compromise.—This rule corresponds with a portion of sect. 98 of Act VIII. of 1859. That section referred to "*mutual agreement*," and ran "*shall be recorded, and the suit shall be disposed of in accordance therewith.*" By Act X. of 1877 these words were changed to "*lawful agreement*," and "*shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final.*" Act XIV. of 1882 added the words "*wholly or in part*," "*the whole or any part of*," and "*so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction.*" The present Code substituted the first set of words in italics for "*If*," and added the words "*the Court shall order.*" The concluding words of the former section, "and such decree shall be final, so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction," have been omitted. The former section was held not to apply to proceedings under sect. 83 of the Transfer of Property Act; (1) nor to proceedings under the Indian Divorce Act, though compromises are given effect to in such cases; (2) nor to Probate proceedings, so as to order a grant of Probate without the will being proved.(3) It does not apply to proceedings in execution of a decree.(4) A compromise effected after a decree for partition must be enforced by a separate suit.(5) A compromise in this rule means the settlement of a disputed claim,(6) and it may be either written or verbal.(7)

Query whether it applies to a proceeding under sect. 93 of the Bengal Tenancy Act VIII. of 1885.(8) The Calcutta High Court formerly held that this rule applied only to cases where all parties consent to have the terms recorded, and not to cases where any party has declined to carry out the agreement before the judgment has been recorded.(9) But the Bombay and Madras High Courts have held that it may be recorded, though one of the parties denies it was made or wishes to withdraw from it or objects to its enforcement.(10) And the Calcutta High Court has since done the same.(11)

"**Where it is proved.**"—This is new, and has been inserted so as to

(1) Tatayya *v.* Pichayya, 13 M. 316 (1890).
(2) Culley *v.* Culley, 10 A. 559 (1888).
(3) Monmohini Guha *v.* Banga Chandra, 8 C. W. N. 197 (1903).
(4) O. XXIII. r. 4.
(5) Hari Raghunath *v.* Krishnaji, 19 B. 546 (1894).
(6) Piraji *v.* Ganapati, 34 B. 502 (1910).
(7) Gajendra *v.* Bindubashini, 13 C. W. N. 1023 (1909).
(8) Kali Charan *v* Parbath Charan, 4 C. L. J. 564 (1906).
(9) Syud Mehndi Alli *v.* Konwar Ram Chunder, S. D. 1851, 381; Hari Sundari *v.* Kumar Dukhinessur, 11 C. 250 (1885).
(10) Goculdas Bulabdas Manufacturing Co., Ltd. *v.* James Scott, 16 B. 202 (1891); Ruttonsey Lalji *v.* Poovabai, 7 B. 304 (1883); Karuppan *v.* Ramasami, 8 M. 482 (1885); Appasami *v.* Manikam, 9 M. 103 (1885); Harakhbai *v.* Jamnabai, 37 B. 639 (1912).
(11) Brojo Durlabh *v.* Ramanath, 24 C. 908 (1897); 1 C. W. N. 597.

recognize the power of a Court to inquire into and to record a disputed compromise.(1) (See last paragraph.)

"By any lawful agreement or compromise."—The Court has no jurisdiction to pass a decree on a compromise unless it is a lawful compromise. Any terms of a contract which are opposed to public policy, *e.g.* the sale of an office attached to a temple involving services of a personal nature and entitling the holder to receive emoluments, are invalid, and will not be enforced by the Courts.(2) The Court must satisfy itself as to its being lawful by evidence taken before it proceeds to record it and pass a decree in accordance therewith.(3) It does not include a mere agreement to refer to arbitration.(4) But it includes an agreement to refer the matter in suit to arbitration and the award made thereon.(5) This does not include a mere agreement of one party to be bound by the oath of another party; (6) nor an arrangement that the decree or dismissal of the suit should depend upon what was stated in a document in the possession of a witness.(7) But it must be such that a Court can pass a decree on and not one that requires something else to be done.(8)

Counsel possess a general authority to settle and compromise a suit in which he is actually retained as counsel, but not collateral matters outside the scope of such suit.(9) Pleaders unless specially empowered have no authority to compromise cases conducted by them; (10) and when a counsel or vakeel compromises a case on the instructions of a person who has had no authority to bind the party, the compromise is binding on the latter if he ratifies it. When a counsel or vakeel enters into a compromise a presumption arises that he has done so with his client's assent.(11) A decree in pursuance of a compromise is binding, though made against the express instructions of a client to his attorney, provided such want of authority was not known to the other side,(12) but where counsel after receiving the attorney's instruction "to do the best he could for the client" compromised a suit notwithstanding the express prohibition of the client, and the dissent was notified to the other side before the consent decree was drawn up, it was held the consent decree must be set aside.(13) Any party has the right to repudiate the action of an agent compromising it without his knowledge and consent before an order is passed accepting the compromise

(1) Harakhbai *v.* Jamnabai, 15 Bom. L. R. 340 (1912).

(2) Lakshmanaswami *v.* Rangamma, 26 M. 31 (1902).

(3) Sridharan *v.* Puramathan, 23 M. 101 (1899).

(4) Tincowry *v.* Fakir Chand, 30 C. 218 (1902); 7 C. W. N. 180; Venkatachala Reddi *v.* Rangiah Reddi, 36 M. 353 (1911).

(5) Samibai *v.* Premji Pragji, 20 B. 304 (1895); Lakshmana *v.* Chinnathambi, 24 M. 326 (1900); Pragdas *v.* Girdhardas, 26 B. 76 (1901); distinguished in Rukhanbai *v.* Adamji, 33 B. 69 (1908).

(6) Konnapalen *v.* Perotta, 4 M. H. C. 422 (1869); Vasudeva *v.* Naraina, 2 M. 356 (1879); Muhammad Zahur *v.* Cheda Lal, 14 A. (1891); Thoyi Ammal *v.* Subbaroya, 22 M. 234 (1899).

(7) Muhammad Zahur *v.* Cheda Lal, 14 A. 141 (1891).

(8) Ib.

(9) Nundo Lal *v.* Nistarini, 27 C. 428 (1900); 4 C. W. N. 169.

(10) Sirdar Begum *v.* Izzut-ool-nissa, 2 N. W. P., H. C. R. 148 (1870).

(11) Bhut Nath *v.* Ram Lall, 6 C. W. N. 82 (1900).

(12) Jagarnath Das *v.* Ramdas, 7 B. H. C. 79 (1870).

(13) Carrison *v.* Rodrigues, 13 C. 115 (1886).

as the final determination of the suit.(1) A Corporation can compromise a suit.(2) It has been held that there is nothing in the Dekkhan Agriculturists' Relief Act (XVII. of 1879) to expressly deprive the parties to a suit of the power of entering into a compromise and having it recorded under sect. 375 of the last Code (now represented by this rule); (3) and it has also been held that a compromise under that Act is not bad in law merely because it does not comply with sect. 15B of that Act.(4)

"**Shall order.**"—This is imperative, and a Court cannot refuse to record a lawful agreement of compromise and to pass a decree in accordance therewith merely because in its view it is too favourable to one of the parties.(5) The compromise ought to be carried out by proper deeds and filed in Court, particularly where infants are concerned, so as to have the assent of the Court at the time.(6) It is not bound to record a compromise which goes beyond the suit.(7) When the compromise was an agreement to refer the matter in suit to arbitration, and the award made thereon dealt with additional matter, the award could only be recorded as far as it related to the suit,(8) but not if it does not give the plaintiff any of the reliefs claimed in the suit, but deals with matters not the subject-matter of the suit, and if it appear that the compromise was arrived at conditionally upon its being incorporated in the decree, the suit should be proceeded with.(9) This rule was intended to meet cases where the parties having agreed to compromise subsequently fell out. The Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit; (10) and the present wording of this rule contemplates the Court taking evidence as to the adjustment before recording it. The rule does not prevent a party obtaining the enforcement of a compromise even though it has not been recorded. So where the parties to a suit executed and registered an agreement whereby the plaintiff agreed to accept certain specific property of the defendant in adjustment of the suit, which agreement was not recorded, and then the plaintiff in execution sold other properties of the defendant, it was held that the agreement was binding and the defendant was, in a suit brought by him, entitled to relief.(11)

"**Shall pass a decree.**"—A consent decree upon a compromise has been refused where the suit was not entered in the Cause List of the Court.(12)

(1) Monmohini *v.* Banga Chandra, 31 C. 357 (1903).

(2) *In re* Norwich Provident Insurance Soc., 8 C. D. 334 (1878).

(3) Piraji *v.* Ganapati, 34 B. 502 (1910).

(4) Shivayagappa *v.* Govindappa, 37 B. 615 (F. B.) (1913); approving Piraji *v.* Ganapati, *supra*; and over-ruling Kishandas Shivram *v.* Nana Rama, 35 B. 190 (1910); Gangadhar Sakharam *v.* Mahadu Santaji, 8 B. 20 (1883).

(5) Motiram Balkrishna *v.* Yesu, 22 B. 238 (1896).

(6) Abdool Ali *v.* Mozuffer Hossain, 16 W. R., P. C. 25 (1871).

(7) Fajaleh Ali *v.* Kamaruddin, 13 C. 170 (1886).

(8) Samibai *v.* Premji Pragji, 20 B. 304 (1893).

(9) Muthu Vijaya *v.* Thandavaraya, 22 M. 214 (1898).

(10) Appasami *v.* Varadachari, 19 M. 419 (1896).

(11) Thota Venkatachellasami *v.* Kristnasawmy, 8 M. H. C. 1 (1874).

(12) Pall and Valetta, 5 C. L. R. 464 (1880).

The words "in accordance therewith" were introduced as the effect of a Privy Council decision.(1)

The former section declared that the decree was final so far as it related to the subject-matter of the compromise, etc. When a Court has sanctioned an arrangement and made an order in conformity with it, and the agreement has been acted upon, neither party is at liberty to resile from it.(2) If the compromise has not been acted upon the plaintiff is restored to his original right of action.(3) But when it has been acted on in whole or in part the plaintiff cannot be restored to his original suit, but may bring a suit for the performance of the condition uncomplied with.(4) The decree must be set aside before a second suit can be brought on the original cause of action.(5) A compromise must be treated as a new and positive contract. A breach of its stipulations may be ground for a suit for its enforcement, but not for a revival of the original claim.(6) The compromise may be specifically enforced as it does not come under sect. 22 of the Specific Relief Act,(7) and should be enforced by execution of the decree and not by a new suit.(8) Where a compromise was not properly embodied in the decree so that it could be executed, a party, it was held, could sue for its enforcement but could not revert to his original rights.(9) A Court, in dealing in a fresh suit with a question of right to forfeiture contained in a previous compromise decree whereby the status of landlord and tenant was established between the parties, is not precluded from granting such relief against forfeiture as it might have granted had the status arisen from contract or custom.(10) A compromise made by the Kurta of a Mitakshara family will be binding, so far as it dealt with the matters in suit, on a son who was an infant at the time and who was not a party if he were not prejudiced thereby, but it would not be binding in regard to matters dealt with outside the scope of the suit if the compromise being one requiring registration were unregistered.(11) But a Hindu widow cannot compromise so as to bind reversioners entitled to the estate after her life interest ceases.(12) A mother as guardian cannot compromise a suit on behalf of a minor daughter unless it is for the benefit of the daughter; (13) and a compromise entered into by a Hindu woman with an alleged adopted son who claimed to be adopted under certain conditions would not bind the daughter.(14) Where a compromise was entered into by a guardian of an infant

(1) Mullick *v.* Jameela, 11 B. L. R. 375 (1872) P. C.; I. A. Sup. Vol. 135.

(2) Sheo Golam *v.* Beni Prosad, 5 C. 27 (1879).

(3) Ameer Begum *v.* Noor Begum, 1 Agra F. B. 1 (1866).

(4) Ib.

(5) Ib.

(6) Bishna Coomar *v.* Joy Hurish, 2 W. R. 209 (1865).

(7) Shib Lal *v.* Collector of Bareilly, 16 A. 423 (1894).

(8) Luckhee Narain *v.* Ram Mohun, 13 W. R. 151 (1870); 4 B. L. R., A. J. 207.

(9) Ram Sahae *v.* Dhunooksharee, 1 W. R. 266 (1864)

(10) Krishna Bai *v.* Hary Govind, 31 B. 15; 8 B. L. R. 813 (F. B.) (1906).

(11) Birbhadra Nath *v.* Kalpataru, 1 C. L. J. 388 (1905); Ram Kuber Pande *v.* Ram Dasi, 35 A. 428 (1913); cf. Madan Lal *v.* Kishan Singh, 34 A. 572 (1912), mortgage-suit maintainable by Kurta without joining other members of joint-family; dissented from in Sidheswari Prosad *v.* Dharamjit Narain, 19 C. L. J. 437 (1913).

(12) Sheo Narain *v.* Khurgo Koerry, 10 C. L. R. 337 (1882).

(13) Roushun Jahan *v.* Enaet Hossein, 5 W. R. 4 (1864).

(14) Imrit Konwur *v.* Roop Narain, 6 C. L. R. 76 P. C. (1880).

with the sanction of the Court upon a misapprehension of material facts,(1) or where a compromise in which an infant was concerned was made without the sanction of the Court,(2) or on the ground that the compromise was obtained upon a misrepresentation of the facts, the compromise would be set aside,(3) and a decree embodying unlawful terms of a compromise, *e.g.*, the sale, as being against public policy, of an office attached to a temple involving services of a personal nature and entitling the holder to receive emoluments, is inoperative and will not be enforced,(4) so a decree made on a compromise entered into behind the back of a defendant and to which she is not a party is a nullity as against her.(5) For grounds on which a compromise may be set aside, see case cited.(6) In England it was held that the question whether a compromise was invalid ought to have been made the subject of a new action, but having been tried without objection as a motion the objection could not be raised on appeal.(7) In India it may be set aside either by suit or by way of review, but preferably by review.(8) It cannot be set aside on a motion on the ground of fraud,(9) nor can the question as to whether the compromise is valid be gone into on an appeal from the consent decree.(10) The effect of setting aside a compromise is to remit both parties to their original rights.(11) When a consent decree by A against B and C is set aside by a decree in a suit by B against A so far as it affected their rights, such decree does not reserve the consent decree so as to entitle A to have his suit restored and reheard on its merits.(12) If the compromise does not give the plaintiff any of the reliefs claimed in the suit but deals with the matters not the subject-matter of the suit, no decree can be made.(13) And a Court is not bound to enforce a compromise which goes beyond the suit. It may refuse to do so but it cannot modify it.(14) If the compromise goes beyond the scope of the suit the decree should be passed for so much as relates to relief which the Court could give in the suit.(15) So where the compromise was an agreement to refer the matter in suit to arbitration, and the award made thereon dealt with additional matter, the award could only be recorded as far as it related to the suit.(16) But by consent of the parties and the leave of the Court a suit may be amended so as to cover an increased claim, and there is nothing in the law which prevents the

(1) Solomon *v.* Abool Azeez, 6 C. 687 (1881).

(2) Karmali *v.* Rahimbhoy, 13 B. 137 (1888).

(3) Gilbert *v.* Endean, 9 C. D. 259, p. 268 (1878).

(4) Lakshmanaswami *v.* Ramaswami, 26 M. 31 (1902).

(5) Sankara *v.* Kumarasamya, 8 M. 473 (1885).

(6) Ram Nirunjun *v.* Prayag Singh, 8 C. 138 (1881).

(7) Gilbert *v.* Endean, 9 C. D. 259 (1878).

(8) Ashootosh *v.* Tara Prasanna, 10 C. 612 (1884); but see Purmessuree *v.* Romeezooddeen, 5 W. R. 226 (1866); Gulab Koer *v.* Badshah Bahadur, 13 C. W. N. 1197 (1909).

(9) Foolcoomary *v.* Woodoy Chunder, 25 C. 649 (1898).

(10) Biraj Mohini *v.* Chinta Moni, 5 C. W. N. 877 (1901).

(11) Khajooroonissa *v.* Roushan Jehan, 2 C. 184, P. C. (1876); 26 W. R. 36; 3 I. A. 291.

(12) Bhimaji *v.* Rakmabai, 10 B. 338 (1885).

(13) Muthu Vijaya *v.* Thandavaraya, 22 M. 214 (1898).

(14) Fajaleh Ali *v.* Kamaruddin, 13 C. 170 (1886).

(15) Venkatappa *v.* Thimma, 18 M. 410 (1894).

(16) Samibai *v.* Premji Pragji, 20 B. 304 (1893).

parties to a suit enlarging by consent or compromise the original claim and getting or allowing a decree for a greater amount of money or land than that originally asked for.(1) Where a compromise goes beyond the subject-matter of the suit, and a decree is made on the basis of the compromise, although the decree in respect of the surplusage cannot be executed,(2) the defendant is bound by its terms if he benefited therefrom. The Madras High Court have, however, held that a decree passed in terms of a compromise entered into between parties and comprising therein reliefs not covered by the suit, is yet enforceable in execution, provided that there is nothing unlawful about the terms, though the decree itself as drafted might have been objected to on an appeal therefrom.(3) The decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions. If such other considerations are the considerations for the compromise they must be incorporated in the decree; if they are independent they may be regarded as surplusage.(4) But where the suit was for money, and the defendant agreed to his property being charged as a term of the compromise, it was held a decree could be made embodying the charge.(5) If the compromise affected matters outside the suit, and it was agreed that if one party failed to carry that portion out the other could sue in respect thereof, the section does not prevent the same being enforced by suit.(6) The language of the section is wide and general, and does not preclude parties from settling their disputes on such lawful terms as they might agree to without being restricted to such relief as one only of the parties had chosen to claim in the plaint. In a suit for money where the plaint asked for a simple money decree, an agreement that the amount decreed should be a charge on certain properties was held to be both lawful and to relate to the suit.(7) When by unregistered documents a compromise going beyond the scope of the suit was affected, but only such portion as related to the suit recorded and decreed, that portion required no registration and the finding thereon was *res judicata*, and if the decree had referred to or narrated the other terms of compromise, it would have been judicial evidence of that portion of the compromise.(8) But an agreement outside the scope of the suit, although incorporated in the decree, does not operate as *res judicata*.(9) When a consent decree was passed in terms of compromise, with a reservation that only the property claimed in the suit could be obtained in execution, a subsequent suit in respect of other property dealt with in the compromise, based upon both title and the compromise, was not barred by this rule or by O. II.

(1) Mohibullah *v.* Imami, 9 A. 229 (1887).

(2) Jasimuddin Biswas *v.* Bhuban Telini, 34 C. 456 (1907).

(3) Anantanarayana Aiyar *v.* Abdul Karim, 17 M. L. J. 255 (1907); s. c., 30 M. 421.

(4) Purna Chandra *v.* Nil Madhub, 5 C. W. N. 485.

(5) Joti Kuruvetappa *v.* Sri Devandra, 16. M. L. J. 354 (1906).

(6) Gupta Narain *v.* Bejoya Sundari, 2 C. W. N. 663 (1897).

(7) Joti Kuruvetappa *v.* Izari Sirusappa, 30 M. 478 (1907); Natesa Chetti *v.* Vengu Nachiar, 33 M. 102 (1909).

(8) Pranal Annee *v.* Lakshmi Annee, 3 C. W. N. 485 P. C. (1899); s. c., 26 I. A. 101; Ramdhari *v.* Kokan Lal, 13 C. W. N. 217 (1908).

(9) Purna Chandra Burman *v.* Panchkari Ghose, 5 C. L. J. 15 (1906); and see Birbhadra Nath *v.* Kalpatara Panda, 1 C. L. J. 388 (1905).

r. 2.(1) The object of judicial sanction to a compromise entered into by the parties to a suit where one of them is an infant is to safeguard the interests of the minor before the Court. An objection that a minor son in a Mitakshara family was not made a party to a suit in which his father as *karta* or manager of the family was a party, and that such minor was in consequence deprived of the protection which he would have enjoyed by reason of a judicial sanction of the compromise, is not by itself sufficient to make the compromise inoperative against him. Unless it is shown that the minor has been prejudiced, he cannot successfully impugn the decree.(2) The difference between a consent-decree declaring the agreement of the parties and the agreement of parties themselves, when the one or the other is sought to be afterwards enforced, goes no further than this, that in the former case it would not be open to a party to question the accuracy of the decree, as expressing what at the time was the contract which had been made.(3)

Appeal.—An appeal lies against an order on a dispute as to whether a compromise had been arrived at, the alleged compromise being impeached as not being lawful.(4) Where the decree recorded a compromise going beyond the scope of the suit an appeal lies, and on appeal the decree should be modified so as to include only such portion of the compromise as relates to relief which the Court could have given in the suit.(5) See now O. XLIII. r. 1 (*m*).

4. Nothing in this *Order* shall apply to any proceedings *in execution of a* decree *or order.*

Proceedings in **execution of decrees not affected.**

"Proceedings in execution."—This rule was added to the Code by Act VI. of 1892, but it then included "*any application or other proceeding in any suit subsequent to the decree*," and had an Explanation which ran: "*An application to the Appellate Court pending an appeal is not an application subsequent to the decree appealed from within the meaning of this section.*" Prior to the passing of Act VI. of 1892 it was held that where a decree was put into execution the proceedings taken therefor amounted to a separate litigation, which could be compromised under O. XXIII. r. 3, read with sect. 141.(6)

(1) Parsanni *v.* Naraini, 2 A. L. J. 680.

(2) Birbhadra Nath *v.* Kalpatara Panda, 1 C. L. J. 388 (1905).

(3) Krishnabai *v.* Hari Govind, 31 B. 15 (1906).

(4) Sridharan *v.* Puramathan, 23 M. 101 (1899).

(5) Venkatappa *v.* Thimma, 18 M. 410 (1894); see also the Manager of Sri Meenakshi Devastanam Madura *v.* Abdul Kasim, 30 M. 421 (1907).

(6) Muhammad Sulaiman *v.* Jhukki Lal, 11 A. 228 (1888).

ORDER XXIV.

Payment into Court.

1. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim. [s. 376.]

Deposit by defendant of amount in satisfaction of claim.

2. Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application. [s. 377.]

Notice of deposit.

3. No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof. [s. 378.]

Interest on deposit not allowed to plaintiff after notice.

4. (*1*) *Where* the plaintiff accepts such amount as satisfaction in part *only* of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff *shall* pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim. [s. 379.]

Procedure where plaintiff accepts deposit as satisfaction in part.

(*2*) *Where* the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall *pronounce* judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Procedure where he accepts it as satisfaction in full.

Illustrations.

(*a*) A owes B Rs.100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(*b*) B sues A under the circumstances mentioned in illustration (*a*). On the plaint being filed, A disputed the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(*c*) A owes B Rs.100, and is willing to pay him that sum without suit. B claims Rs.150 and sues A for that amount. On the plaint being filed A pays Rs.100 into Court and disputes only his liability to pay the remaining Rs.50. B accepts the Rs.100 in full satisfaction of his claim. The Court should order him to pay A's costs.

Payment into Court.—This and the following rules (which are now in the same terms as the last Code) were based upon and followed the practice at the time these sections were framed, though not now obtaining in England.(1) A plea of tender before action must, to stop interest, be accompanied by a payment into Court after action, otherwise the tender is ineffectual.(2)

"**To recover a debt or damages.**"—A suit for an injunction involving a declaration of plaintiff's right to ancient lights is not a suit of this character, even though the Court may have discretion to award damages in lieu of an injunction.(3) It is, however, a well-established practice to pay into Court money in injunction cases, and though there is no express provision for such a case in the Code in ordinary cases where no declaration of right is sought, the principle underlying r. 4 ought to regulate the discretion of the Court.(4)

"**At any stage.**"—This is apparently before decree as the money is paid in satisfaction of the "claims." (5) As to what amounts to a compliance with a direction in a decree to pay money into Court, see below.(6) When a decree treats an estate as primarily liable to discharge a debt with interest, the

(1) See Dwarka Das Agurwallah *v.* Girish Chunder Roy, 26 C. 766, 768 (1899); and Ann. Pr., O. 22.

(2) Haji Abdul Rahman *v.* Haji Noor Mahomed, 16 B. 141 (1891); a debtor can derive no benefit from a rejected offer of part-payment: Kunhya Singh *v.* Tooydun Singh, 7 W. R. 20 (1867) [dist. Poreshnath Mookerjee *v.* Kristo Mohun Shaha, 12 W. R. 50 (1869)]; Watson & Co. *v.* Dhonendra Chunder, 3 C. 6, at p. 16 (1877); Chunder Caunt Mookerjee *v.* Jodoonath Khan, 3 C. 468 (1878).

(3) Luxumon Nana *v.* Moroba Ramkrishna, 21 B. 502 (1896).

(4) Ib.

(5) As to notice of deposit affecting question of interest, see Kalee Dass Ghose *v.* Puran Koomaree, 16 W. R. 304 (1871); and see also Kunhya Singh *v.* Tooydun Singh, 7 W. R. 20 (1867): dist. Poreshnath Mookerjee *v.* Kristo Mohun Shaha, 12 W. R. 50 (1869).

(6) Gujadhur Pauree *v.* Naik Pauree, 8 C. 528 (1882).

proprietor or his heir has a right to pay the money into Court to satisfy the decree to protect himself from being made responsible to indemnify the sureties.(1)

Notice.—For form of notice see No. III. of Appendix H to the First Schedule. The money can be paid to the plaintiff's agent or pleader unless the Court requires the attendance of the party in person (O. III. r. 1).

"Otherwise directs."—See note, *post*.(2) Where there are conflicting claims, the order of the Court is required under this rule.(3)

Acceptance in part.—Money may be paid in with a denial of liability (see *ante*). According to the present English practice in such a case the money remains in Court. This is, however, not the rule under the Code, and a plaintiff can take out the money and prosecute the suit for the balance, though the Court has a discretion under r. 2, which must be exercised reasonably, to refuse to allow the money to be paid out.(4) So where in a suit on promissory notes, the defendant admitted the receipt of a certain sum, but alleging minority denied all liability in respect of this, or any other portion of the claim, the plaintiff was allowed to take the money out of Court.(5)

Acceptance in full.—Until issues are settled a plaintiff has no means of knowing what case his adversary means to set up, and if he accepts the amount paid at the settlement of issues in full satisfaction, he does so at the earliest possible moment, and he is therefore entitled to his costs up to that time. The fact that he first refuses to accept the money does not deprive him of this right to have costs if he does so before trial.(6)

Cases not within r. 1.—Where the suit is not one "to recover debt or damages" within the meaning of this rule, the Court has a discretion to apportion the costs.(7)

(1) Bissessar Singh *v.* Nim Chand Bose, 12 W. R. 505 (1869).

(2) Dwarka Dass Agurwallah *v.* Girish Chunder Roy, 26 C. 766, at p. 769 (1899).

(3) Haji Abdul Rahman *v.* Haji Noor Mahomed, 16 B. 141 (1891).

(4) Dwarka Dass Agurwallah *v.* Girish Chunder Roy, 26 C. 766 (1899).

(5) Ib.

(6) Ardesir Limji *v.* Sorabji Pestonje, 1 B. H. C. R. 70 (1863).

(7) Luxmon Nana *v.* Moroba Ramkrishna, 21 B. 502, at p. 509 (1896).

ORDER XXV.

Security for Costs.

When security for costs may be required from plaintiff.

1. (*1*) *Where*, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India *other than* the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by *it*, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

Residence out of British India.

(*2*) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of *sub-rule* (*1*).

(*3*) On the application of any defendant in a suit for *the payment of* money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

Effect of failure to furnish security.

2. (*1*) In the event of such security not being furnished within the time fixed, the Court shall *make an order* dismiss*ing* the suit unless the plaintiff or plaintiffs *are* permitted to withdraw therefrom.

(*2*) Where a suit is dismissed under this *rule*, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(*3*) The dismissal shall not be set aside unless notice of *such* application has *been* served *on* the defendant.

"**Residing," r. 1, sub-rule (1).**—As to the meaning of this word, see notes to sect. 20, *ante*. The meaning of the term depends upon the intention of the Legislature in framing the particular provision in which the word is used. The term here means residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided. Each case must therefore depend on its particular circumstances.(1) A person who leaves British India under the circumstances mentioned in r. 1, sub-rule (2), is deemed to be residing out of British India.

"**British India.**"—As to the meaning of this term, see notes to sect. 1, *ante*. As the residence must be out of British India a plaintiff who resides in another Province or Presidency of British territory cannot be called on to give security.(2) An inhabitant of foreign territory such as Hill Tippera, must give security even though the defendant is also a resident in foreign territory.(3) The British cantonment of Secunderabad was held to be out of,(4) and the cantonment of Wadhwan within,(5) British India.

"**May.**"—The exercise of the power conferred on the Court is not imperative but discretionary to be exercised according to the circumstances of each case,(6) and the Court will not order a plaintiff to give security unless grounds are shown tending to show that the defence is true,(7) or that the suit is not a *bonâ fide* one,(8) and it appears that the exercise of the power is necessary for the reasonable protection of the defendant.(9)

"**Leaves British India," r. 1, sub-rule (2).**—When a plaintiff leaves British India before the case is decided, the defendant should apply to the Court under sub-rule (1) to take security for costs,(10) and then, unless there is a reasonable probability that he will be forthcoming whenever he may be called on to pay costs, or, that he has sufficient immoveable property in British India to meet them, he must give security. If no security is furnished judgment will be passed against the plaintiff by default. But when a case has gone to judgment without such application the Appellate Court cannot pass any order as to the costs in the first Court.(11) As to security in the case of appeals, see O. XLI. r. 10, *post*.

(1) Mahomed Shuffli *v.* Laldin Abdula, 3 B. 227 (1878); where a residence of 4 months with a statement that it was intended to be permanent was considered insufficient, see Sri Goswami *v.* Shri Govardan Lalji, 14 B. 541, at 547 (1890).

(2) Gahan *v.* Owen, Coryt 11 (1864); as to the Code of 1859, see ss. 34 and 35 of same.

(3) Koroona Moyee *v.* Ooma Churn, 12 W. R. 465 (1869).

(4) Hossain Ali Mirza *v.* Abed Ali Mirza, 21 C. 177 (1893).

(5) Triccaru Panachand *v.* Bombay, Baroda, etc., Ry., 9 B. 244 (1885).

(6) Degumbari Debi *v.* Aushootosh Banerjee, 17 C. 610, 613 (1890); Shama Sundary *v.* Rash Behary Dhur, 3 C. W. N. 753 (1899); In the goods of Prem Chand Moonshee, 21 C. 283 (1894); Bai Pirbai *v.* Devji Meghji, 23 B. 100, 102 (1898).

(7) Shama Sundary *v.* Rash Behary Dhur, *supra*.

(8) Namubai *v.* Daji Gobind, 35 B. 421 (1910).

(9) In the goods of Prem Chand Moonshee, *supra*, in which case, as the suit would have to proceed as an administration-suit, the plaintiff could in no event have been liable for the defendant's costs.

(10) *In re* Calcutta and S. E. Ry. Co., 8 W. R. 217 (1867).

(11) Ib.

"Suit for the payment of money," r. 1, sub-rule (3).—The last paragraph in sect. 380 of the former Code was inserted by sect. 5, Act VI. of 1888. A suit "for money" is wider than a suit for debts. It is necessary to look at the substance of the suit. A suit for money damages is within the section ; (1) such as a suit for possession of ornaments and other things, or in the alternative, their value.(2) The words formerly appearing, "*independent of the property in suit,*" have been omitted because the nature of the suit excludes the possibility of the property in suit being immoveable. If the suit is one in which the chief or principal relief asked is the recovery of money, or of moveable property for which the plaintiff is liable to pay money, the suit falls within this rule.(3)

Security.—In terms no exception is made in this rule of the case of a minor, nor can such an exception be introduced into the rule. The order to give security is, however, a discretionary one, and unless in exceptional cases, neither an infant plaintiff nor his or her next friend ought to be required to give security for costs.(4) Without deciding the question whether a continuing security is necessary, the Supreme Court held that if security has been furnished, fresh security will not be demanded unless it is shown that the sureties are in no wise subject to, and have no property within, jurisdiction.(5) For the proper mode of proceeding on a security-bond see below.(6) The words "*or show good cause,*" etc., at the end of sect. 381 of the last Code, and the last paragraph of that section, have been omitted. The Court has, however, under sect. 148 power to enlarge the time.

Calling for security in other cases.—The Code itself provides for the taking of security in other cases, such as in staying execution (O. XLI. r. 6, O. XLV. r. 13) and where an appeal has been filed (O. XLI. r. 10). It would, however, appear that the Court can demand security in cases for which no express provision is made. So though the Court will not require security because the plaintiff is a pauper or because he is a mere trustee, they will do so when they find that he is not the real litigant but a mere puppet in the hands of another.(7) And the representatives of a Hindu testator suing for the performance of religious and charitable trusts created by him, and in which they are not personally interested, should, it has been held, give security for costs.(8)

(1) Degumbari Debi *v.* Aushootosh Banerjee, 17 C. 610, 613 (1890).

(2) Ib.; followed in Anandamoi *v.* Gokul, 16 C. W. N. 763 (1912).

(3) Sonabai *v.* Tribhowandas, 32 B. 602 (1908).

(4) Bai Pirbai *v.* Devji Meghji, 23 B. 100 (1898).

(5) Gibson *v.* Chisholm, Fulton, 480 (1844); Bhaishankir *v.* Mulji, 35 B. 339 (1910).

(6) Poynor Bibee *v.* Nujjoo Khan, 5 C. 437 (1897); Mingale Antone *v.* Ramchandra Baje, 19 B. 694 (1894); Gopi Nath Chowdhry *v.* Benode Lall Roy, 31 C. 162 (1903); Krishnan Nayar *v.* Ittiman Nayar, 24 M. 637 (1901).

(7) Khajah Assenoollajoo *v.* Solomon, 14 C. 533 (1887) [citing dictum of P. C. in Ram Coomar Kundoo *v.* Chunder Kanto Mookerjee, 2 C. 233, at pp. 259, 261 (1876)]; Hari Nath *v.* Ram Kumar Bagchi, 19 C. L. J. 59 (1913); Govind Das *v.* Ramsahoy Jemadar, Fulton, 155 (1843) [if collusion and instigation by a third party is proved security for costs will be ordered].

(8) Brojomohun Doss *v.* Hurrololl Doss, 6 C. L. R. 58, 60 (1880); and as to suits by relators to enforce public rights, see Cazee Mozhur Hossain *v.* Denobundoo, Bourke, 119, 40 (1865).

Failure to furnish security.—Act VIII. of 1859, sect. 35 (sect. 381 of the former Code). The words after "sect. 373" of first paragraph, were inserted by sect. 33, Act VII. of 1888, but have now been taken out: *vide ante*, "Security." The time may be extended under sect. 148. Before dismissing a suit under this rule, the Court should see that notice of the order requiring security has been served on the party or his pleader.(1) A person whose suit has been dismissed under this rule, may, if defendant in a subsequent suit, rely on the same matter put forward in the previous suit. It was queried whether he could do so if he were plaintiff in the subsequent suit.(2) It has, however, recently been held that a dismissal of a suit under this rule does not bar a fresh suit for the same cause of action.(3) An order dismissing a suit under this rule is a decree and open to appeal.(4)

(1) Timmu *v.* Deva Rai, 5 C. 265 (1882).

(2) Rungrav *v.* Sidhi Mahomed, 6 B. 482 (1882)

(3) Hariram Mohanji *v.* Lalbai, 26 B. 637 (1902); s. c., 4 Bom. L. R. 262.

(4) Williams *v.* Brown, 8 A. 108 (1886).

ORDER XXVI.

Commissions.

Commissions to examine witnesses.

Cases in which Court may issue commission to examine witness.

1. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of *any* person resident within the local limits of its jurisdiction who *is* exempted under this Code from attending the Court or who *is* from sickness or infirmity unable to attend it.

Order for commission.

2. *An* order *for the issue of a commission for the examination of a witness* may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

Where witness resides within Court's jurisdiction.

3. *A* commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute.

Persons for whose examination commission may issue.

4. (*1*) Any Court may in any suit issue a commission for the examination of—

(*a*) any person resident beyond the local limits of its jurisdiction;

(*b*) *any* person who *is* about to leave such limits before the date on which *he is* required to be examined in Court; and

(*c*) *any* civil *or* military officer of *the* Government who cannot, in the opinion of the *Court*, attend without detriment to the public service.

(*2*) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this *rule* shall direct whether the commission shall be returned to itself or to any subordinate Court.

Commission *or Request* **to examine witness not within British India.**

5. *Where* any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that *the* evidence *of such person* is necessary, the Court may issue such commission *or a letter of request.*

Commissions.—Commissions under the Code are of four kinds: (a) to examine witnesses (rr. 1–8, 15–81); (b) for local investigations (rr. 9, 10, 15–18); (c) to examine accounts (rr. 11, 12, 15–18); (d) to make partition (rr. 13–18). A commission should not be issued for any cause not stated in the foregoing or following rules, and when any such cause is shown, the Court has a discretion, which, however, must be judicially exercised, to grant or refuse a commission. The issue of commissions is governed solely by the provisions of the Code, which are exhaustive.(1) An order refusing to issue a commission on the ground that the evidence was not necessary has been held not subject to revision under sect. 622 (now 115). In the case of those interlocutory orders against which no immediate appeal lies, a remedy is supplied by sect. 105.(2)

To examine witness.—A commission may be issued: —(a) Where a person resides *outside British India* (3) under r. 5. The reference to letters of request is inserted, as the provisions of the evidence by Commission Acts, 1859, 1885 (22 Vict. c. 2; 48 & 49 Vict. c. 74), are apt to be overlooked. The British Court may request a Court in foreign territory to execute the commission, or the British Court may itself appoint a commissioner to take the evidence in foreign territory, as was done in the first of the cases last cited. Cf. O. 34, r. 6A of the English rules. A Form of Letters of Request is given in Appendix H, Form 8. (b) Where the person is *resident in British India, but beyond the local limits* of the Court's jurisdiction [r. 4, clause (*a*)]. (c) Where the person is *resident within the local limits*, (i.) but about to leave such limits [r. 4, clause (*b*)]. Though the case cited (4) is no longer law the Court may, and frequently does, instead of issuing a commission, examine a witness under these circumstances *de bene esse*; (5) (ii.) persons who are not about to leave, but who are absolutely

(1) Veerabadran Chetty *v.* Nataraja Desikar, 28 M. 28 (1904) [in which it was also held that the Court may prevent abuse of its process as regards summons to witnesses]. See cases cited, *post.*

(2) *In re* Nizam of Hyderabad, 9 M. 256 (1886).

(3) See In the goods of Gopal Lal Seal, 7 C. W. N. 806 (1903); s. c., 30 C. 934; Aga Mohamed *v.* Nazirullah, 2 B. L. R. 73 (1868).

(4) Edwards *v.* Muller, 5 B. L. R. 252 (1870).

(5) In the matter of the German steamship *Drachenfels*, 3 C. W. N. 67 (1898), it was held that though no written statements had yet been filed an application for consolidation of actions, and for a commission to examine *de bene esse*, was not premature.

exempted from attending Court, as purdanashin women under sect. 132, *post*,(1) or other persons of rank exempted under sect. 133, or persons living without the jurisdiction who are not bound to attend under O. XVI. r. 19; (iii.) civil and military officers who cannot, in the opinion of the Judge, attend Court without detriment to the public service (2) [r. 4, clause (*c*)]; and lastly, (iv.) persons who are from sickness or infirmity unable to attend Court (r. 1).

An application for a commission should not be made except on notice to the opposite party.(3) A commission should not issue for any cause not stated in these sections, the practice standing upon the statute.(4) Assuming, however, that the cause alleged is one mentioned, the Court has a discretion (5) to grant or refuse a commission, the question being in each instance whether a sufficient case has been made out, having regard to the disadvantage (6) which attends evidence taken on commission. This discretion, however, must, like any other, be judicially and not arbitrarily exercised.

A Court will not, unless there be an absolute exemption or for strong reason, issue a commission to examine a party to the suit; nor a servant of the party applying; (7) for such a witness may be brought by his master before the Court. If the proposed witness be a stranger, the Court may consider the importance of the matter to which he will testify, and may assume the possibility of his not being credible, and the importance of observation of demeanour; (8) the opportunity which has taken or may take place for his examination *de bene esse*,(9) and the like, and will consider not merely what the plaintiff's case requires, but what justice to the defendant as well as to the plaintiff requires.(10) In a large number of cases, where the witness is material, the commission goes as a matter of course. As regards delay in making the application, if a party applies late, but thinks it worth his while to incur the expense of taking out a process such as summons or

(1) Chamatkar Mohiney *v.* Mohes Chunder, 3 C. W. N. 750 (1892); Mohes Chunder *v.* Manick Lall, 3 C. W. N. 751 (1899); Provat Kumaree *v.* Opurbakissen, 3 C. W. N. 753 (1899), in which it was held, that if a purdanashin offends against the rules of her class that does not deprive her of her right to be examined under commission. Native ladies not exempted under s. 132 should be allowed to remain in their palkis in Court while giving evidence: Rukea Banu *v.* Roberts, 1 B. L. R. S. N., V. (1868); Kristomohun Mookerjee *v.* Adarmoney Dabee, 2 Hyde, 88 (1864); Nusrut Banoo *v.* Mahomed Sayem, 18 W. R. 230 (1872). As to examination at the witness's residence, see Zohurutoollah Chowdhry *v.* Asalooddeen Chowdhry, 15 W. R. 129 (1871).

(2) See Marshall *v.* Chiene, 2 Tayl. & Bell, 194 (1851) [application to examine Commander-in-Chief].

(3) Tarucknath Mookerjee *v.* Gouree Churn, 3 W. R. 147 (1865).

(4) See Gopal Chunder *v.* Kurnodhar Moochee, 7 W. R. 349 (1867) [as to prisoners, see now Prisoners' Testimony Act]; Marshall *v.* Chiene, 2 Tayl. & Bell, 194 (1851); *Re* Beenodeeny, 2 Hyde, 152 (1864) [infant of tender years].

(5) Burney *v.* Eyre, 1 Hyde, 68 (1862-63); Mowji *v.* Nemchand, 23 B. 626, 629 (1899); Nusrut Banoo *v.* Mahomed Sayem, 18 W. R. 230 (1872).

(6) Almost invariably of the opposite side, Amrith Nath *v.* Dhunput Singh, 20 W. R. 253, 255 (1873).

(7) Amrith Nath *v.* Dhunput Singh, 20 W. R. 253 (1873).

(8) Mowji *v.* Nemchand, 23 B. 626, 628 (1899); citing Berdan *v.* Greenwood, 20 Ch. D. 764.

(9) Ib.

(10) *Per* Cotton, L.J., in Berdan *v.* Greenwood, 20 Ch. D. 764 (1899); cited in Mowji *v.* Nemchand, *supra*.

a commission on the chance of deriving benefit from it, the Court should ordinarily not prevent his doing so, though it should take care to see that the party does not use the late issue of process as an excuse for delaying the final hearing of the case ; (1) and a commission has been allowed where the cause was on the peremptory board of the day, where the issuing of it was not calculated to prejudice the defendant or subject him to loss or inconvenience.(2) As to expenses and costs of issuing commission, see r. 15, *post*.

Court to examine witness pursuant to commission.

6. Every Court receiving a commission for the examination of any person shall examine him *or cause him to be examined* pursuant thereto.

Examination of witness.—The parties should appear before the Commissioner in person, or by agent or pleader (r. 18). It is the duty of the party obtaining a commission for the examination of witnesses to take all such steps as are necessary to secure their attendance before the Commissioner.(3) As to the latter's powers in this and other respects, see r. 17, *post*. If one party obtains a commission and the other joins in it, the latter is entitled to examine his own witnesses, but he may cross-examine his opponent's witnesses without joining.(4) In Calcutta the examination and cross-examination is by counsel and not by attorney, the examination of witnesses under a commission being of the same nature as an examination in open Court.(5) The examination may either be *vivâ voce* or by interrogatories.(6)

Return of commission with depositions of witnesses.

7. *Where a* commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court *from* which it *was* issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order ; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following *rule*) form part of the record of the suit.

Return.—The commission may be open,(7) but generally it is directed to be executed on or before a certain date, called the returnable date of the

(1) Huree Dass *v.* Meer Moazzum, 15 W. R. 447 (1871).

(2) Janssen *v.* Dundas, 1 Hyde, 269 (1864).

(3) Lekraj *v.* Palee Ram, 2 A. H. C. R. 210 (1870).

(4) Gregory *v.* Dooley Chand, 14 W. R., O. J. 17 (1868) ; a commission returned before a witness is fully cross-examined is inadmissible : Boisogomoff *v.* Nahapiet Jute Co., 5 C. W. N. ccxxx. (1901).

(5) Hoffman *v.* Framjee, Coryton, 7 (1864-5) ; Pran Krishna *v.* Biswanath, 8 B. L. R. App. 101 (1872).

(6) See Mowji *v.* Nemchand, 23 B. 626, 627 (1899) ; Tarucknath Mookerjee *v.* Gource Churn, 3 W. R. 147, 150 (1865).

(7) In Mackellar *v.* Wallace, Fulton, 16 (1842), no specific time was fixed, but six months was held not too long a time for a commission for the examination of witnesses in England to be outstanding

commission, though the time within which a commission must be executed may be enlarged on application from time to time. The evidence must be taken within the time allowed. Where a Commissioner took evidence after the last return day had expired it was held that the depositions were inadmissible.(1) The return should show on the face of it that the Commissioner had administered the oath to himself and the interpreter, if any.(2) Documents attached to the return of a commission and identified with the documents referred to in the evidence may be read at the hearing of the suit in which the commission issued, unless they have been objected to on being tendered in evidence before the Commissioner. Objection to the inadmissibility of such documents should be taken before the Commissioner.(3)

[90.] **When depositions may be read in evidence.**

8. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(*a*) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, *or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service*, or

(*b*) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (*a*), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Reading of commission.—The last rule provides that the commission shall form part of the record. On this ground it has been considered that before it is tendered in evidence by the party at whose instance the commission issued, the other party is entitled to refer to it without putting it in evidence.(4) This is the practice of the Courts in the Mofussil.(5) But according to the practice prevailing on the Original Side of the Calcutta High Court, the party obtaining the commission tenders it in evidence. If he does not, the opposite party may do so. Until evidence taken on commission is tendered, and has been admitted as evidence taken on commission is tendered, and has been admitted as evidence

(1) Gregory *v.* Dooley Chand, 14 W. R., O. J. 17 (1868).

(2) Pran Krishna *v.* Biswanath, 8 B. L. R. App. 101 (1872).

(3) Struthers *v.* Wheeler, 6 C. L. R. 109 (1880); see Authors' Evidence Act, 6th edition, notes to ss. 5, 33.

(4) Nistarini Dassee *v.* Nundo Lall, 3 C. W. N. ccxxxix. (1899); foll. Dwarka Nath *v.* Gunga Dayi, 8 B. L. R. App. 102 (1872).

(5) Dhaniram *v.* Murli Lal, 13 C. W. N. 525; 36 C. 567 (1909); Man Gobinda *v.* Shashindra, 35 C. 28 (1907).

in the suit, neither party has the right to make use of it.(1) *Semble*, that the mere fact that a deposition was not read and signed in the usual course would not by itself prevent the reception of the evidence.(2) Where a commission was returned after the witness had been in part, but before he had been fully, cross-examined it was held to be inadmissible.(3) Unless there is consent the Court may refuse to hear evidence taken by commission, unless the circumstances mentioned in clause (*a*) are shown to exist at the time of trial.(4) But the Court may dispense with proof under clause (*b*). And where it appears from the deposition itself that the person was examined outside the jurisdiction, that is sufficient.(5) Clause (*a*) supplies with reference to r. 4 an omission in the former Code.

Commissions for local investigations.

Commissions to make local investigations.

9. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, *where* the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

"**Requisite or proper.**"—The Judge should not delegate to a Commissioner functions which he can and should discharge himself. He cannot depute a Commissioner to inquire into that which can with equal convenience be proved in Court.(6) He cannot direct him to take evidence which the Court can take, or decide points which the Court can and should decide, such as the trial of the most important issues of fact in a case; (7) deputing, in effect, the decision of the case to the Ameen; (8) as where an Ameen was deputed in a case of disputed boundary, the issue turning chiefly on possession before the date of suit.(9)

(1) Kusum Kumari *v.* Satya Ranjan, 30 C. 999, 1003 (1903); Hemanta Kumari *v.* Banku Behari Sikdar, 9 C. W. N. 794 (1905).

(2) Boisogomoff *v.* Nahapiet Jute Co., 5 C. W. N. ccxxx. (1901).

(3) Ib.; see generally Authors' Evidence Act, notes to s. 33.

(4) Rajah Prithee *v.* Hara Dhun, 22 W. R. 331 (1874).

(5) Girdhar Nagjishet *v.* Ganpat Moroba, 11 B. H. C. R. 129, 131, 132 (1874).

(6) Shushee Ram *v.* Nobo Kant, 14 W. R. 190 (1870); Ram Dhun *v.* Ram Monee, 21 W. R. 280 (1874).

(7) Buroda Churn *v.* Ajoodhya Ram, 23 W. R. 286 (1875); Shitawa *v.* Bhimappa, 24 B. 43, 45 (1899). In Kristo Chunder *v.* Brojo Mohun, 22 W. R. 183 (1874), an objection that the Court itself should have decided the question was overruled.

(8) Iswar Chandra *v.* Jugat Kishor, 4 B. L. R. App. 33 (1870); Sangili *v.* Mookan, 16 M. 350, 351 (1892).

(9) Kalee Doss *v.* Khettro Pal, 17 W. R. 472 (1872).

It is of the utmost importance that witnesses should be examined in open Court, and by the Court itself. Ameens or other Commissioners must not be made the real Judges of important questions of law and fact, which it is the duty of the Court itself to determine. Local investigations ought to be restricted to points which really require some local *inspection* for their elucidation. Witnesses therefore cannot be examined out of Court, except with reference to points for the determination of which local inspection is required.(1) An Ameen should be appointed to hold a local investigation only when it is necessary to inspect the land, to make maps, to obtain information with regard to physical features, to identify land in maps with parcels which are the subject of suit, to identify maps with one another with the aid of objects to be found on the land. For these and similar purposes an Ameen may examine witnesses when the evidence which they have to give is of such a nature that it ought to be taken by him on the spot. Where, however, any fact can be proved by evidence taken otherwise than on the spot it should be taken in Court.(2) In short, the local investigation referred to in this rule presupposes the existence on the record of independent evidence which requires to be elucidated, and that rule does not authorize a Court to delegate to a Commissioner the trial of any material issue which it is bound to try.(3) The last Code after the words "*nett profits*," ran "*and the same cannot be conveniently conducted by the Judge in person.*" These words, it was held, showed that when a Judge could conveniently conduct a local investigation in person he should do so. The information so derived by him was a matter which, of course, he could take into his consideration in deciding the case.(4) But it was considered desirable that he should put the result on record so that the parties might see what he considered established.(5) Though a Judge might view a spot he could not, in a case where the issue was whether two persons were man and wife, go himself to the village where the parties lived in order that he might make inquiries amongst their neighbours. He should, in such case, summon witnesses and examine them in Court.(6) These words have now been omitted. And it has been recently held that the omission of these words indicates that a Judge should only make a local investigation where it is necessary for the purpose of understanding the evidence, and should not do so for the purpose of gathering information to be used for his judgment, for if additional information is required his proper course is to appoint a Commissioner whose report can be used in evidence and who can be examined as a witness.(7)

"**May issue.**"—The Judge has a discretion which must be judicially exercised to grant or refuse a local investigation. A local investigation is not imperative in every case, and a Judge is not bound to issue a commission of his

(1) Shadhoo Singh *v.* Ramanoograha, 9 W. R. 83 (1868); Bindabun Chunder *v.* Nobin Chunder, 17 W. R. 282 (1872).

(2) Bindabun Chunder *v.* Nobin Chunder, *supra*; Iswar Chandra *v.* Jugat Kishor, 4 B. L. R. App. 33 (1870); the local investigation, however, does not refer to questions of title to and possession of the lands themselves: Sangili *v.* Mookan, 16 M. 350, 352 (1892).

(3) Sangili *v.* Mookan, 16 M. 350 (1892); Ram Narain *v.* Odindra Nath, 17 C. W. N. 369, 374 (1911); 15 C. L. J. 17 23.

(4) Dwarka Nath *v.* Prosunno Kumar, 1 C. W. N. 682 (1897); Joy Coomar *v.* Bundhoo Lall, 9 C. 363 (1882).

(5) Joy Coomar *v.* Bundhoo Lall, *supra*.

(6) Jhubhoo Sahoo *v.* Mussamat Jusoda, 17 W. R. 230 (1872).

(7) Raikishori *v.* Kumudini, 15 C. L. J. 138 (1910).

own motion.(1) Though the propriety of the order may, under sect. 105, be questioned in regular appeal, it cannot be made the subject of direct or special appeal.(2) When a Judge has ordered a fresh local investigation, his successor should not interfere with the order, but carry it out before disposing of the case; (3) nor where one inquiry has been carried on, should a second issue for the same purpose without setting aside the first.(4) If the Court considers it necessary to order an inquiry, such an inquiry cannot be left to be made after decree.(5)

"**Such person.**"—Subject to the Proviso, any person whom the Court thinks fit may be appointed. A Munsif may be appointed Commissioner.(6) The section itself, however, does not now require that an officer of Government should be appointed.(7) But a Judge should not order a Subordinate Judge, whose judgment is before him on appeal, to go and inspect the locality and make a report. A Judge from whose decision an appeal is pending, is the most unsuitable person to make such investigation.(8)

"**To make such investigation.**"—A Commissioner is bound not to go beyond the points referred to him for inquiry.(9) Where a Commissioner was only appointed to draw a map, and no power was given to him to take evidence, statements of persons recorded by him were held not to be evidence, and ought not to have been looked at by the Judge.(10) Notice should be given to the parties of the time when the local investigation will be held.(11)

Procedure of Commissioner.

10. (*1*) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed *by him*, to the Court.

Report and depositions to be evidence in suit.

(*2*) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit, may examine the Commission personally in open Court touching any of the matters referred to him or mentioned in his report, *or as to his report*, or as to the manner in which he has made the investigation.

Commissioner may be examined in person.

(1) McDonald *v.* Munar Roy, 3 W. R., Act X., 153 (1865).

(2) Graham *v.* Lopez, 1 W. R. 141 (1864); Bykunt Nath *v.* Pearee Monee, ib., 196 (1864); Poorno Persad *v.* Chundernath, ib., 249 (1864); Rash Beharee *v.* Saheb Roy, 12 W. R. 76 (1869).

(3) Shurrioollah *v.* Bawl Mundal, 1 W. R. 102 (1864).

(4) Nowab Syud *v.* Surussutty Debia, 23 W. R. 93 (1874).

(5) Jugodumba Debia *v.* Rohinee Debia, 23 W. R. 422 (1875).

(6) Churamun Singh *v.* Anoop Singh, 11 C. L. R. 533, 537 (1882).

(7) Doorga Dass *v.* Gooroo Churn, 6 W. R., Act X., 81 (1866).

(8) Roy Sultan *v.* Mussumat Laloo, 17 W. R. 300 (1872).

(9) Ram Dhun *v.* Ram Monee, 21 W. R. 280 (1874).

(10) Shitawa *v.* Bhimappa, 24 B. 43 (1899).

(11) Kristo Monee *v.* Eglinton, 12 W. R. 139 (1869); Jhubhoo Sahoo *v.* Mussamat Jusoda, 17 W. R. 230 (1872).

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Procedure.—A day should be fixed for the return of the report, and then for hearing objections to it.(1) The report and evidence are filed, and become part of the record (*vide post*, "Shall be evidence"). The evidence without the report is not evidence in the suit. It may be, however, that oral testimony may not be necessary, as where a Commissioner is simply deputed to make a measurement, and it is not necessary that the report must have depositions attached to it to make it legal evidence,(2) though, if there be depositions, these cannot go in without the report. The latter cannot be rejected because the Ameen's remuneration has not been paid.(3) The Court considers the report and evidence taken, subject, of course, to any objections that may be taken to them by either party along with the other evidence on the record,(4) and may examine the Commissioner and take further evidence, as to which, see *post*. While the report may be looked to to explain a map,(5) the Court should not question the correctness of a map attached to a report which is not impugned by either party.(6)

"Shall be evidence."—The report, and evidence if the investigation is completed,(7) is evidence upon whatever materials it is based, though, of course, it will have more or less weight according as the basis of it is more or less reasonable and valid,(8) and although the Court may have exercised its discretion unwisely and wrongly in ordering an inquiry or in giving the Commissioner too extensive powers,(9) but not if the proceeding is without jurisdiction.(10) The Court is not bound by the report, but may inquire further into the matter if there is any necessity for so doing. The report is for the assistance of the Court, and is part only of the evidence, and other evidence may be received to explain it or show that it was wrong.(11) The Court is at liberty to adopt a portion of the report, and reject the rest.(12) The report is sufficient evidence to support a decree if it is believed by the Court and considered sufficient without further

(1) Ram Narain *v.* Goburdhun Lall, 21 W. R. 2 (1873).

(2) Chunder Monee *v.* Nilumbur Mustofee, 7 W. R. 43 (1867).

(3) Jagat Kishore *v.* Dina Nath, 17 C. 281 (1889).

(4) Ib.

(5) Mahomed Anwar *v.* Roy Chunder, 17 W. R. 521 (1872).

(6) Brijonath Chowdhry *v.* Lall Meah, 14 W. R. 391 (1870).

(7) Kalee Dass *v.* Deb Narain, 13 W. R. 412 (1870).

(8) Chunder Coomar *v.* Joy Chunder, 19 W. R. 213 (1873); see Sheo Narain *v.* Boodh Singh, 11 W. R. 423 (1869); Jannobee Chowdhrain *v.* Collector of Mymensingh, 8 W. R. 287 (1867); Dole Gobind *v.* Chamoo Sing, 10 W. R. 312 (1868); Khajah Abdool *v.* Bhuttoo Sheikh, 22 W. R. 350 (1874).

(9) Umbica Churn *v.* Goluck Chunder, 9 W. R. 596 (1868); Rajnath Pandah *v.* Doorga Lall, 12 W. R. 136 (1869); cf. Shah Nuthoo *v.* Ghunessam Singh, 8 W. R. 267 (1867).

(10) Nidhoo Sircar *v.* Phillippe, 10 W. R. 153 (1868).

(11) Azim Sarung *v.* Alimooddeen, 17 W. R. 270 (1872); as to further evidence, *vide post*.

(12) Poreshnauth Mookerjee *v.* Martin, 1 W. R. 93 (1864).

evidence to corroborate it.(1) The report is evidence in the suit in which it is made, but in that suit only.(2)

Examination of Commissioner.—The Commissioner may be examined in person. This provision, it has been said, was probably considered necessary because an Ameen is something like an arbitrator, and it may have been thought that he could not be examined as to his proceedings.(3) In a recent case it was said that the object of this provision was to protect the Commissioner (who is a *quasi* judicial officer) on grounds of public policy from vexatious examination by either party, and it was held that a Court cannot arbitrarily withhold permission to examine a Commissioner for accounts asked by a party.(4) Charges against the Commissioner ought to be fully inquired into.(5) This and the last rule do not contemplate the tender of further evidence after the report, except the examination of the Commissioner himself, but they do not forbid it. They are consistent with either course, and the point must be decided on general principles, according to the facts of each case.(6) Sub-rule (3) as to further inquiry is new.

Appellate Court.—The report must be taken into consideration by the Appellate Court, even though it may be of opinion that local investigation should not have been made.(7) If the Court finds the report deficient in any point it can send for the Commissioner and examine him.(8) An Appellate Court ought not to interfere with the result of a local inquiry except upon clearly defined and sufficient grounds, which must be expressed in its judgment.(9) On the other hand, the report should not be made the basis of a judgment to the total disregard of the other evidence on the record.(10)

Commissions to examine accounts.

Commission to examine or adjust accounts.

11. In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

(1) Seetaram Mookerjee *v.* Ramnarain Mookerjee, 6 W. R. 51 (1866). A Munsif's report of a local investigation when not shown to be substantially erroneous in its data or reasoning should convey the greatest weight as evidence of the facts it sets forth: Wise *v.* Ameeroonnissa Chatoon, 3 W. R. 219 (1865).

(2) Denobandhu Ghose *v.* Nistarini Dasi, 12 C. L. R. 50 (1882).

(3) Azim Sarung *v.* Alimooddeen, 17 W. R. 270 (1872); *sed qu.* as to Amin's position.

(4) Sitaram *v.* Ram Prosad Ram, 19 C. L. J. 87 (1913).

(5) Abdool Kurreem *v.* Campbell, 8 W. R. 172 (1867).

(6) Grish Chunder *v.* Soshi Shikharoshwar, 27 C. 951, 966 (1900); s. c., 4 C. W. N. 631.

(7) Rajnath Pandah *v.* Doorga Lall, 12 W. R. 136 (1869).

(8) Sheo Dyal *v.* Hodgkinson, 24 W. R. 342 (1875).

(9) Ranee Sarut *v.* Baboo Prosunno, 15 W. R. (P. C.) 15 (1870); s. c., 13 Moo. I. A. 607; cf. Protab Chunder *v.* Ranee Surnomoyee, 19 W. R. 361 (P. C.) (1873); Nilmadhub *v.* Raj Kishore, 18 C. L. J. 220 (1913).

(10) Bustee Sahoo *v.* Jeo Narain, 24 W. R. 338 (1875).

12. (*1*) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Court to give Commissioner necessary instructions.

(*2*) The proceedings *and report* (*if any*) of the Commissioner shall be evidence in the suit, *but where* the Court has reason to be dissatisfied with them, *it may* direct such further inquiry as *it shall think fit*.

Proceedings and report to be evidence. Court may **direct further inquiry.**

Accounts.—These and the next rule correspond with sects. 180 and 181 of the Code of 1859, which in their essentials are the same as the present law.(1) A Court may issue a commission under r. 11 without the consent of parties ;(2) but where the reference had been made by consent, it was, under the circumstances of the case last cited, regarded as made on an agreement that the Commissioner should decide the questions of fact referred to him reserving questions of law to be disposed of by the Court.(3) As to the proceedings on the commission, *vide post*. Presidency High Courts on their Original Side have a procedure and officers of their own in and for the taking of accounts, and it has in consequence been held that the provisions of the Code relating to the adding of parties should be adapted *cy près* to the requirements of the Court in its ordinary civil jurisdiction.(4) A reference to the Registrar of the High Court has, however, been treated as having been made under the former section.(5) The rule does not require that the Commissioner should be sworn or affirmed.(6) A direction to a Commissioner to take accounts under these rules is not a preliminary decree.(7)

"Necessary."—It was held where the plaintiff filed his books in Court and they were not impugned, that a commission should not have issued, but the plaintiff should have made up the account himself.(8) Where there is objection and the items of objection are few in number, they may be disposed of in open Court. If, however, they are numerous, and in order to dispose of

(1) Chetty *v.* Mahomed Essa, 5 C. W. N. 692, at p. 706 (1901).

(2) Watson *v.* Aga Mohedee, 1 I. A. 346, at p. 362 (1874).

(3) Ib.

(4) Vakatchand *v.* Advocate-General, 8 B. H. C. R. 96, 100 (1871), where it was held that when a decree had been passed referring the matter to the Commissioner's office to have accounts taken and property sold, the Court had still power to add a party to the suit.

(5) Chetty *v.* Mahomed Essa, 5 C. W. N. 692, at pp. 699, 705 (1901). As to the nature of the certificate made by the Commissioner in the Bombay High Court, see Rustomji *v.* Kessowji, 3 B. 161 (1879); and as to extension of time for making of motion to vary report, see Hurmusji *v.* Bomonji, 9 B. 250 (1885).

(6) Rai Narsingh *v.* Rai Narain, 3 A. H. C. R. 217, 232 (1871).

(7) Narayan Balkrishna *v.* Gopal Jiv Ghadi, 38 B. 392 (1914); and see Kaluram Pirchand *v.* Gangaram Sakharam, 38 B. 331 (1913).

(8) Chand Ram *v.* Brojo Gobind, 19 W. R. 14 (1873).

them it is necessary to enter upon complicated inquiries, the proper course to pursue is to appoint a Commissioner. This course may properly be pursued in the first instance if the account required is not of such a nature as to render it probable that there will be no difficulty in dealing with the disputed items in Court.(1)

Examination.—The Court furnishes the Commissioner with such proceedings and instructions as are necessary (r. 12). The Commissioner may examine the parties and any witnesses (2) which may be produced, and call for and examine documents relevant to the inquiry (r. 16).

Proceedings.—This includes both the evidence taken (3) and the Commissioner's report or opinion.(4) A distinction is drawn in the second paragraph between the proceedings which may or may not be accompanied by a report of the Commissioner's opinion and the report. The section is now more clearly worded.

"**Shall be evidence.**"—The Commissioner's proceedings are an inquiry for the information of the Court, not a trial. His position is different from that of a Judge trying a cause. The proceedings, which include his report when he is required to report, are under this section to be treated as merely evidence in the cause. If, therefore, he finds a fact, his finding is only evidence of that fact, but not a decision upon it. The report cannot be regarded as a judgment of a Court, for, standing by itself, it is inoperative. It requires affirmance by an order of a Court to make it operative.(5) It is only evidence if the Court is not dissatisfied with it. The section does not restrict the grounds of dissatisfaction.(6) The Court must be satisfied with the proceedings before it adopts them. The Court will no doubt in all cases give due weight to the opinion of the Commissioner; and the duty cast upon it of satisfying itself as to the proceedings is in practice modified to this extent, that it is usual to confine the examination to those parts of them to which exception has been taken by the parties; but the duty to that extent at all events remains, and can only be discharged by such an examination as is sufficient for the purpose of satisfying the Court that the investigation has been conducted by the Commissioner fairly and in accordance with law.(7)

Powers and duty of Appeal Court.—The fact that the judgment of the Court of first instance is an affirmance of the report of a Commissioner, does not affect the powers of a Court of Appeal, though when the case comes before the latter the situation is, of course, somewhat different. What has

(1) Degambar Mozumdar *v.* Kallynath Roy, 7 C. 654, 657 (1881); Annoda Persad *v.* Dwarkanath Gangopadhya, 6 C. 754 (1881), in which cases the procedure in taking accounts is laid down.

(2) Chand Ram *v.* Brojo Gobind, 19 W. R. 14 (1873), on this point is not law.

(3) As regards the case of Chand Ram *v.* Brojo Gobind, 19 W. R. 14 (1873), see last rule. In Rai Nursingh *v.* Rai Narain, 3 A. H. C. R. 217, at p. 233, it is pointed out that the depositions are to be returned with the report.

(4) Ib.; Chetty *v.* Mahomed Essa, 5 C. W. N. 692, at p. 707 (1901).

(5) Chetty *v.* Mahomed Essa, 5 C. W. N. 692, at pp. 701, 705, 707 (1901).

(6) Ahmed Nanabhai *v.* Khasaji Karimbhai, 6 B. H. C. R., A. C. J. 149, 150 (1869).

(7) Chetty *v.* Mahomed Essa, 5 C. W. N. 692, at pp. 706, 707 (1901).

then to be dealt with is the decree of the Court below, and when this gives effect to the findings of the Commissioner, there is the added weight of the Judge's decision. But the duty of the Appellate Court is commensurate with that of the Court of first instance, and if it is dissatisfied with the proceedings in whole or in part, it is incumbent on it to do that which the Lower Court ought to have done, namely, to set them aside either wholly or partially, and send the matter back for such further inquiry as may be necessary.(1) It is open to the Court of Appeal to deal with the report on matters of fact, and its powers are not limited any more than are those of the first Court to questions of principle when examining such report.(2) In the first of the cases last cited, Maclean, C.J., was of opinion that if there had been a fair investigation of the matter by the Registrar or Commissioner, and his finding had been confirmed, the Appeal Court ought not to interfere except on the strong ground of manifest error or manifest abuse.(3)

Commissions to make partitions.

Commission to make partition of immoveable property.

13. *Where a preliminary decree for partition has been passed,* the Court may, *in any case not provided for by section 54,* issue a commission to such person as it thinks fit to make *the* partition *or separation* according to *the* rights *as declared in such decree.*

Procedure of Commissioner.

14. (*1*) The Commissioner shall, *after such inquiry as may be necessary,* divide the property into as many shares as may be directed by the order under which the commission *was* issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(*2*) The Commissioner shall then prepare and sign a report or *the Commissioners* (*where the commission was issued to more than one person and* they cannot agree) *shall prepare and sign* separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the

(1) Chetty *v.* Mahomed Essa, 5 C. W. N. 692, at pp. 701, 706, 707 (1901).

(2) Chetty *v.* Mahomed Essa, 5 C. W. N. 692, at pp. 701, 706, 707 (1901); Ahmed Nanabhai *v.* Khasaji Karimbhai, 6 B. H. C. R. 149, A. C. J. (1869); Kankatala *v.* Poleshetti, 6 M. H. C. R. 36 (1870) [diss. from Sarapa *v.* Malai, 1 M. H. C. R. 1 (1862); Venkata *v.* Venkataramaiya, ib. 418 (1863)]. In the second and third cases it was held that the Appellate Court would examine the accounts even if no exception were taken to them in the first Court; but see Venkata *v.* Venkataramaiya, 1 M. H. C. R. 418 (1863); Kantee Chunder *v.* Gopee Madhub, 11 W. R. 3 (1869); and Seth Gujmull *v.* Mussumat Chahee, 2 I. A. 34 (1874), in which the Privy Council refused to entertain objections to an account which had not been brought to the notice of the first Court or made a ground of appeal in India.

(3) Chetty *v.* Mahomed Essa, 5 C. W. N. 692 (1901).

commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall *confirm, vary or set aside the same.*

(*3*) *Where the Court confirms or varies the report or reports it shall* pass a decree in accordance *with the same as confirmed or varied; but where the Court sets aside the report or reports it shall* either issue a new commission *or make such other order as it shall think fit.*

Revenue paying land.—The jurisdiction of the Civil Court in matters of partition of revenue paying land is restricted only on questions affecting the right of Government to assess and collect in its own way the public revenue.(1) See notes to sect. 54.

"**Commissioner.**"—In the last Code the plural was used. It was held by Pontifex, J., that the Court was not bound to appoint more than one Commissioner; but Field, J., doubted whether, having regard to the language of the third clause of the former section, this was so.(2) And a Full Bench of the Allahabad High Court held that the Court could not legally *issue* a commission to one Commissioner only.(3) The Court may now issue a Commission to one or more persons. Commissioners have been looked on as officers of Court acting by a majority,(4) though it is no longer so as regards Commissioners appointed to make a partition. Commissioners have no lien on the return for their fees, and cannot refuse to give it up until they are paid.(5) When a Commissioner is unable to execute the commission, the plaintiff may apply for the issue of a fresh commission and the Court should grant such an application.(6)

Report.—A party on the original side of the High Court desiring to move to vary a report made by the Commissioner, must not only file his exceptions to such report, but must also make his motion to vary it, within twenty days after the filing of the report; or, if the Judge or the Court have allowed him further time for such application, then within the further time so allowed.(7)

"**Metes and bounds.**"—These are merely the measurements and the limits of the shares which may be mentioned in the Commissioner's report. "*Bounds*" there do not mean a wall to be built. A Court has no power under this section to order its Ameen to cause a wall to be built separating portions of property of which partition has been decreed.(8)

(1) Jogodishury Debea *v.* Kailash Chundra, 24 C. 725 (1897); Ruttun Monee *v.* Brojo Mohun, 22 W. R. 11 (1874); Ajoodhia Lall *v.* Gumani Lall, 2 C. L. R. 134 (1878); Chundernath Nundi *v.* Hur Narain, 7 C. 153 (1881); Zahrun *v.* Gouri Sunkar, 15 C. 198 (1887); Debi Singh *v.* Sheo Lall, 16 C. 203 (1889); Hemanta Kumari *v.* Jagadindra Nath, 18 C. L. J. 526 (1913).

(2) Gyan Chunder *v.* Durga Churn, 7 C. 318 (1881).

(3) Mulchand *v.* Muhammad Ali Khan, 29 A. 235 (1906).

(4) Rajendra Matilal *v.* Ramnarayan Matilal, 3 B. L. R. App. 3 (1869).

(5) Rajmoheeny *v.* Muddoosoodun, Bourke, 24 (1865).

(6) Masum-un-nissa *v.* Latifan, 32 A. 319 (1910).

(7) Narrottam *v.* Hari Chand, 13 B. 368 (1889).

(8) Sohan Lal *v.* Hardeo Sahai, 19 A. 194 (1896).

Decree.—In suits for partition of immoveable property not paying revenue to Government, the Court, if it has the information before it necessary to enable it to make a decree not only declaring the rights of the parties but actually fixing the particular areas, or rooms, or parts of the houses, as the case may be, of which possession is to be given to the parties respectively in partition, may make such a decree without employing the procedure of these rules, and the decree so made would be enforceable in execution, and possession of the respective areas, rooms, etc., could be given to the parties in execution of the decree.(1) But where, as most generally happens, a Court has not the information necessary to the making of such a decree, it must make a preliminary or interlocutory decree of a declaratory nature, and then adopt the procedure of these rules by appointing a Commissioner, or Commissioners, whose duty will be, not to give possession for at that period there would be no decree capable of execution by possession but who should allot such shares to the parties, award the sums to be paid in case sums are to be paid, and then prepare and sign a report appointing the shares and distinguishing such shares by metes and bounds, if ordered so to do.(2) The Commissioner, or Commissioners, must then submit that report to the Court, and the Court, after giving the parties an opportunity of objecting (3) to the report, might under the last Code quash the report and proceedings of the Commissioner or Commissioners, and issue a new commission, or (where the Commissioners agreed) pass a decree in accordance with the report. The decree in accordance with such report would be a decree allotting the specific shares, areas, rooms, etc., distinguishing them, where possible, by metes and bounds or other adequate description, and decreeing to the respective parties possession of those portions of the property allotted to them. In the latter case that would be the final decree. It is true that the interlocutory decree would be appealable,(4) but for all that it is not the final decree or the decree which is capable of execution, except possibly for such costs as it might award to be paid. It is merely of the character of an interlocutory and declaratory decree.(5) It is only after a decree has been made by the Court expressing its approval of the partition scheme that there is any decree capable of execution as a partition-decree.(6) In a case which falls under the second of the above mentioned categories, the appointment of a Commissioner, whether he be the Amin of the Court or some one else, is not the issuing of a process in execution of a decree, nor are any proceedings of such Commissioner the carrying out of any process in execution. The time has not yet arrived for execution of the decree.(7) Proceedings under this rule for the purpose of effecting partition are proceedings in the suit itself, and not proceedings in execution of a decree.(8

(1) Krishnamachariar *v.* Kuppummal, 31 M. 540 (1908).

(2) Shah Muhammad *v.* Hanwant Singh, 20 A. 311, 312-314 (1898).

(3) Shah Muhammad *v.* Hanwant Singh, *supra*; see as to acquiescence barring objection, Gyan Chunder *v.* Durga Churn, 7 C. 318 (1881).

(4) Shah Muhammad *v.* Hanwant Singh, *supra*; see Bhola Nath *v.* Sonamoni Dasi, 12 C. 273 (1885); Bepin Behari *v.* Lal Mohun, 12 C. 209 (1885); Dulhin Golab *v.* Radha Dulari, 19 C. 463 (1892); Boloram Dey *v.* Ram Chundra, 23 C. 279 (1895).

(5) Shah Muhammad *v.* Hanwant Singh *supra*.

(6) Abdus Samad *v.* Abdur Razzaq, 2 I. A. 409, 411 (1899).

(7) Shah Muhammad *v.* Hanwant Singh, 2 A. 311, 312-314 (1898).

(8) Dwarkanath Misser *v.* Barinda Nath Misser, 22 C. 425 (1895); foll. in last case.

The amendments in clause (2) and the addition of clause (3) replace the following words in the former section : " either quash the same and issue a new commission *or* (*where the Commissioners agree in their report*) pass a *decree* in accordance therewith." The provisions are the same with this difference, that the Court has not now to pass a decree where the Commissioners agree, but has in *every* case power to confirm, vary, or set aside.(1) The action of an Amin appointed under this rule in a partition-suit to demarcate the shares assigned to the respective parties to the suit is not the executing of a process for enforcing the judgment within the meaning of article 164 of the second schedule to the Indian Limitation Act, 1877.(2) An order passed in a suit for partition, subsequently to the preliminary decree appointing a commission to make the partition, is not an order in execution, and therefore is not appealable under sect. 47. It is an interlocutory order pending the suit which has not been finally decided ; and the appellant may take objection to it in an appeal against the final decree.(3) Where in suits for partition, possession is sought of a definite share of a property consisting of a number of houses, the principle in such cases is, that if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made ; but where partition cannot be made without destroying the intrinsic value of the property, then a money-compensation should be given.(4) The decree must be stamped.(5)

Appeal.—An application for the appointment of a Commissioner was held not to be a matter coming within the scope of sect. 244 (now 47), and therefore no appeal lay from an order made on such application.(6)

General provisions.

Expenses of commission to be paid into Court.

15. Before issuing any commission under this *Order*, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Costs.—Costs of a commission to take evidence was generally made costs in the cause ; (7) and this has been done where a commission issued to examine a purdanashin at her own request.(8) A Commissioner has no lien on a return of partition for his fees, and cannot refuse to give it up till they are paid.(9)

(1) Cf. Janki Prasad *v.* Gauri Sahai, 28 A. 75 (1905), where it was held that the Court might accept or reject the report but could not modify it.

(2) Shah Muhammad *v.* Hanwant Singh, 20 A. 311 (1898).

(3) Jogodishury Debea *v.* Kailash Chundra Lahiry, 24 C. 725 (1897).

(4) Ashanullah *v.* Kali Kinkur Kur, 10 C. 675 (1884).

(5) Balaram *v.* Ramkrishna, 29 B. 366 (1905).

(6) Jatla Mallayya *v.* Madepalli, 17 M. L. J. 144 (1906).

(7) Gahan *v.* Owen, Coryt. 11 (1864–65).

(8) Monendrobhoosun Biswas *v.* Soshee-bhoosun Biswas, 5 C. 866 (1880).

(9) Rajmoheeny Dabee *v.* Muddoosoodun Dey, Bourke, 24 (1865).

While it is competent to a Court to require that a sum should be deposited, the omission to exercise this power does not debar a Commissioner from recovering his remuneration from the party at whose instance he was engaged.(1) It has been held by the Madras High Court (2) that the Code does not authorize the dismissal of a suit on refusal or failure of a party to deposit the amount ordered under this section. When after the issue of a commission it is found that the work is in excess of the amount paid in for the costs of the commission, and that the party at whose instance the commission was issued is not willing to pay, the only way in which the additional costs can be realized is by making the amount costs of the suit, and entering the same in the decree. An order for depositing additional costs when not entered in the decree cannot be enforced.(3)

Powers of Commissioners.

16. Any Commissioner appointed under this *Order* may, unless otherwise directed by the order of appointment,—

(*a*) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(*b*) call for and examine documents and other things relevant to the subject of inquiry;

(*c*) at any reasonable time enter upon or into any land or building mentioned in the order.

Powers.—A Commissioner has wide powers and discretion to inquire as he may into the matters referred to him for investigation.(4) He is entitled to take evidence in the matter referred to him.(5) Where instructions are given in the presence of both parties, and no objection is made by either then and there, they have no ground of complaint after the Commissioner has carried out his instructions, if the Court acts upon his report.(6) He cannot, however, go beyond the terms of the order appointing him.(7)

Attendance *and* examination of witnesses before Commissioner.

17. (*1*) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall

(1) Gopalaratnamayyar *v.* Bupala Narasimma, 4 M. 399 (1882); as to nature of remuneration, see Ragava Chariar *v.* Vedanta Chariar, 3 M. 259 (1881).

(2) Ragava Chariar *v.* Vedanta Chariar, 3 M. 259 (1881).

(3) Tadhin Proshad Singh *v.* Sardar Coomar Narayan Singh, 10 C. W. N. 234 (1905).

(4) Mohun Lall *v.* Unnopoorna Dossee, 9 W. R. 566, 568 (1868); as to calling for wills, see Unnopoonah Dabee *v.* Ranee Kolochomoney, Fulton, 83 (1839).

(5) Tincouri Debi *v.* Suttya Doyal Bannerji 6 C. L. J. 105 (1889) [duty of Commissioner when examining accounts].

(6) Bissessur Roy *v.* Kanchun Roy, 11 W. R. 155 (1869).

(7) Ram Dhun *v.* Ram Monee, 21 W. R. 280 (1874); Shibo Soondaree *v.* Ram Chunder 17 W. R. 469 (1872); Bustee Sahoo *v.* Jeo Narain, 24 W. R. 338 (1875); Bijoy Gobind *v.* Kalee Prosunno, 16 W. R. 294 (1871) Doogar Churn *v.* Neem Chand, 24 W. R. 20 (1875).

apply to persons required to give evidence or to produce documents under this *Order* whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, *and* for the purposes of this *rule* the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

Powers of Commissioner.—A Commissioner was under the last Code vested with the powers of a Civil Court to summon witnesses and enforce their attendance under the provisions of the Code. But a private Commissioner, without the machinery of a Court, might find practical difficulty in enforcing the order. In a case in which a private Commissioner experienced difficulty in enforcing the attendance of witnesses before him, the Calcutta High Court directed the return of the commission, and sent it under sect. 386 (now r. 4) to the Civil Court, within whose jurisdiction the witnesses resided.(1) It has, therefore, been enacted that, as is already the practice in many places, a private commissioner may cause his processes to be executed through the Court having local jurisdiction where the witnesses reside. It has been held in Bombay, on the Original Side, that an attachment will issue to compel a party to obey an order made by a Commissioner upon the certificate of the Commissioner that such order has been made and disobeyed without, in the first instance, making such order a rule of Court.(2)

18. *(1) Where* a commission is issued under this *Order*, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

Parties to appear before Commissioner.

(2) Where all or any of the parties do not so appear the Commissioner may proceed *in their absence.*

Appearance of parties before Commissioner.—Act VIII. of 1859, sect. 181. A party, refusing to appear before an Ameen at the time he holds his local investigation, is not at liberty afterwards to take any objection to his report.(3) In the case of Eshan Chunder *v.* Soorjo Lall,(4) it was held that where a plaintiff fails to appear before a Commissioner, and the defendant appears, the plaintiff is liable to have his suit dismissed with costs. Before proceeding under clause (2) due notice of the time and place fixed for proceeding should be given.

(1) Mahomed Ali *v.* Wazid Ali, 23 C. 404 (1896).

(2) Dhurandhardas *v.* Bhau Govind, 10 B. H. C. R. 4 (1873).

(3) Bamun Doss *v.* Brojo Kishore, 6 W. R. 130 (1866).

(4) Marsh. 139 (1864).

ORDER XXVII.

Suits by or against the Government or Public Officers in their official capacity.

1. *In any suit by or against the Secretary of State for India in Council, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.*

Suits by or against Government.

Suits against Government or Public Officers.—See notes to sects. 79–82, *ante*.

2. Persons being *ex officio* or otherwise authorized to act for *the* Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of *the* Government.

Persons authorized to act for Government.

3. In suits by *or against* the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of *residence* of the plaintiff *or defendant*, it shall be sufficient to insert the words "The Secretary of State for India in Council."

Plaints in suits by *or against Government.*

4. The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State *for India* in Council issued *by* such Court.

Agent for Government to receive process.

5. The Court, in fixing the day for the Secretary of State *for India* in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through

Fixing of day for **appearance** *on behalf of Government.*

the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State *for India* in Council or the Government, and may extend the time at its discretion.

Attendance of person able to answer questions relating to suit against Government.

6. The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State *for India* in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

Extension of time to enable *public* officer to make reference to Government.

7. (1) *Where the defendant is* a public officer *and*, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court *shall* extend the time for so long as appears *to it* to be *necessary*.

Procedure in suits against public officer.

8. (*1*) *Where* the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register *of civil suits*.

(*2*) *Where no* application *under sub-rule* (*1*) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties:

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

Government undertaking defence.—This does not change the nature of the suit, which will continue as before. The suit is against the officer, and against him the decree, if any, must be passed.(1)

(1) O'Kinealy's C. P. C., note to s. 426.

ORDER XXVIII.

Suits by or against Military Men.

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

1. (*1*) *Where* any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

(*2*) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (*a*) his commanding officer, or the next subordinate officer, if the party *is* himself the commanding officer, or (*b*) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(*3*) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this *Order* the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps, detachment or depôt to which the officer or soldier belongs.

Person so authorized may act personally or appoint pleader.

2. Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may prosecute or defend it *in person* in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

Service on person so authorized, or on his pleader, to be good service.

3. Processes served upon any person authorized by an officer or a soldier *under rule 1* or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

Military men.—Generally, as regards suits against soldiers, see Army Act, 1881, and case cited.(1) If a person sues for a soldier without authority the suit must be dismissed ; (2) and an objection to the plaintiff's right to bring the suit, though not taken in the Court of first instance, was allowed on second appeal.(3) The provisions of sect. 468 of the last Code have been embodied in O. V. rr. 28–29, which deal with service on military men.

(1) Mahomed Saib *v.* Aggas, 10 M. 319 (1887).

(2) Shivram Vithal *v.* Bhagirthebai, 6 B. H. C. R. A. C. J. 20 (1869).

(3) Ib.

ORDER XXIX.

Suits by or against Corporations.

Subscription and verification of *pleading.*

1. In suits by *or against* a corporation, *any pleading* may be *signed* and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Service on corporation.

2. *Subject to any statutory provision regulating service of process,* where the suit is against a corporation, the summons may be served—

(*a*) *on* the secretary, or on any director, or other principal officer of the corporation, or

(*b*) by leaving it or sending it by post addressed to *the corporation* at the registered office, *or if there is no registered office then at the place where the corporation carries on business.*

Power to require personal attendance of officer of corporation.

3. The Court may, *at any stage of the suit,* require the personal appearance of the secretary or *of* any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

"**Corporation.**"—The corporation contemplated by the former Code was, it was held, a corporation as known in English law, that is, a corporation created with the express consent of the Sovereign, or of such antiquity that the consent of the Sovereign may be presumed.(1) Thus, the Akhara Panchaiti, an association formed by the followers of Guru Nanak, who flourished in the fifteenth century, and having no royal sanction, though it be a corporation under the Civil law, was held not to be a corporation under English law.(2) A company which has been duly registered under the Indian Companies Act of 1882 is a

(1) Panchaiti Akhara *v.* Gauri Kuar, 20 A. 167, 169 (1897); as to corporations by prescription, see Yusuf Beg *v.* Board of Foreign Missions, 16 A. 420, 422 (1894); and as to the attributes of a corporation, see Cantonment Committee *v.* Burjorji Bamanji, 14 B. 286, 289 (1889).

(2) Panchaiti Akhara *v.* Gauri Kuar, 20 A. 167 (1897).

corporation.(1) There is nothing in r. 1 to exclude from its operation a foreign corporation or a foreign company, and there is nothing in the Code, or in the Indian Companies Act, requiring such corporation or company to be registered under the Indian Companies Act before it can claim the benefit of this rule.(2) The former section referred also to companies authorized to sue and be sued in the name of an officer or trustee. Authority to sue or be sued in the name of an officer or trustee can only be conferred by Act of Parliament, or by an Act of the Indian Legislature, and there are some Acts in the Indian Statute Book by which certain companies are authorized to sue or be sued in the name of an officer.(3) Where the actuary of an assurance company established in London by Act of Parliament, which gave him the privilege of suing there on behalf of the company, sued in India, it was held, though the Act did not extend to this country, that he might sue, inasmuch as the insured must be assumed to have notice of the Act under which he could sue and be sued, and the contract might be considered as in effect made by him only.(4) The rule now omits reference to such companies. Most companies are registered, and a registered company is a corporation. Companies authorized to sue and be sued in the name of an officer or trustee must, it was said, be very few, if, indeed, any exist, and it has been thought that they do not appear to call for special treatment.

Suits by or against corporations.—These rules do not deal with the question who may sue or be sued and in what manner, but merely deal with two incidents of procedure in such suits, viz. the subscription and verification of the plaint and service on a defendant corporation. The general rule, however, is that a corporation (and a registered company is such) must sue and be sued in its corporate name,(5) and cannot sue (6) or be sued (7) through an agent. A company "authorized to sue and be sued," etc., will of course sue and be sued in the name of the officer or trustee. It has been held that in the case of a suit by (8) or against (9) an unregistered and unincorporated company or association not authorized to sue or be sued in the name of an officer, the names of the

(1) Campbell *v.* Jackson, 12 C. 41, 44 (1885).

(2) Singer Manufacturing Co. *v.* Baijnath, 30 C. 103 (1902); dist. Yusuf Beg *v.* Board of Missions, 16 A. 420 (1894), in which it was not shown that the party claiming the benefit of s. 435 of the last Code was a corporation, and see Jones *v.* Tagore, Fulton, 388 (1845), *post*.

(3) Campbell *v.* Jackson, 12 C. 41, 44 (1885).

(4) Jones *v.* Tagore, Fulton, 388 (1845).

(5) Ram Doss *v.* Stephenson, 10 W. R. 366 (1868); and according to Private International Law a corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States: Singer Manufacturing Co. *v.* Baijnath, 30 C. 103, 105 (1902); as to suits by an official liquidator, see Muhammad Yusuf *v.* Himalaya Bank, 18 A. 198 (1896).

(6) See Campbell *v.* Jackson, 12 C. 41 (1885).

(7) Nubeen Chunder *v.* Stephenson, 15 W. R. 534 (1871).

(8) Mahommedan Association of Meerut *v.* Bakshi Ram, 6 A. 284 (1884); Panchaiti Akhara *v.* Gauri Kuar, 20 A. 167 (1897); Campbell *v.* Jackson, 12 C. 41 (1885); as to minors, see Pitum Dass *v.* Ram Dhone, 1 Taylor, 279 (1849-50).

(9) Koylash Chunder *v.* Ellis, 8 W. R. 45 (1867); Ganesha Singh *v.* Mundi Forest Co., 21 A. 346 (1899). The latter case, however, dissented from the former in that it held that a plaintiff could not escape the obligation of making each individual member of the defendant company a defendant by stating in the plaint that he had been unable to discover who the individual members of the company were.

members of the company or association must be disclosed, and they must be made parties as in the case of a firm ; (1) and a suit cannot be brought by or against a secretary or other person representing such association, though advantage may be taken of the provisions of O. I. r. 8, *ante*. As to suits by or against firms, see O. XXX.

Subscription and verification of plaint.—The Code enables a principal officer of a corporation to verify a plaint, and it is therefore not necessary that permission for that purpose should be obtained ; but it should be shown, in cases to which r. 1 applies, that the person purporting to verify a plaint is a principal officer, and is able to depose to the facts of the case. If the plaint contains a statement to that effect, verification in the usual form would probably be sufficient.(2) But the Code does not require that the officer should verify from actual personal knowledge. He may do so upon information and belief.(3) An acting manager of a bank is a principal officer of the bank corporation, and may sign a plaint for it.(4)

Written statements and petition in insolvency.—The provisions of the former section (now r. 1) have, by virtue of the provisions of sect. 115 (now O. VI. rr. 14, 15) and sect. 346 of the last Code respectively, been held to be applicable to written statements (5) and petitions in insolvency under the Code.(6) Sect. 346 has now been removed from the Code, insolvency being dealt with by a separate Act (III. of 1907). In conformity with the provisions of the Indian Companies Act service is allowed by post on corporations having a registered office.

Service.—An executive engineer of a railway company is not an officer within the meaning of r. 2, clause (*a*), on whom service may be made.(7)

(1) Yeknath *v.* Gulabchand, 1 B. H. C. R., A. C. J. 85 (1863).

(2) Sreenath Banerjee *v.* East Indian Railway, 22 C. 268 (1894), which dealt with an insufficient written statement and allowed evidence to be supplied by affidavit and with waiver of objection to sufficiency of verification.

(3) The Port Canning, etc., Co. *v.* Dharanidhar Sardar, 9 C. W. N. 608 (1905).

(4) Delhi Bank *v.* Oldham, 21 C. 60 (1894) ; 20 I. A. 139.

(5) Sreenath Banerjee *v.* East Indian Railway, 22 C. 268, 269 (1894).

(6) Ram Komal *v.* Bank of Bengal, 5 C. W. N. 91, 98 (1900). It is, however, to be observed that both these sections which preceded s. 435 of the last Code, use the word "hereinbefore."

(7) Hanlon *v.* India Branch Railway, 1 Hyde, 197 (1862–63).

ORDER XXX.

Suits by or against Firms and Persons carrying on business in names other than their own.

Suing of partners in name of firm.

1. (*1*) *Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.*

(*2*) *Where persons sue or are sued as partners in the name of their firm under sub-rule* (*1*), *it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.*

Disclosure of partners' names.

2. (1) *Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.*

(2) *Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule* (*1*), *all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.*

(3) *Where the names of the partners are declared in the manner referred to in sub-rule* (*1*), *the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:*

Provided that all the proceedings shall nevertheless continue in the name of the firm.

3. *Where persons are sued as partners in the name of their firm, the summons shall be served either—*

Service.

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

Suits by or against firms.—"Firm" is simply a compendious expression for the several persons who are members of it, and the general law knows nothing of the firm as a body or artificial person distinct from the members composing it. The Judicature enabled partners to sue or be sued in the names of their firms, but this rule did not introduce anything that amounts to the recognition of the firm as an artificial person as distinct from its members.(1) This Order dealing with this subject is entirely new. It is, with the exception of r. 4, taken from O. 48A of the English Rules. The following notes are also taken from such portions of the notes in the Annual Practice on those rules as are of applicability in this country.

The following are the cross-references with respect to this note :—

Disclosure of partner's name, r. 2; service of writ on partners is dealt with in this rule and r. 5. Appearance, r. 6. No appearance except by partner, r. 7. Appearance denying partnership, r. 8. Execution of judgment against firm, O. XXI. r. 50. Application of rules, r. 9. Application of rules to person trading as a firm, r. 10. As to liability of partners out of the jurisdiction under a judgment against a firm, see O. XXI. r. 50. Actions between co-partners, r. 9, *infra*.

Actions between partners.—Prior to r. 10 of the English rules, corresponding with r. 9, *post*, it was not quite clear that actions between a firm and one of its members, or between two firms with a common member, were maintainable in the firm's name,(2) but this doubt is now removed by that rule which applies the rules to such actions, provided the firm or firms carry on business within the jurisdiction; and with the further proviso that "no execution shall be issued in such suits except by leave of the Court."

"Any two or more persons."—If one of the partners is an infant, the minority of one partner cannot be utilized by the other, or others, as a means of deferring payment of the firm's debts.(3) But the judgment should be either

(1) Lukhmidas Khimji *v.* Purshotam Haridas, 6 B. 700, 702 (1882).

(2) See Pollock, pp. 20 and 109.

(3) Harris *v.* Beauchamp Bros. (1893), 2 Q. B. 534. See also O. XXI. r. 50, note, "Infant partner." See also *infra*, note, "May sue or be sued."

against the adult partners by name, or against the firm "other than A. B. an infant." And in such a case bankruptcy proceedings will, in England, lie against the firm other than the infant partner.(1) A foreign corporation is different from a firm, and may be sued as an individual.(2)

"**As partners.**"—The liability of partners for debts is joint.(3) As a general rule a suit by or against an ordinary partnership would have been defective for want of parties, unless all the partners were before the Court; (4) but now the firm may be sued *without first ascertaining who all the partners are.*(5) Where a partner dies before action, and the action is brought against the firm alone, in the firm's name, the deceased partner is not a party to the action at all so far as his private estate is concerned. If in an action against a firm in the firm name a partner dies between service of the writ and judgment, the estate of the deceased partner is not bound. Unless his personal representative is a defendant, judgment is against the surviving partners, and can only be enforced against them and the partnership assets.(6) See here as to right of suit on death of partner, r. 4. The estate of a deceased partner is not liable for goods ordered before, but not delivered till after, his death.(7)

"**Carrying on business in British India.**"—If the firm carry on business within the jurisdiction within the meaning of the cases cited below, they may sue or be sued in the firm name. It happens that in all the cases cited in this and the note on "Foreign Firms," the points raised turned upon the question whether the *defendants* were rightly sued. But the principle laid down in those cases applies equally to a plaintiff firm as to a defendant firm, the right to "*sue or be sued*" being given by the same sentence of this rule. It is, therefore, the practice of the Central Office in England to refuse to issue a writ wherein a foreign firm is either plaintiff or defendant, unless the individual names of the partners are given. The words "carrying on business" do not include an *agency*, even though the name of the firm be painted on the door of the office of the agency.(8) *Semble*, "*carrying on business*" means the possession within the jurisdiction of a place of business held in the name of the firm where business is carried on on behalf of the firm by a partner or by a person or persons in the pay of the firm.(9) If the firm has no place of business in this country held in the name of the firm they do not carry on business within the jurisdiction, even though the partners come to this country regularly in order to purchase goods to be sent to the firm

(1) Lovell *v.* Beauchamp, A. C. 607 (1894). For a case in which a cost-book mining company was sued in its partnership name, see Escott *v.* Gray, 39 L. T. (N. S.) 121.

(2) See Ann. Pr., O. 9, r. 8, note, "Foreign Corporation."

(3) Pollock, Part., p. 26; Kendall *v.* Hamilton, 4 App. Cas. 504; Pilley *v.* Robinson, 20 Q. B. D. 155; and cf. The Partnership Act, 1890, ss. 9, 10, 12, and Weall *v.* James, 68 L. T. 515.

(4) Lindley, (516).

(5) Pollock, Part., p. 109.

(6) Ellis *v.* Wadeson, 1 Q. B. 714 (1899).

(7) Bagel *v.* Miller, 2 K. B. 212 (1903).

(8) Grant *v.* Anderson, 1 Q. B. 108 (1892).

(9) See Worcester City Banking Co. *v.* Firbank & Co., 1 Q. B. 784 (1894); and compare Baillie *v.* Goodwin, 33 C. D. 604; Grant *v.* Anderson, *supra*, and Heinemann & Co. *v.* S. B. Nale & Co., 2 Q. B. 83 (1891).

abroad.(1) The English rule has been held not to apply to proprietors of a newspaper sued under the name of the newspaper.(2)

The effect of the addition to the English rule of the words "carrying on business within the jurisdiction," is to establish, out of all the cases cited in the note on "Foreign Firms," the decision of Chitty, J.,(3) that where a firm carried on business in England and a partner was a resident in England, service at the principal place of business upon the person in control of the business, was good service on the firm, including any foreign partner resident abroad.(4) Moreover, the rule as now framed appears to go even one step further, seeing that under its terms a foreign firm consisting of two or more persons (5) can be sued as a firm, provided it *carries on business within the jurisdiction*, whether a partner resides in this country or not. For though Wright, J., held otherwise,(6) the C. A. refused to indorse his ruling on this point (S. C.). And in the case cited (7) it was held that partners usually resident abroad and having a London office in the firm name were rightly sued as a firm. If the foreign firm does carry on business within the jurisdiction the partners are persons sued as partners in the name of their firm under r. 1, and service on the person in control of the business is good service on the firm, including all the partners out of the jurisdiction so far as, but no further than (see O. XXI. r. 50), any property of the partnership within the jurisdiction is concerned. It makes no difference whether the partners abroad are foreign subjects or British subjects. It is not allegiance to the Crown which is in question, but whether the firm and its partners are subject to the jurisdiction of the Court. If they carry on business within the jurisdiction in the firm name, then the rule, which must be read with O. XXI. r. 50, applies.(8) If the firm does not carry on business within the jurisdiction it cannot be sued in the firm name; (9) though a counterclaim may be pleaded against a foreign firm suing in an English Court.(10)

"May sue or be sued."—A firm consisting of "two or more persons" may sue or be sued even though one of them is under a disability.(11) A person trading by himself as a firm or in an assumed or trading name, must *sue* in his own name, though he may be *sued* in his trading name.(12) If one of several partners dies before action brought, and the plaintiff seeks, in suing the firm, to make the deceased partner's private estate liable, he must add as a defendant

(1) Singleton *v.* Roberts & Co., 70 L. T. 687.

(2) De Bernales *v.* New York Herald, 2 Q. B. 97 (N) (1893).

(3) In Shepherd *v.* Hirsch, Pritchard & Co., 45 C. D. 231.

(4) See also Lysaght *v.* Clark & Co., 1 Q B. 552 (1891).

(5) See note, "Any two or more persons," *supra*.

(6) In Grant *v.* Anderson, *supra*.

(7) Worcester Banking Co. *v.* Firbank & Co., 1 Q. B. 784 (1894).

(8) Ib.

(9) Western National Bank of New York *v.* Perez Triana & Co., 1 Q. B. 304 (1891); Indigo Co. *v.* Ogilvy, 2 Ch. 31 (1891); Heinemann & Co. *v.* S. B. Hale & Co., 2 Q. B. 83 (1891); Baillie *v.* Goodwin, 33 C. D. 604.

(10) Griendtoveen *v.* Hamlyn & Co., 8 Times Rep. 238; see O. XXI. r. 50, note, "Shall not render liable," etc. See also following note.

(11) See Harris *v.* Beauchamp Bros., cited *supra*, note, "Any two or more persons."

(12) Mason *v.* Mogridge, 8 Times Rep. 805; see r. 10, *infra*, note, "May be sued." As to "owners of cargo" in an Admiralty action *in rem* suing as such in lieu of trading name, see The Assunta (1902), P. 150.

the personal representative of such deceased partner; (1) and see r. 4. The right to sue partners in the name of the firm is not limited to the case of partners in the firm at the date of the writ. And the liability of partners who have left the firm prior to or since the action commenced is a question of fact which may be raised under O. XXI. r. 50.(2) A judgment against the firm has the same effect as a judgment against all the partners had formerly.(3) If final judgment has been obtained against a firm upon a writ issued against the firm, execution cannot issue against a member of the firm without leave of the Court, unless such member comes within the provisions of O. XXI. r. 50 (*a*), (*b*), (*c*), *ante*. Under the English rules, if a firm has recovered judgment, and one member afterwards dies, the survivor may issue execution.(4) A firm cannot appear as a firm; but if a partner, together with the firm, are made co-defendants, he may put in separate defences, one for himself, and one for the firm.(5)

"**At the time of the accruing of the cause of action.**"—These words enable the co-partners in a firm dissolved before action to sue or be sued as a firm provided the co-partnership existed at the time the cause of action accrued. And by the operation of r. 10, *infra*, it enables an individual trading in a name other than his own name at the time the cause of action accrued to be sued in his trading name, although he has ceased to so trade at the time the action was brought.

Foreign firms.—The ruling in the following cases applies to a plaintiff foreign firm suing as well as to a defendant foreign firm being sued. See preceding note, "Carrying on business," etc. A purely foreign firm all the partners in which reside abroad cannot be served as a firm. The partners should be sued and served individually.(6) The same rule applies to a colonial firm.(7) A foreign firm having a resident partner in England, who transacts business for the firm but not having an office occupied in the firm's name, cannot be sued as a firm, and a writ so issued and served upon such resident partner, together with the service thereof, was set aside.(8) A single individual residing abroad and being a foreign subject and carrying on business in this country in the name of a firm, must be sued individually in his own name.(9) If a single individual who is a foreigner is sued in his own name and served with the writ while temporarily

(1) See Ellis *v.* Wadeson, 1 Q. B. 714; and Phillips *v.* Homfray, 24 C. D. 428; *Re* Shephard, 43 C. D. 136.

(2) Davis *v.* Morris, 10 Q. B. D. 436.

(3) Pollock, Partnership, p. 109, and see Clark *v.* Cullen, 9 Q. B. D. 355.

(4) See O. 17, r. 1, and Davis *v.* Andrews, W. N. 84, 94. See also O. XXI. r. 50, *ante*.

(5) Taylor *v.* Collier, 30 W. R. (Eng.) 701.

(6) Western National Bank of New York *v.* Perez Triana & Co., 1 Q. B. 304 (1891); overruling Pollexfen *v.* Sibson, 16 Q. B. D. 792 (in which case a foreign firm was sued in the firm name and service on a partner happening to be temporarily in England was held good service on the firm).

(7) Indigo Co. *v.* Ogilvy, 2 Ch. 31; and cf. Judgment of Esher, M.R. (1891), in Worcester City Banking Co. *v.* Firbank & Co., 1 Q. B. 784 (1894); Agar *v.* Kaufman Bros., 39 Sal. Jo. 181.

(8) Heinemann & Co. *v.* S. B. Hale & Co., 2 Q. B. 83 (1891); cf. note, *supra*, "Carrying on business within the jurisdiction."

(9) See St. Gobain *v.* Hoyermann's Agency, 2 Q. B. 96 (1893), and Russell *v.* Cambefort, 23 Q. B. D. 526, overruling O'Neile *v.* Clason & Co., 46 L. J., Q. B. 191, where a foreigner trading in England was sued in his trading name, and service on the manager of the business in England was held good service on the person sued.

in this country, the service, it appears, would be good.(1) Service on the agent of a firm has been held to be no service on the firm.(2) As to service out of the jurisdiction on a partner in a firm carrying on business in England, see note.(3) It has been held in England that a defendant firm may contract itself out of the rules and rulings as to foreign firms. If its principal place of business is out of the jurisdiction, and it has agreed to receive service at some place within the jurisdiction, a writ served in the manner agreed is well served.(4) But an agreement that the Court shall have power to *order* service on the foreign firm, even though the case is not within O. 11 of the English rules, is of no effect. The jurisdiction of the Court as to the ordering service out of the jurisdiction cannot be extended by agreement.(5) A foreign firm suing in the English Court is liable to have a counterclaim pleaded against it, even though the nature of the counterclaim is such as to preclude the possibility of bringing an action upon it under O. 11 of the English rules, which provide for service out of the jurisdiction.(6)

"**For a statement of the names.**"—An order to disclose the names of partners hereunder is not an order for discovery within O. 31, r. 21 of the English rules, corresponding with O. XI. r. 21 of this Code.(7) Where an affidavit has been filed stating the names of the partners in the plaintiff firm, there is no power to direct a cross-examination on such affidavit, or the trial of an issue as to who were the partners in the firm at the time of the accruing of the cause of action.(8)

Rule 2. Disclosure of partners' names.—By sub-rule (1), r. 1, *supra*, in an action by or against a firm, *any party* to the action may apply by summons to a Judge for the *names and addresses* of the persons who were partners at the time the cause of action accrued.(9)

"**Provided that all the proceedings.**"—See *post*, notes to r. 6.

Rule 3. "Where persons are sued as partners."—These words authorize service in accordance with the provisions of this rule on any person sued, who is carrying on business within the jurisdiction in a name or style other than his own name ; (10) and also upon any two or more persons sued, who are liable as co-partners and carry on business within the jurisdiction. A foreign firm, not carrying on business within the jurisdiction, cannot sue or be sued as a firm.(11) *Semble*, it provides a mode of service within the jurisdiction within the meaning of the English rule, on firms trading within the jurisdiction whether the partners reside within or without the jurisdiction.(12)

(1) See Carrick *v.* Hancock, 12 Times Rep. 59.

(2) Baillie *v.* Goodwin, 33 Ch. D. 604 ; see also Grant *v.* Anderson, 1 Q. B. 108 (1892).

(3) See O. XXI. r. 50, note, "Unless service has been made on such partner."

(4) Montgomery *v.* Liebenthal & Co., 1 Q. B. 487 (1898).

(5) British Wagon Co. *v.* Gray, 1 Q. B. 35 (1896).

(6) Griendtoveen *v.* Hamlyn & Co., 8 Times Rep. 231.

(7) Pike *v.* Keene, 24 W. R. (Eng.) 322.

(8) Abrahams & Co. *v.* Dunlop Pneumatic Tyre Co., 91 L. T. 11 (C. A.).

(9) See r. 1, *supra*, note, "For a statement of the names."

(10) *Supra ;* r. 10, *infra*.

(11) See *supra*.

(12) Ann. Pr., notes to O. 48A, r. 3.

"**Shall be served.**"—The mode of service prescribed by this rule applies solely to service within the jurisdiction. If a partner is served, service must be personal, and may be effected anywhere subject to the rules as to service out of the jurisdiction and to the decisions with regard to foreign firms.(1) If the person in control of the business is served, service must be effected at the principal place of business within the jurisdiction and must include service of the notice prescribed by r. 5, *infra*.(2) If no such notice is served the person is deemed to be served as a partner.(3) Where a firm is duly served and no appearance is entered and judgment in default is signed, subsequent service of the writ on a partner not previously served is wrong, and will entitle such partner to apply to set aside the judgment. The plaintiff's proper course in such a case, in order to bind the personal goods of a partner not originally served, is to apply under O. XXI. r. 50, for an order giving leave to issue execution against the person sought to be made liable as a partner.

"**At the principal place at which.**"—*Semble*, this means a place where the business of the firm is *carried on in the firm's name* by a partner or some person who is in the pay of the firm and not merely an agent.(4)

"**Control of management.**"—Service on the agent of a firm was held to be no service on the firm.(5) Service on a receiver and manager appointed by the Court was held to be bad on the ground that the words of this rule mean that the person having the control or management of the partnership business must be the servant of the partners, whereas a receiver is the servant of the Court. So held on the same words in r. 260 of the English Bankruptcy Rules, 1886.(6) Where there was no one in control, substituted service was ordered.(7)

"**Deemed good service upon the firm.**"—Service on the firm by serving the person in control hereunder, is not service upon each member of the firm so as to make such member "a person who has been served as a partner," etc., within O. XXI. r. 50,(8) though if partners appear individually under r. 6, they will each be personally liable.(9)

"**Whether all or any of the partners are within or without British India.**"—These words must be read in conjunction with the words bearing on the same point in O. XXI. r. 50. *Semble*, they mean under the wording of the English rule that the service shall be good service on the firm

(1) See *supra*.

(2) Cf. notes, *infra*, "At the principal place," etc., and "The control or management."

(3) R. 5, *infra*.

(4) See Worcester City Banking Co. *v.* Firbank & Co., 70 L. T. 102 (1894); 1 Q. B. 784; Grant *v.* Anderson, 1 Q. B. 108 (1892); and cf. Heinemann & Co. *v.* S. B. Hale & Co., 2 Q. B. 83 (1891). It does not mean an agency, see Baillie *v.* Goodwin, 33 Ch. D. 604; and cf. De Bernales *v.* New York Herald, 2 Q. B. 97 (n) (1893). See notes, *supra*, "Carrying on business," etc., and "Foreign firms;" and as to a foreign firm contracting out of the cases by agreeing to service within the jurisdiction, see note, "Foreign firms," *supra*.

(5) Baillie *v.* Goodwin, 33 Ch. D. 604.

(6) *Re* Flowers & Co., 65 L. J. Q. B. 679.

(7) See Shillito *v.* Child, W. N. 83 (208).

(8) *Re* Ide, 17 Q. B. D. 755.

(9) See r. 6, note, "Practice," and O. XXI. r. 50; and cf. Alden *v.* Beckley, 25 Q. B. D. 543.

so far as concerns any property of the firm within the jurisdiction; (1) but not so as to otherwise "render liable, release or otherwise affect" any partner out of the jurisdiction at the time the writ was issued, unless service has been made upon such partner or he has come within the jurisdiction after the summons was issued in the manner provided by r. 3.(2) The whole rule applies only to actions against partners "*in the name of their firm*," carrying on business within the jurisdiction.

"Provided that."—The above proviso was formerly contained in O. 16, r. 14 (now r. 1), of the English rules, and its effect is defined in the case cited (3) If there has been a dissolution to the knowledge of the plaintiff he cannot make an outgoing partner liable unless he serves the writ of summons upon him. If he omits to do this, and on proof of service on the firm takes judgment in default against the firm, and then applies under O. XXI. r. 50, for leave to issue execution against the partner who has left the firm, on the ground that he was a partner when the debt was contracted, the Court will refuse to order execution against such partner because he was not made liable by being served with the writ.(4)

Right of suit on death of partner.

4. (1) *Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.*

(2) *Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—*

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

Devolution of joint rights.—The section of the Contract Act referred to, provides that when a person has made a promise to two or more others jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives all jointly. It has been held that this rule is not confined to cases where a suit is brought by or against a firm in the name of the firm. The legal representatives of deceased partners may, if desired, be brought on the record.(5)

(1) R. 9 (*a*); and cf. Worcester City Banking Co. *v.* Firbank & Co., 1 Q. B. 784 (1894).

(2) See Ann. Pr., notes to O. 48A, r. 3.

(3) Wigram *v.* Cox & Co., 1 Q. B. 792 (1894).

(4) Ann. Pr., notes to r. 3, and see *Ex p.* Young, 19 C. D. 124, and O. XXI. r. 50, note, "Has failed to appear."

(5) Bal Kissen Das *v.* Kanhya Lal, 17 C. L. J. 648 (1913).

5. *Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.*

Notice in what capacity served.

"**Shall be informed.**"—If service is effected on the person in control of the business and no notice is served as here provided, the service is not effective, and cannot be made so. If service is effected on a partner, he may be served with the writ with or without a notice, for if served without he is deemed to be served as a partner. (See next note.) But if the person in control is served without a notice, that cannot be treated as service on a partner, unless the deponent to the affidavit of service, if he subsequently discovers that the person served was a partner, can swear that he served A. B., a partner in the defendant firm. The notice, when served, must be served with the writ in accordance with the rule. The usual practice is for the person effecting service to take a written notice with him headed in the name of the action and being to the following effect:—"Take notice that the writ served herewith is served on you, as the person having the management or control of the partnership business of (A. B. & Co.)." Where a partner is served such notice is not delivered with the copy writ; but where the person in control of the business is served on behalf of the firm, it is delivered to him with the copy writ. The notice need not, and indeed, under the circumstances cannot, be addressed to any one by name. Where any difficulty is anticipated in identifying the person served either as a partner or as the person in control of the business, the best course is, in any case, to serve with the writ the following notice:—"Take notice that the writ served herewith is served on you as a partner in the defendant firm of (A. B. & Co.), and also as the person in control of the business." This practice is authorized by the words of the rule "or in both characters."(1) As to entering judgment after such service, see below.(2) As to effect of not serving such notice and the necessity of proving service of the notice, see next note. The object of the notice is to remove the possibility of dispute as to the character in which a person has been served: the Legislature did not intend to raise merely a rebuttable presumption but to lay down the legal effect of the service.(3)

"**Deemed to be served as a partner.**"—As pointed out *supra*, these words obviate the necessity of serving any notice on a person who is served as a partner, but they render such notice and proof of service thereof absolutely necessary wherever the firm is served by service on the person in control of the business. If, in such a case, the notice is not served with the writ, or if the person served is served as a partner by notice, such person will be able to protect himself from liability as a partner by entering appearance under protest

(1) Ann. Pr., notes to O. 48A, r. 4.

(2) See note, *infra*, "Persons served both as," etc

(3) Baishnab Charan Saha *v.* Bank of Bengal, 19 C. L. J. 581 (1914).

denying that he is a partner.(1) The effect of such an appearance is merely to nullify the service altogether as regards the defendant firm.(2) If a person served as a partner appears under protest under r. 6, and the plaintiff desires to contest his denial of partnership, he, according to the English practice, can apply by summons to strike out the appearance, entered on the ground that the party appearing is a partner in the firm sued, or was a partner at the time the cause of action accrued, or in the alternative to strike out of such appearance the denial of partnership. If necessary, an issue may be directed to determine the question of partnership.(3) Or the plaintiff may disregard the appearance under protest, and serve the writ again as provided by r. 3, and having obtained judgment against the firm he may apply under O. XXI. r. 50, for leave to issue execution against the person appearing under protest, if he alleges him to be a partner.

Person served both as partner and manager.—Where a person is served both as a partner and as the person in control of the business, by delivery with the writ of a notice to that effect, and such person appears with denial of partnership, and no one appears as a partner, the plaintiff is entitled, notwithstanding such appearance, to take judgment in default against the firm on proof that the person served was also served in the capacity of manager. Such judgment, however, only entitles the plaintiff to issue execution against the firm, unless otherwise ordered under O. XXI. r. 50.(4)

6. *Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.*

Appearance of partners.

7. *Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.*

No appearance except by partners.

8. *Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against a firm in default of appearance where no partner has appeared.*

Appearance under protest.

(1) R. 8, *infra*.

(2) See the words of r. 8, "but such appearance shall not preclude the plaintiff from *otherwise serving* process on the firm and obtaining a decree," etc.

(3) Ann. Pr., notes to O. 48A, r. 4; and see O. 36, r. 4, O. 33, r. 1; and see Davis *v* Morris, 10 Q. B. D. 436, and Worcester Banking Co. *v.* Trotter, 3 Times Rep. 709, cited *supra*, rr. 1–3.

(4) Ann. Pr., notes to O. 48A, r. 4.

Rule 6. "Sued as partners in the name of their firm."—*I.e.* according to the English rule, persons carrying on business within the jurisdiction.(1) *Semble*, where a firm is sued in the firm name, a person claiming to be a partner may appear under r. 6 if he describes himself as a partner, irrespective of the fact that his claim to be a partner is disputed.(2)

"They shall appear individually."—A firm cannot appear in the firm name, but the partners must appear in their own names, and must describe themselves as partners. Any partner has a right to appear as such, either with or without his co-partners. An appearance here under protest is taken as an admission of partnership.(3) No one but a partner and a person served as a partner who denies that he is a partner, or that he was a partner at the time the cause of action accrued, has any right to appear.(4) Nor will any appearance be received which does not clearly state that the person either (*a*) is a partner; or (*b*) was a partner at the time the alleged cause of action accrued; or (*c*) has been served as a partner, but denies that he is a partner in the firm sued; or (*d*) has been served as a partner but denies that he was a partner in the firm sued at the time the alleged cause of action accrued. Before the English rules (O. 48A) were passed it was held that a person denying partnership had no right to appear.(5) That case is now overruled by r. 8, and r. 7 provides that no appearance is necessary by a person served on behalf of the firm as the person in control of the business, and such an appearance would be refused. A partner appearing must describe himself as such. *Semble*, any appearance without protest in an action against a firm must be taken to be in all respects an appearance by a partner.(6) An authority given by the managing partner of a firm to defend an action is a good authority to a solicitor to enter appearance for all the partners in the firm.(7) An appearance by one out of several partners sued is an appearance on behalf of the firm, and sufficient to stop judgment in default against the firm.(8)

"All subsequent proceedings shall, nevertheless, continue in the name of the firm."—This is laid down by r. 2. In every action against partners sued *in the firm name* every subsequent proceeding must be headed with the firm name as defendants. By r. 6 the defendants are to appear individually, so that if they defend the action and are unsuccessful, they become personally liable to execution.(9) But their individual appearances are to make no difference in the way the action is instituted in all subsequent proceedings, nor can they put in any defence which is not a defence on behalf of the firm.(10) The judgment must be against the firm in the firm name. The only exception is where the defendant firm contains an infant partner, when judgment should be against the

(1) See rr. 1–3, *supra*, and notes, "Carrying on business," etc.

(2) Ann. Pr., notes to O. 48, r. 5; see Robinson *v.* Ward & Son, 36 Sol. Jo. 415, cited r. 10, *infra*, note, "Appearance."

(3) See O. XXI. r. 50.

(4) See r. 7.

(5) See Davis *v.* André, 24 Q. B. D. 598.

(6) Ann. Pr., notes to O. 48A, r. 5.

(7) Tomlinson *v.* Broadsmith, 1 Q. B. 386 (1895); see also Ellis *v.* Wadeson, cited *infra*, note, "Defence of one of several partners."

(8) Adam *v.* Townend, 14 Q. B. D. 103; Taylor *v.* Collier, 30 W. R. 701.

(9) O. XXI. r. 50.

(10) Ellis *v.* Wadeson, cited *infra*, note, "Defence of one of several partners."

firm "other than A. B. an infant."(1) Execution thereon may be (*a*) against the firm's goods; (*b*) against the individual partners liable to execution.(2) Thus, if one partner out of several appears the appearance is a good appearance for the firm.(3) "The rule at Common Law is that the judgment must follow or accord with the writ. Under the Judicature Act, and its Order, the writ may be against the firm. . . . The writ being against the firm, the judgment must be against the firm." (4) The English Partnership Act, 1890, sect. 23, provides that "a writ of execution shall not issue against partnership property except on a judgment against the firm."

Defence of one of several partners.—The action being against the firm any and every defence put in must be a defence for the firm, and cannot be a personal defence of a particular partner. Each partner is entitled to put in a defence if there is disagreement, but the form must be "Defence of the defendant firm by A. B. a partner." The plaintiff must in case of several defences show that none of them prevents him from taking judgment. A defendant by putting in a separate defence improperly might render himself liable to his co-partners, but that would not affect the plaintiff whose action is against the firm.(5)

Rule 7. "Unless he is a partner of the firm sued."—An appearance tendered by a person describing himself as the person in control of the business, is refused at the central office in England. The effect of this rule is to guard the plaintiff against the embarrassment and delay previously occasioned by the appearance of persons who were not partners in the firm sued. The concluding words of the rule render any person appearing (except under r. 8) liable to be dealt with as a partner.(6) This rule is to be read subject to r. 5, and contemplates only a case where service is on a manager and not a case where the person served is deemed to be served as a partner.(7)

Rule 8. "May appear under protest."—The appearance is entered without leave in the following form: "For A. B. having been served as a partner, but who denies that he is a partner in the defendant firm of," etc., or who denies that he was a partner in the defendant firm at the time the cause of action accrued. If the plaintiff desires to contest the denial of partnership, he should take the course indicated, *supra*, r. 5, note, "Deemed to be served as a partner."

"Such appearance shall not preclude the plaintiff," etc.—The words of this part of the rule entitle the plaintiff to disregard the appearance under protest altogether, and proceed as if the writ had not been served, *i.e.*, by "*otherwise serving the firm.*" If the person served was served both as a partner and as the person in control of the business, the appearance with denial of partnership is no bar to judgment in default against the firm based upon the service on the person in control. After judgment, if the person appearing

(1) See notes to rr. 1–3, *ante*.

(2) See O. XXI. r. 50.

(3) Taylor *v.* Collier, 30 W. R. 701; and see Adam *v.* Townend, 14 Q. B. D. 103, *supra*.

(4) *Per* Brett, L.J., Jackson *v.* Lichfield, 8 Q. B. D. p. 478.

(5) Ann. Pr., notes to r. 5, O. 48A; Ellis *v.* Wadeson, 1 Q. B. 714 (1899); and see Weall *v.* James, 68 L. T. 54.

(6) Cf. O. XXI. r. 50, and see sub-rule (1), *ante*, "They shall appear individually."

(7) Baishnab Charan *v.* Bank of Bengal, 19 C. L. J. 581 (1914), at p. 589, *per* Beachcroft, J.

under protest with denial of partnership is in fact a partner, the plaintiff may apply for leave to issue execution against his private goods under O. XXI. r. 50.(1)

Suits between co-partners.

9. *This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.*

Application.—Application for leave to issue execution under this rule is made in England by summons.

Partners generally.—See notes to rr. 1–3, *supra*.

"**Execution.**"—See notes to O. XXI. r. 50, *ante*.

Suit against person carrying on business in name other than his own.

10. *Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.*

"**Any person.**"—By the concluding words of this rule all the foregoing rules of this Order are to apply to an individual sued, who trades within the jurisdiction as a firm, or who carries on business under an assumed or trading name.(2) But the rule applies to a single individual residing and trading within the jurisdiction in a name other than his own name, whether it purports to be the name of a firm or not. If the trading name is apparently the name of an individual (*e.g.*, if William Smith is carrying on a business under the name of Richard Smith), the plaintiff, if he is aware of it, should add to the defendant's name in the title to the writ, the words "(a trading name)." (3) The English ruling as laid down in the case of foreign firms, viz. that they cannot be sued in the firm name, applies also to a single foreigner trading in a name or style other than his own name. He cannot be sued in his trading name, even though he has a branch office in this country.(4)

"**May be sued.**"—He may *be sued* but he cannot *sue* in his trade name.(5) Though this does not interfere with the old Admiralty practice under which

(1) See as to this and as to application to strike out the appearance, r. 5, *supra*, note, "Deemed to be served as a partner."

(2) Cf. remarks of James and Brett, L.JJ., *Ex parte* Blain, 12 C. D. 522, and see r. 194, *supra*.

(3) Ann. Pr., notes to O. 48A, r. 11.

(4) St. Gobain *v.* Hoyermann's Agency, 2 Q. B. 96 (1893); see also rr. 1–3, *supra*, notes, "Foreign firms," and "Carrying on business," etc.; and cf. Worcester City Banking Co. *v.* Firbank & Co., 70 L. T. 102 (1894); 1 Q. B. 784.

(5) Mason *v.* Mogridge, 8 Times Rep. 805.

the "owners of the cargo" may in an action *in rem*, sue as such, even where the "owners" consist of a person trading as a firm.(1) A person sued by his trading name may be ordered to disclose his real name and private address (rr. 1–3). In a firm of "L. & Co.," apparently consisting only of L. trading as "L. & Co.," there was a concealed partner. An action was brought by "L. & Co.," against G., who counterclaimed for jewellery supplied to L. for personal use. Held that counterclaim was bad against the firm.(2)

Service.—The writ may be served as provided by r. 3, *supra*, *q.v.*, but not in England if the defendant is resident out of the jurisdiction.(3) Where a single individual trading as a firm could not be served and there was no responsible person in charge of the business, it was held that substituted service could be ordered.(4)

Appearance.—Must appear in his own name.(5) Appearance under protest of person served denying that he is the person sued.(6) As to effect of non-appearance, see O. XXI. r. 50.

All subsequent proceedings continue in the name of the firm.—See as to this, notes rr. 6–8, *supra*.

Execution.—See O. XXI. r. 50, *ante*.

(1) The Assunta, P. 150 (1902).

(2) Baker *v.* Gent, 9 Times Rep. 159.

(3) See St. Gobain & Co. *v.* Hoyermann's Agency, cited *supra*, note, "Carrying on business within the jurisdiction."

(4) Shillito *v.* Child, W. N. (83), 208; Croydon & Co. *v.* Jackson, 3 Times Rep. 650.

(5) R. 6. As to the effect of such an appearance, see note to that rule, "They shall appear individually."

(6) See r. 8.

ORDER XXXI.

Suits by or against Trustees, Executors and Administrators.

Representation of beneficiaries in suits concerning property vested in trustees, etc.

1. In all suits concerning property vested in a trustee, executor or administrator, *where* the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

Representation of beneficiaries.—The rule which corresponds with English O. 16, r. 8, applies only when the contention is between the person beneficially interested and a third person. Persons acting as trustees in succession under a will were held to adequately represent all persons beneficially interested in the estate in all suits relating to it.(1) Trustees sufficiently represent an unascertained and unascertainable class (2) or persons.(3) The rule governs all suits concerning property without distinction.(4) The rule has no application when the contention is between beneficiaries and trustees, or between the beneficiaries themselves, though where the section applies it is not ordinarily necessary to make the beneficiaries parties. The Court may, if it think fit, do so. The last clause is taken from 15 & 16 Vict. c. 86, s. 42, r. 9, and beneficiaries are made parties in England when the trustee is either wholly uninterested, or has an interest adverse to their interest.(5) The discretion of the Court is not limited in this respect.(6) A *cestui que trust* may sue on the refusal or inability of trustees to sue.(7) Where a suit was brought by an executor and the names of the beneficiaries who took possession of the estate during the pendency of the suit were

(1) Ardesir *v.* Hirabai, 8 B. 474 (1884).

(2) Fussell *v.* Dowding, 27 Ch. D. 240; *Re* Sheldon, 39 Ch. D. 52.

(3) Cardigan *v.* Curzon Howe, 1901, 2 Ch. 485.

(4) See Ann. Pr., notes to O. 16, r. 8, which rule was amended to expressly include a case of foreclosure.

(5) Beresford *v.* Ramasabba, 13 M. 197, 202 (1889).

(6) See Day *v.* Radcliffe, 24 W. R. (Eng.) 844; Wilkins *v.* Reeves, 3 W. R. (Eng.) 305; Gas Light, etc., Co. *v.* Towse, 35 Ch. D. 526; May *v.* Newton, 34 Ch. D. 347; cf. also D. C. P 173, 188, 190, 207. In Mohananda Chatterjee *v.* Ackhoy Kumar, 6 C. W. N. 488 (1901), the Court refused to add parties.

(7) Ann. Pr. 160; cf. Meldrum *v.* Score, 56 L. T. 471.

some other person to sue. Sect. 440 of the last Code required notice to be given to the guardian. This has been omitted. When there is no guardian, any person who fulfils the qualifications of r. 4 may sue. In r. 1 the word "adult" has been removed. It is unnecessary, as majority is one of the required qualifications under r. 4. The protection of the minor's interests is left to persons who may be willing to come forward at the risk of costs, and subject to that risk any person may do so.(1) In either case the person suing for the minor is called his next friend. A minor cannot sue alone. He can only sue or be sued by a next friend or guardian *ad litem*, and a decree can only be given for or against him if thus duly represented. The reason why no proceeding can be taken by an infant without the assistance of a next friend is on account of an infant's (2) supposed want of discretion, and his inability to bind himself and make himself liable for costs.(3) So far as the minor is concerned, the object of his appointment is to secure the minor's interests, and as regards the defendant, in order that there may be some one before the Court to whom the defendant can look for his costs, if successful. The rule was intended for the protection and benefit of defendants, as in England it has been held that when a defendant waives this benefit and protection the suit may proceed without a next friend.(4) Any sane, adult person, not a defendant, and having no interest adverse to the minor, may be a next friend.(5) No person can be made a next friend without his consent.(6) Although the consent of a minor to the institution of a suit by a next friend is immaterial, and a suit may be instituted on his behalf whether he consents or not, the suit is, in fact, brought in his name, and is treated as a suit brought by him.(7) The minor is the real plaintiff.(8) The next friend is not a party to the suit, but a person whose duty it is to prosecute the suit for the minor, and he cannot therefore appeal in his own name.(9) The right of a minor to sue by a next friend is a matter of principle, and a rule independent of statutory enactment, and therefore a minor may sue for possession in a Mamlatdar's Court by his next friend, although the Mamlatdar's Act (Bom., Act III. of 1876) makes no provisions for such a

(1) Kerakoose *v.* Serle, 3 M. I. A. 329, at p. 345 (1844).

(2) Noor Ahmed *v.* Lulta, 2 A. H. C. R. 189 (1870); Bama Soonduree *v.* Grish Chunder, 3 W. R., Act X., 138 (1865); Chinniah *v.* Baribun Saib, 5 M. H. C. R. 435 (1870).

(3) Doorga Mohun *v.* Tahir Ally, 22 C. 270, 274 (1894).

(4) Ib.; and see as to waiver of irregularity, Kamalakshmi *v.* Ramasami Chetti, 19 M. 127 (1895), cited *post*; and Chinniah *v.* Baribun Saib, 5 M. H. C. R. 435 (1870) [advantage of the point must be taken by pleader's objection].

(5) R. 4, *post*.

(6) See O. I. r. 10.

(7) Venkatanarasayya *v.* Achemma, 3 M. 3. 4 (1881).

(8) Brijessuree Dossia *v.* Kishore Doss, 25 W. R. 316 (1876); Bhobotarini *v.* Sree Ram, 9 C. 629, 630 (1883). The statement in Bama Soonduree *v.* Grish Chunder, 3 W. R., Act X., 138 (1865), that "the minor is himself no party to a suit in the eye of the law," is incorrect. As the next friend is not a party to the suit, and the party is the minor, a suit by a next friend on behalf of a minor is that of the minor, and is governed by the law of limitation applicable to the minor: Khodabux *v.* Budree Narain, 7 C. 137 (1881); Jaggivan Amirchand *v.* Hasan Abraham, 7 B. 179 (1883); Monmohun *v.* Gunga Soondery, 9 C. 181 (1882); Lolit Mohun *v.* Janoky Nath, 20 C. 714 (1893). Representation by a guardian does not remove disability, Anantharama *v.* Karuppanan, 4 M. 119 (1881), which, however, is purely personal: Rudra Kant *v.* Nobo Kishore, 12 C. L. R. 269 (1883).

(9) Bhobotarini *v.* Sree Ram, 9 C. 629 (1883).

suit.(1) The plaint should describe the minor plaintiff as "*A B* a minor by his next friend *C D*," and a minor defendant as "*C D*, minor of whom *E F* is guardian *ad litem*." (2) The representative capacity comes to an end with the death of the minor, and the next friend or guardian *ad litem* cannot execute a decree after the minor's decease. The latter's legal representatives should move in the matter.(3) Where a suit is brought in violation of these provisions, the plaint should be returned in order that the error may be rectified.(4) When a suit is brought by an alleged minor through his next friend, and when it is found that the plaintiff is not a minor, the suit should not (though the Allahabad High Court dissents) be dismissed, as the defendant can be indemnified by costs. The defendant should apply to have the plaint taken off the file or amended, and if this is not done the next friend's name may be treated as mere surplusage.(5) Where, on the other hand, the defendant contends that the plaintiff is a minor,(6) and that the suit cannot be carried on without a next friend; if the plaintiff fails to prove his majority, the Court should not dismiss the suit, but should appoint a next friend.(7) Where a minor sued herself without a next friend, but no objection was taken by the defendants until the case came before the Court of first appeal, at which time the plaintiff had attained majority, it was held that the irregularity was waived.(8)

Costs.—The words in sect. 440 of the last Code, "*and may be ordered to pay any costs in the suit as if he were the plaintiff*," have been omitted. If the suit fails, the next friend will be ordered to pay the defendant the costs, an order addressed to the minor in person to pay those costs being illegal.(9) But as between the next friend and the minor, the former is *primâ facie* entitled to costs.(10) The Court may,(11) and usually does, direct that the next friend should, though the suit be unsuccessful, have his costs out of the estate. It frequently is right to make a next friend or guardian liable for costs, but there are also cases in which it is not proper to hold him personally liable.(12) As a rule he is entitled to attorney and client costs, except where the fund is reversionary, and then he may claim the difference when the fund comes into

(1) Dattrataya *v.* Vaman, 21 B. 88 (1895).

(2) See Mongula Dossee *v.* Sharoda Dossee, 20 W. R. 48 (1873); Komul Chunder *v.* Surbessur Doss, 21 W. R. 298 (1874). As to the effect of misdescription, see notes to r. 5, *post*.

(3) Hulodhur Roy *v.* Judoonath, 14 W. R. 162 (1870).

(4) Russick Das *v.* Preonath Mis.r, 10 C. 102 (1883).

(5) Taqui Jan *v.* Obaidulla, 21 C. 866 (1894); Net Lal Sahu *v.* Karim Buksh, 23 C. 686, 689 (1896); dissented from in Sheorania *v.* Bharat Singh, 20 A. 90 (1897).

(6) As to evidence of minority, see Khetter Mohun *v.* Ramessur, W. R. (1864), p. 304; Kalee Haldar *v.* Sreeram Ghose, W. R. (1864), p 366 [appearance of alleged minor; positive evidence].

(7) Moorlee Dhur *v.* Nathonee Mahtoon, 25 W. R. 184 (1876).

(8) Kamalakshmi *v.* Ramasami Chetti, 19 M. 127 (1895).

(9) Rajah Bikromajeet *v.* Court of Wards, 21 W. R. 312, 314 (1874) [a peculiar case, in which, though the suit failed, the defendant had, under the circumstances, to pay]; Bai Porebai *v.* Devji Meghji, 23 B. 100, 102 (1898).

(10) Dunn *v.* Dunn, 3 Drew. 17; Ann. Pr., 1905, p. 173. See Cross *v.* Cross, 8 Beav. 445; Staines *v.* Maddox, Mos. 319.

(11) Devkabai *v.* Jefferson, 10 B. 248, 253, 254 (1886).

(12) Damant *v.* Hennell, 33 Ch. D. 224.

and permitted to act as such on the minor's behalf.(1) These provisions have been taken from the Original Side rules.(2) The same reasons which require the representation of an infant plaintiff (3) apply to the case of an infant defendant. A minor may appear by attorney or pleader, but he can only plead or conduct the defence by his guardian.(4) As to the age of majority, see notes to r. 1, *ante*. A guardian *ad litem* is not within the scope of sect. 3 of the Majority Act.(5) The rule assumes that there is a suit which may, and indeed must be instituted before a guardian is appointed, and limitation counts from the date of the plaint and not from the appointment of the guardian.(6)

Upon the institution of a suit against an infant the question of service of summons is one of some difficulty. There are no special provisions as to the service of summons upon infants, and therefore the same rules appear to apply as in the case of adults.(7) Summons should be issued and served on the minor defendant. Where there has been neither personal nor substituted service on the minor defendant or on the certificated guardian, and an *ex parte* decree has been passed, it will be set aside under sect. 108 (now O. IX. r. 13).(8) Where, however, it was not definitely shown that any attempt was made to serve the summons upon the infants personally, or upon their mother before serving it upon the only adult male member and *karta* of the family, but it was not shown that the alleged irregularity had caused any prejudice, it was held to be cured by sect. 578 (now sect. 99).(9)

Subsequent to the issue of summons, the Court must proceed under this rule to satisfy itself of the fact of minority.(10) Where no guardian *ad litem* is appointed (mere notice of a proposal to appoint a person being insufficient) and an *ex-parte* decree is passed, it will be set aside.(11) And where it is so satisfied, the Court should proceed to the appointment of a guardian. It is the duty of the Court to see that a minor's interests are properly represented.(12) The provisions of the rule are mandatory, and should be strictly followed.(13)

(1) Subramanya Pandya *v.* Siva Subramanya, 17 M. 316, 335 (1894).

(2) Suresh Chunder *v.* Jugut Chunder, 14 C. at p. 209 (1886).

(3) *Vide* r. 1.

(4) Kasi Doss *v.* Kassim Sait, 16 M. 344, 346 (1892); these provisions apply to the Parsi Marriage Act; Sorabji *v.* Buchoobai, 18 B. 366 (1894).

(5) Gordhandas *v.* Harivallubdas, 21 B. 281, 285 (1896).

(6) Khem Karan *v.* Har Dayal, 4 A. 37 (1881).

(7) Suresh Chunder *v.* Jugut Chunder, 14 C. 204, 215 (1886), where Wilson, J., doubted whether service on a guardian *ad litem* was good service under the Code. In Jatindra Mohan *v.* Srinath Roy, 26 C. 267 (1898), it was said that ss. 74 and 76 were controlled by this section; but in that case no summons was served either upon the minors or their certificated guardians. In Dakeshur *v.* Rewa, 24 C. 25 (1896), an attempt to serve the latter was held insufficient.

(8) Jatindra Mohan *v.* Srinath Roy, 26 C. 267 (1898).

(9) Walian *v.* Banke Behari, 30 C. 1021 (1903); Munnu Lal *v.* Ghulam Abbas, 32 A. 287 P. C. (1910); 37 I. A. 77.

(10) Suresh Chunder *v.* Jugut Chunder, 14 C. at p. 217 (1886).

(11) Bhura Mal *v.* Har Kishan, 24 A. 383 (1902); Dakeshur *v.* Rewat, 24 C. 25 (1896).

(12) Nursinghomoyee Gooptia *v.* Peary Soonduree, 2 Sev. 699 (1863); and a Court should not pass a decree against a minor without taking care that he is properly represented; Sheoburrut Singh *v.* Lalljee Chowdhry, 13 W. R. 202 (1870).

(13) Walian *v.* Banke Behari, 30 C. 1021 (1903); s. c., 7 C. W. N. 744; 5 Bom. L. R. 822; Jatindra Mohan *v.* Srinath Roy, 26 C. 267, 274 (1898); Bhura Mal *v.* Har Kishan, 24 A. at p. 386 (1902).

No order appointing a guardian should be made *ex parte*, so that opportunity may be given for the making of an application on behalf of the infant under r. 3, though the fact that an order appointing a guardian at the instance of the plaintiff is made *ex parte* is not necessarily fatal to the suit.(1) If the minor or his friends and relatives, in whose care he may be, fail to move the Court to appoint a guardian, then the appointment may be made at the instance of the plaintiff.(2) The appointment is made by the Court and not by the parties, though it is on their application; (3) and by the Court in which the litigation is pending.(4) The appointment of a guardian *ad litem* under this rule is wholly distinct from the appointment of a guardian under the Guardian and Wards Act.(5) The Code expressly requires the appointment of a guardian *ad litem* whether or not a guardian is appointed under Act VIII. of 1890, although that Act gives precedence (r. 4, clause 2) to a guardian appointed under its provisions.(6) Though advisable it is not necessary that there should be a formal order of appointment if it appears on the face of the proceedings that the Court has sanctioned the appointment.(7)

As to who may be appointed, see r. 4. Sub-rule (2) of that rule gives precedence (8) to guardians of the person or property unless special reasons exist against their appointment. So while there is nothing to prevent a guardian suing her ward, in such a case the minor must be represented by some other person whose interest is not adverse to him.(9) Where a guardian filed a written statement which was prejudicial to the interests of the minor, the Court observed that in a suit in which it is not necessary for a minor defendant to take an active part, no guardian is ever justified in taking any step prejudicial to his ward. If he can do nothing positively for the minor's benefit he ought simply to leave the matter to the Court.(10) A father cannot act as guardian *ad litem* of his son when there is a clear conflict of interest between them. Thus where a father, professing to act as the head of a *Mitakshara* family, executed a mortgage of the family joint-property, it was not open to him to impugn its validity, but

(1) Suresh Chunder *v.* Jugut Chunder, 14 C. 204 (1886).

(2) Ib. See *In re* Motiram, 11 B. H. C. R. 21 (1874); Babaji *v.* Maruti, 11 B. H. C. R. 182 (1874); under the Code of 1859, where the plaintiff failed to give the name of the guardian (*vide ante*), the Court dismissed the case: Radha Kristo *v.* Ram Chunder, 11 W. R. 300 (1869). See rr. 3, 4, *post*.

(3) Guru Churn *v.* Kali Kissen, 11 C. 402 (1885) [neither the Code nor Act XL. of 1858 give a plaintiff any power to institute a suit against a person named by himself as guardian *ad litem*]; Sreenarain Mitter *v.* Sreemutty Kishen, 11 B. L. R. at p. 191 (1873); Doorgapersad *v.* Keshopersad, 8 C. 656 (1882) [manager of estate].

(4) Ruling, 5 M. H. C. R. App. viii. (1869).

(5) Vithaldas *v.* Dattaram, 26 B. 298 (1901).

(6) Dakeshur *v.* Rewat, 24 C. 25 (1896).

(7) Walian *v.* Banko Behari, 30 C. 1021 (1903); Suresh Chunder *v.* Jugut Chunder, 14 C. 204 (1886); Jatindra Mohan *v.* Srinath Roy, 26 C. at p. 272 (1898); Kunhammad *v.* Kutti, 12 M. 90, 91 (1888).

(8) Cf. under Act XL. of 1858; Baldeo Das *v.* Gobind Shankar, 7 A. 914 (1885).

(9) Rakhalmoni Dassi *v.* Adoita Prosad, 7 C. W. N. 419 (1900); s. c., 30 C. 613, in which case the plaintiff alleged that the natural father of the minor defendant had fraudulently, and without the knowledge of the plaintiff, obtained the appointment of the plaintiff as guardian of the minor as her husband's alleged adopted son.

(10) Court of Wards *v.* Raj Coomar, 17 W. R. 142 (1871); the usual practice in such cases is to state that the defendant is a minor, and that he leaves his interests to the protection of the Court.

it would be the duty of the guardian *ad litem* of the infant son to urge as a defence that the mortgage was beyond the scope of the father's authority; and it was therefore held that the father could not be the guardian *ad litem*.(1) Where the plaintiff alleges that the defendant is not a minor, and minority is pleaded as a defence to an action, inasmuch as an alleged minor cannot be treated as if he was of full age during the investigations of any material averment in a suit, a guardian should be appointed for the defendant and a preliminary issue should be framed and tried as to whether the defendant is or is not a minor.(2) Though by sect. 440 of the last Code the next friend of a plaintiff might be made liable for costs there was no similar express provision with respect to a guardian. But according to the English practice, which has been followed by the Bombay High Court, he has been made to pay costs where he has been guilty of gross misconduct in the case; (3) as where a guardian put executors to proof of a will which he wished to upset for his own private purposes, and which the evidence showed was, to his knowledge, duly executed.(4) The Madras High Court, in a case (5) which does not appear to have been considered in the one last cited, has held that the Code does not authorize a Court to decree costs against the guardian of a defendant except in the case referred to in sect. 458 (now r. 11), which deals only with costs when a guardian is removed.

"**Shall appoint.**"—The provisions are imperative, and where they are not substantially complied with the minor is not properly represented, and any decree which may be passed against him is a nullity.(6) Thus where a decree had been passed against a minor who was described in the suit as of age, it was held that it was a nullity so far as he was concerned.(7) The Court must not only appoint a guardian, but satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence, and generally to act in the interests of the minor. The duty of the Court is not a mere matter of form.(8)

Clause (4).—This is based on sect. 443 of the last Code. The Legislature has considered it necessary to ensure that notice should reach one interested in the minor's welfare, and this rule aims at securing this result. It was held that the appointment, apparently by an oversight, as guardian *ad litem* to a minor defendant, of a person other than the certificated guardian, amounted to no more than an irregularity not vitiating the decree or sale thereunder. See next rule, clause (2).(9)

(1) Balkesen *v.* Tapesur, 17 C. W. N. 219 (1911); cf. Ganesha Row *v.* Tuljaram Row, P. C., 18 C. L. J. 1 (1913).

(2) Kari Doss *v.* Kassim Sait, 16 M. 344 (1892).

(3) Goolam Hoosein *v.* Fatmabai, 8 B. 391 (1884).

(4) Ib.

(5) Narasimha Rau *v.* Lakshmipati, 3 M. 263 (1881).

(6) Hanuman Prasad *v.* Muhammad Ishaq, 28 A. 137 (1905).

(7) Purno Chandra *v.* Bejoy Chand, 18 C. L. J. 18 (1913); following Rashid-un-nisa *v.* Muhammad Ismail, P. C., 31 A. 572; 13 C. W. N. 1182 (1909); and Narsingh *v.* Sheikh Jahi, 15 C. L. J. 3 (1911); distinguishing Walian *v.* Banke Behary, *supra*, 30 C. 1021 (1903).

(8) Ramchandra Das *v.* Joti Prasad, 29 A. 675 (1907).

(9) Dammar Singh *v.* Pribhu Singh, 29 A. 290 (1907).

Petition for guardian ad litem.—See *ante*, where the procedure will be found dealt with. A person cannot be appointed guardian *ad litem* against his will; and this is now enacted by r. 4; (1) but where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made, unless and until it is revoked by the Court; (2) and therefore for purposes of appeal.(3) A Court has jurisdiction to try a suit against a minor notwithstanding the appointment of one of its officers (4) to be the minor's guardian *ad litem*.(5)

Who may *act as* **next friend** *or be appointed guardian for the suit.*

4. (*1*) Any person *who is* of sound mind and *has attained* [*majority* may act as next friend of a minor *or as his guardian for the suit:*

Provided *that the* interest *of such person* is not adverse to that of the minor and *that* he is not, *in the case of a next friend*, a defendant, *or, in the case of a guardian for the suit, a plaintiff.*

(*2*) *Where* a minor has a guardian appointed or declared [by competent authority, *no* person other than such guardian *shall act as the next friend of the minor* or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that *another* person be permitted to act or be appointed, as the case may be.

(*3*) *No person shall without his consent be appointed guardian for the suit.*

(*4*) Where there is no other person fit and willing to act as [guardian for the suit, the Court may appoint any of its officers to be such guardian, *and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.*

Who may act.—See notes to r. 1, *ante*.

Who may be next friend and guardian.—A married woman may be next friend,(6) though under the provisions of sect. 457 of the last Code, which

(1) Jadow Mulji *v.* Chhagan Raichand, 5 B. 306 (1881); Issur Chunder *v.* Nobo Kristo, 7 C. L. R. 407, 410 (1880); Narsingh *v.* Sheikh Jahi, 15 C. L. J. 3 (1911).

(2) Jwala Dei *v.* Peibhu, 14 A. 35 (1891).

(3) Venkata *v.* Alakarajamba, 22 M. 187 (1898).

(4) See Issur Chunder *v.* Nobo Kristo, 7 C. L. R. 407 (1880); Babaji *v.* Maruti, 11 B. H. C. R. 182 (1874).

(5) Jadow Mulji *v.* Chhagan Raichand, 5 B. 306 (1881).

(6) Asirum Bibi *v.* Sharip Mondul, 17 C. 488 (1890), F. B.; overruling Guru Pershad *v.* Gossain Munraj, 11 C. 733 (1885).

have not in this respect been re-enacted, she could not be appointed guardian *ad litem*.(1) In a suit by minors to obtain a declaration that a decree did not affect them, inasmuch as they were not properly represented by their mother, who was incapable of acting as guardian, they were held entitled to a decree.(2) Whatever be the propriety of making provision by the appointment of a public officer for the institution of suits on behalf of infants, it is of the utmost importance that no person should be appointed of whom even a suspicion can exist that he may be barred by personal interest. The Privy Council therefore disapproved of the appointment of the Registrar, who, according to the practice of the Supreme Court, was entitled to a commission of 5 per cent. on all sums paid into Court.(3) It was held that the Code did not apply to all guardians, for it did not apply to natural guardians. See notes to last rule.(4)

Representation of minor **by next friend or guardian** *for the suit.*

5. (*1*) Every application to the Court on behalf of a minor, other than an application under *rule 10, sub-rule* (*2*), shall be made by his next friend or *by* his guardian for the suit.

(*2*) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, *where* the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

Applications to be by representative.—The Code no doubt distinguishes between next friends and guardians for the suit; the former term being used in respect of plaintiff minors, and the latter when the minors are defendants. But if a guardian *ad litem* has not been appointed for a defendant a next friend can apply.(5)

Order obtained by next friend or guardian.—This rule shows that no order by which a minor or lunatic is in any way concerned or affected can legally be made without such minor being represented by a next friend or guardian for the suit.(6) The words "may be discharged" appear to give discretionary power to the Court.(7) No order binds a minor unless he was

(1) See Kachayi Kuttiali *v.* Udumpumthala, 29 M. 58 (1906), 60, 61; Kali Shankar Sahai *v.* Pratab Udai Nath Sahi, 6 C. L. J. 36 (1907); Kundan Lal *v.* Gajadhar Lal, 29 A. 728 (1907). The disability has now been removed. But see Narsingh *v.* Sheikh Jahi, 15 C. L. J. 3 (1911); appointment of a married woman as guardian *ad litem* for an infant defendant renders the proceedings a nullity so far as the infant is concerned.

(2) Sham Lal *v.* Ghasita, 23 A. 459 (1901).

(3) Kerakoose *v.* Serle, 3 M. I. A. 329 (1844).

(4) Budhilall Manji *v.* Morarji Premji, 31 B. 413 (1907) [testamentary guardian appointed by Hindu father].

(5) Jotindronath Mitter *v.* Raj Kristo, 16 C. 771 (1889).

(6) Amichand Talakchand *v.* Collector of Sholapur, 13 B. 234 (1888) [application to sue as pauper].

(7) Doorga Mohun *v.* Tahir Ally, 22 C. at p. 274 (1897).

properly represented at the time it was made.(1) Where an order for sale was made when the minor was properly represented, the absence of a guardian was held not to affect the validity of subsequent proceedings.(2) And where a Hindu widow during the course of a litigation adopted a son, but did not put him on the record, it was held that she was justified in pursuing the litigation *bonâ fide* for his benefit, and that he was bound by the decree.(3) If, however, a person entitled to represent a minor does purport to represent him, a mere misdescription in the cause title is not fatal to the suit. In all cases the question to be decided is whether on a construction of the plaint and pleadings the minor is really a party to the suit or not, and, if he be, any irregularity is provided for by sect. 99, *ante*.(4) And where a minor has been properly represented he is as much bound by a judgment in his own action as if he were of full age,(5) and the principle of *res judicata* applies.(6) Where the decree is sought to be executed, the Court executing the decree cannot entertain the plea of non-representation, is it must presume that the decree was rightly passed. The minor's remedy as to apply for a review or to file a suit for an injunction restraining the execution of the decree.(7) If a minor desire to have a decree set aside because any available good ground of defence was not put forward at the hearing by his guardian, he should apply for a review. If the decree was *ex parte*, the procedure to be adopted is that prescribed by the Code for setting aside *ex parte* decrees. Where a decree has been made against an infant duly represented, and the former on majority seeks to set that decree aside by separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian.(8) The costs may be

(1) Mrinamoyi Dabia *v.* Shibchand Chuckerbutty, 5 C. 450 (1879); Vishnu Keshav *v.* Ramchandra Bhaskar, 11 B. 130 (1886); Daji Himat *v.* Dhirâjram Sadaram, 12 B. 18 (1887); Ganga Prosad *v.* Umbica Churn, 14 C. 754 (1887); Jungee Lall *v.* Sham Lall, 20 W. R. 120 (1872); Durgapersad *v.* Keshopersad, 8 C. 656, 662 (1882); Radha Kristo *v.* Ram Chunder, 11 W. R. 300 (1869); Russick Das *v.* Preonath Misree, 10 C. at p. 105 (1883); Sham Lal *v.* Ghasita, 23 A. 459 (1901). As to carrying on suit after majority, see notes to r. 12.

(2) Net Lall Sahoo *v.* Sheikh Kareem, 23 C. 686 (1896).

(3) Hari Saram *v.* Bhubaneswari, 16 C. 40 (1888); 15 I. A. 195; ref., Vasudev *v.* Krishnaji, 20 B. 534 (1895).

(4) Bhaba Pershad *v.* Secretary of State, 14 C. 159, 163, F. B. (1886); Jogi Singh *v.* Kunj Behari, 11 C. 509 (1885); Suresh Chunder *v.* Jugut Chunder, 14 C. 204 (1886) [approved by P. C., Walian *v.* Banke Behari, 30 C. 1021, 1032 (1903)]; Natesayyan *v.* Narasimmayyar, 13 M. 481 (1890); Kedar Prosanno *v.* Pratap Chunder, 20 C. 11 (1892); Goonoo Monee *v.* Ram Komul, 17 W. R. 144 (1872); Alim *v.* Jhalo, 12 C. 48 (1885). But see Shonai Bewa *v.* Monoram Mundul, 11 C. L. R. 15 (1882); Grish Chunder Mookerjee *v.* Miller, 3 C. L. R. 17, 19 (1878) [" there is no authority for saying that where minors have been really sued, though in a wrong form, a decree against them would not be valid "]; Subramanya Panda *v.* Siva Subramanya, 17 M. at pp. 337, 338 (1894).

(5) Modhoo Soodun *v.* Prithee Bullub, 16 W. R. 231 (1871); Sherafutoollah Chowdhry *v.* Sm. Abedoonissa, 17 W. R. 374 (1872) [and the minor is liable to arrest]; unless there be fraud or collusion: Raghubar Dyal *v.* Bhikya Lal, 12 C. 69, 76 (1885); Cursandas *v.* Ladka Vahu, 19 B. 571 (1895).

(6) Bonomally Kesh *v.* Hungshessur Roy, 17 W. R. 492 (1872); Venkatachalam *v.* Mahalakshmamma, 10 M. 272 (1886).

(7) Nawab Mahomed *v.* Har Charan, 6 A. H. C. R. 98 (1874).

(8) Raghubar Dyal *v.* Bhikya Lal, 12 C. 69 (1885); Dabee Dutt *v.* Subodra Bibee, 25 W. R. 449 (1876); Cursandas *v.* Ladka Vahu, 19 B. 571 (1895); as to estoppel against the minor, see Ganesh Lala *v.* Bapu, 21 B. 198 (1895); Brohmo Dutt *v.* Dhurmodass Ghosh,

directed to be paid by the pleader.(1) But the minor being unrepresented, the Court has no authority to make his estate liable for costs.(2)

Receipt by next friend or guardian *for the suit* of property under decree for minor.

6. (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

(*a*) by way of compromise before decree or order, or

(*b*) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

Receipt of property under decree.—This section was substituted in the last Code by Act VIII. of 1890, sect. 53 (*d*). It has been held that this rule did not apply in the case of a managing member of a Mitakshara joint-family who was appointed guardian *ad litem* of his minor brother for the purpose of a rent suit in which both the brothers obtained a decree for arrears of rent.(3)

Agreement or* compromise *by* next friend or guardian *for the suit.

7. (*1*) No next friend or guardian for the suit shall, without the leave of the Court, *expressly recorded in the proceedings*, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(*2*) Any such agreement or compromise entered into without the leave of the Court *so recorded* shall be voidable against all parties other than the minor.

Scope of rule.—The provisions of this rule are intended to protect the interests of minors,(4) and have been adopted (5) from the rule previously laid down by the Privy Council.(6) A suit relating to the estate or person of an infant,

26 C. 388 (1898); Ameer Ali and Woodroffe's Evidence Act, s. 115, 6th ed. In Ramachari *v.* Duraisami, 21 M. 167 (1897), the alleged minors were of age but acquiesced.

(1) See Shonai Bewa *v.* Monoram Mundul, 11 C. L. R. 15 (1882).

(2) Amichand Talakchand *v.* Collector of Sholapur, 13 B. 234 (1888).

(3) Harihar *v.* Mathura, 35 C. 561 (1908).

(4) Rajagopal Takkaya *v.* Subramanya Ayyar, 3 M. 103, 104 (1881).

(5) Sharat Chunder *v.* Kartik Chunder, 9 C. 810 (1883).

(6) Moulvie Abdool *v.* Mozuffer Hossein, 16 W. R., P. C. 22 (1871).

nd for his benefit, has the effect of making him a ward of Court, and no act can e done affecting the property of the minor unless under the express or implied irection of the Court itself.(1) This principle, on which the rule is based, as been applied to a case which, it was held, strictly did not fall within its erms; it being held that when the next friend of a minor withdrew from a suit, hough it was not proved that the defendant entered into any agreement with he next friend, it was open to the minor through another next friend to have the uit re-opened on review, on the ground that the former next friend, though uilty of no fraudulent conduct, was grossly negligent of the minor's interest n withdrawing from the suit.(2) The rule contemplates the existence of a guardian and a pending litigation, and was therefore held not to apply where, when he agreement was made, there was neither a guardian for a suit nor a suit.(3)

As to the effect of a compromise entered into without leave, *vide post.* Where a compromise was effected and allowed by the Court, and a decree was nade in accordance with its terms, it was held that no appeal lay against the compromise decree, and that the remedy for setting it aside was by way of eview or regular suit.(4) Where a guardian had entered into a compromise without leave but undertook to present the petition to Court, and subsequently declined to do so, and opposed a decree being passed in its terms, it was held that inasmuch as leave had not been asked for and the guardian objected to the Court passing a decree in terms of the compromise, the Court had no power to enforce it, even though its terms might appear to be beneficial to the minors.(5) A decree-holder who rests his case upon his decree having been made against a minor by consent, is under the necessity of proving that the consent was given by some one having authority to bind the minor.(6)

Leave.—The Court has to grant leave. The form, however, of expression used for the purpose of indicating that the Court grants leave to compromise is of slight importance. The question is whether the Court, after a consideration of the circumstances, really intended to grant leave.(7) The Court must, however, in some form show that it has considered the question and granted leave. And the mere passing of a decree on a compromise does not amount to sanction, which will not be inferred from the subsequent passing of a decree in terms of such compromise.(8) In order that a compromise may be binding upon a minor, the leave of the Court must be express, and it must be arrived at upon the exercise of a judicial discretion as to the propriety of the compromise in the interests of the minor, and the section makes no exception in the case of

(1) Doraswami Pillai *v.* Thungasami Pillai, 27 M. 377 (1903).

(2) Ram Sarup *v.* Shah Latafat, 29 C. 735 (1902).

(3) Vithaldas *v.* Dattaram, 26 B. 298 (1901); s. c., 3 Bom. L. R. 887.

(4) Rakhalmoni Dassi *v.* Adoita Prasad, 7 C. W. N. 419 (1903).

(5) Ranga Rao *v.* Rajagopala Raju, 22 M. 378 (1899).

(6) Muhammad Mumtaz *v.* Sheoratangir, 23 C. 934 (1896).

(7) Virupakshappa *v.* Shidappa, 26 B. 109 (1901); s. c., 3 Bom. L. R. 565.

(8) Arunachalam Chetty *v.* Miyappa Chetty, 21 M. 91 (1897); Rajagopal Takkaya *v.* Subramanya Ayyar, 3 M. 103 (1881); Sharat Chunder *v.* Kartik Chunder, 9 C. 810 (1883). See Manohar Lal *v.* Jadunath Singh, 28 A. 585 (1906); Krishun Prosad *v.* Romesh, 13 C. W. N. 103 (1908).

a certified guardian.(1) Under the last Code such leave was presumed in certain cases.(2) The amended rule now requires that the leave should be expressly recorded: following the Privy Council decision that it should in some way, not open to doubt, be shown that the leave of the Court was obtained.(3) Where a Hindu father was party to a partition suit and was himself the guardian *ad litem* of his minor son (also a party) it was held that the fact that he represented the family did not exempt him from the duty of obtaining leave for a compromise which was clearly intended to affect the son's interest, and that since such leave was not obtained, the son was not bound by it.(4)

The Court should not make a decree by consent against an infant without ascertaining that it is for his benefit that such a decree should be pronounced.(5) The Court must have before it the materials necessary to enable it to arrive at a judicial conclusion with respect to the compromise. The terms and evidence of their propriety and reasonableness must be before it.(6) In order to make an agreement or compromise, to which this rule applies, a lawful agreement or compromise, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise, and before making the agreement or entering into the compromise should obtain permission from the Court to enter into the agreement or compromise proposed. The Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court, and that, having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise. From the mere fact that the Court passed the decree in accordance with the compromise, it cannot be inferred that any of those steps preliminary and necessary to the making of the decree have been taken by the Court.(7) If leave is given under a misrepresentation of a material fact, due either to fraud or culpable and wilful ignorance, it is not binding.(8)

When necessary.—The rule does not only refer to agreements out of Court but to such agreements as also to compromise decrees, namely, those agreements which are given effect to by a decree of the Court. The words "any agreement," etc., include a compromise finally determining the suit.(9) The provisions apply to compromises after decree.(10) Applications in execution are proceedings in the suit, so that a compromise of such a proceeding would be a compromise

(1) Lala Majlis *v.* Musst. Narain, 7 C. W. N. 90 (1902). In an early case the Court required the certificate-holder to procure the consent of the Court by which the certificate was granted to the filing of the compromise: Sheonundun Singh *v.* Katesa Kooer, 6 A. H. C. R. 179 (1874); and see Pirojshah *v.* Manibhai, 36 B. 53 (1911) (no exception in the case of a Collector).

(2) Sridhar Rao *v.* Ram Lal, 31 A. 7 (1908).

(3) Manohar Lal *v.* Jadunath Singh, 28 A. 585 (1906); Kunwar Partab Singh *v.* Babuti Singh, P. C., 18 C. L. J. 384 (1913).

(4) Ganesha Row *v.* Tuljaram Row, P. C., 40 I. A. 132; 36 M. 295; 18 C. L. J. 1; 17 C. W. N. 765 (1913).

(5) Ram Churn *v.* Mungal Sircar, 16 W. R. 232 (1871).

(6) Virupakshappa *v.* Shidappa, 26 B. 109 (1901); s. c., 3 Bom. L. R. 565.

(7) Kalavati *v.* Chedi Lal, 17 A. 531 (1895).

(8) Bibee Solomon *v.* Abdool Azeez, 6 C. 687 (1881).

(9) Lala Majlis *v.* Narain Bibi, 7 C. W. N. 90 (1902).

(10) Arunachellam *v.* Ramanadhan, 29 M. 309 (1905).

"with reference to the suit." (1) A guardian has no power to waive a right to compensation for part of the estate taken under the Land Acquisition Act; (2) nor to enter into an agreement to refer matters in suit to arbitration,(3) though the contrary has also been held,(4) or to withdraw a suit without the leave of the Court.(5) A mere matter of proof, such as the consent by a guardian of a minor defendant to accept the oath of the plaintiff,(6) or abstaining from pressing objections, it being uncertain whether there was evidence sufficient to sustain them,(7) is not within the rule.

Effect of want of leave.—A decree by consent without leave is invalid and not binding on the minor.(8) The only modes, however, of setting aside a decree are by review under sect. 114, or by a separate suit,(9) and not by application for a rule in the original suit; (10) or in execution proceedings under sect. 47: the question whether a decree was void as against the minor not being one relating to the execution of the decree.(11) The compromise can be avoided by a minor either on or before his attaining majority.(12) In a recent Privy Council decision where a Hindu father had been appointed guardian *ad litem* of an infant son in a suit for partition by a member of the joint-family and had made a compromise without the leave of the Court, it was held that the

(1) Virapakshappa *v.* Shidappa, 26 B. 109 (1901); s. c., 3 Bom. L. R. 565.

(2) Luchmeswar Singh *v.* Chairman, Dharbhanga Municipality, 18 C. 99 (1890).

(3) Lakshmana Chetti *v.* Chinnathambi Chetti, 24 M. 326 (1900). As to arbitration out of Court, see Romon Kissen *v.* Hurrololl Sett, 19 C. 334 (1892).

(4) Hardeo Sahai *v.* Gauri Shankar, 28 A. 35 (1905); Atmaram *v.* Bhila Ganpat (1912), 15 Bom. L. R. 223; and see Lutawan *v.* Lachya, 36 A. 69 (F. B.) (1913).

(5) Doraswami Pillai *v.* Thungasami Pillai, 27 M. 377 (1903).

(6) Chengal Reddi *v.* Venkata Reddi, 12 M. 483 (1889); Sheo Nath *v.* Sukh Lal, 27 C. 229 (1899); s. c., 4 C. W. N. 327. See Lakshmana Chetti *v.* Chinnathambi, 24 M. at p. 330 (1900).

(7) Mirali Rahimbhoy *v.* Rehmoobhoy, 15 B. 594, at p. 597 (1891), *per* Bayley, J. It has, however, been held that actual waiver will not bind a minor if not for his benefit: Swamirao *v.* Collector of Dharwar, 17 B. 299 (1892).

(8) Arunachellam r. Marugappa, 12 M. 503, 504 (1889); Virupakshappa *v.* Shidappa, 26 B. 109, 114 (1901); as to an adjustment being binding at any rate upon parties not minors, see Lakshmana Chetti *v.* Chinnathambi, 24 M. 326, at p. 321 (1900). The effect of the decision in Aman Singh *v.* Narain Singh, 20 A. 98 (1897), is not clear, but apparently sanction was given after the compromise had been entered into and not before. See Sethuram *v.* Vasanta, 34 M. 314 (1910) (in which Aman Singh *v.* Narain Singh was not followed), and Bhiwa *v.* Devchand, 35 B. 322 (1911) (the fact that the minor has benefited by the settlement makes no difference).

(9) Mirali Rahimbhoy *v.* Rehmoobhoy, 15 B. 594 (1891) [which deals, at p. 599, with the case of Eshan Chundra Safooi *v.* Nundamoni Dossee, 10 C. 357 (1884)]; Virupakshappa *v.* Shidappa, 23 B. 620 (1899); s. c., 1 Bom. L. R. 82 [and not by the Court *proprio motu*: but see as to this decision, Virupakshappa *v.* Shidappa, 26 B. 109, at p. 113 (1901)]; where the Court wrongly rejected an application for review, the High Court interfered in revision. Doraswami Pillai *v.* Thungasami Pillai, 27 M. 377 (1903); Barhamdeo Prasad *v.* Banarsi Prasad, 3 C. L. J. 119 (1904) [when decree should be set aside by suit and when by review].

(10) Mirali Rahimbhoy *v.* Rehmoobhoy, *supra*; s. c. in Lower Court, *sub voc.* Karmali Rahimbhoy *v.* Rahimbhoy Habibhoy, 13 B. 137 (1888).

(11) Arunachellam *v.* Marugappa, *supra*; but see Rajagopal Takkaya *v.* Muttuplaem Chetti, 3 M. 103 (1881).

(12) Virupakshappa *v.* Shidappa, 26 B. 109 (1901).

compromise was not binding on the minor and that he was remitted to his original rights under the decree in partition.(1)

Retirement of next friend.

8. (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by *an* affidavit showing the fitness of the person proposed, and also that he has no interest adverse to *that of* the minor.

"**Retire.**"—The words "*at his own request*" have been omitted, but the sense is the same.(2)

Removal of next friend.

9. (1) *Where* the interest of the next friend of a minor is adverse to that of *the* minor or *where* he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or *where* he does not do his duty, or, *during the* pend*ency of* the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, *and make such other order as to costs as it thinks fit.*

(2) *Where* the next friend is not a guardian appointed or declared by an authority competent in his behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, *and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.*

Removal of next friend.—Where a Court finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on his behalf for the removal of the next friend and for the appointment of a new next friend, or in order that the minor plaintiff may,

(1) Ganesha Row *v.* Tuljaram Row, 36 M. 295, P. C. (1913); 40 I. A. 132.

(2) Banarsi *v.* Ram Narain, 30 A. 105 (1907).

on coming of age, elect to proceed with the suit or withdraw from it.(1) Courts can be moved to stay a suit improperly brought on behalf of an infant, and to remove an improper next friend of an infant and to substitute a proper person in his place.(2) It has been considered expedient to enact that where a guardian insists on his right to be appointed next friend in the place of another there should be power to require him to become liable or give security for costs in the suit previously incurred, and the second clause has been amended accordingly.

Stay of proceedings on removal, *etc.*, of next friend.

10. (1) On the *retirement*, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

(2) *Where* the pleader of such minor omits, within *a* reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or *in* the matter *in* issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

Retirement, removal or death of guardian for the suit.

11. (*1*) *Where* the guardian for the suit *desires to retire or* does not do his duty, or *where* other sufficient ground *is* made to appear, the Court *may permit such guardian to retire or* may remove him, and may *make such* order *as to* costs *as it thinks fit.*

(*2*) *Where* the guardian for the suit *retires*, dies or is removed by the Court *during the* pend*ency of the* suit, the Court shall appoint a new guardian in his place.

Costs.—The former section ran : "*and may order him to pay such costs as may have been occasioned to any party by his breach of duty.*" This may be done now. This rule is not, so far as regards payment of costs, applicable to any person appointed to act as guardian *ad litem* without his previous consent.(3) As to whether the Court may decree costs against a guardian, except in the case mentioned in this rule, see notes to r. 3, *ante*.

Course to be followed by minor plaintiff or applicant on *attaining majority*.

12. (*1*) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending *shall*, on *attaining majority*, elect whether he will proceed with the suit or application.

(*2*) *Where* he elects to proceed with *the suit or application*, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(1) Doraswami Pillai *v.* Thungaswmi Pillai, 27 M. 377 (1903).

(2) Bai Porebai *v.* Devji Meghji, 23 B. 100 (1898).

(3) Jadow Mulji *v.* Chhagan Kaichand, 5 B. 306 (1881).

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus :—

"A. B., late a minor, by C. D., his next friend, but now *having attained majority*."

(4) *Where* he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or *opposite party* or which may have been paid by his next friend.

(5) Any application under *this rule* may be made *ex parte;* but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

Election of minor to proceed.—An application under this rule may be made *ex parte*, and does not require notice. Leave (which may be *nunc pro tunc*) will be given as a matter of course unless there is an absolute bar by positive enactment. The provisions as to correction of title refer to a pending suit, and not to a suit after final decree, in which it only remains to proceed to execution. The omission to comply with the requirements of this rule is a mere irregularity, and will not bar execution of a decree.(1) *Quære*—whether a minor who, having been a party to a suit but not properly represented, was served with summons afterwards on attaining majority carried on the suit as transferee of the estate from the previous owner, was not bound as a party.(2)

Where **minor co-plaintiff** *attaining majority* **desires to repudiate suit.**

13. (1) *Where* a minor co-plaintiff on *attaining majority* desires to repudiate the suit, *he shall* apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(2) Notice of the application shall be served on the next friend, *on any co-plaintiff and* on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) *Where the applicant is* a necessary party to the suit, the Court may direct him to be made a defendant.

Majority.—Sect. 454 of the last Code required that the attainment of majority must be proved by affidavit. Though this provision is omitted proof of course is still necessary.

(1) Durga Mohun *v.* Tahir Ali, 22 C. 720 (1894).

(2) Partab Narain *v.* Trilokinath, 11 C. 186 (1884); 11 I. A. 197.

Unreasonable or improper suit.

14. (1) A minor on attaining majority may, if a sole plaintiff, apply *that a* suit instituted in his name by a next friend *be* dismissed *on the ground that it* was unreasonable or improper.

(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, *or make such other order as it thinks fit.*

Application of *rules* to persons of unsound mind.

15. The provisions contained in *rules* 1 *to* 14, *so far as they are applicable*, shall *extend to* persons adjudged to be of unsound mind *and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.*

Persons of unsound mind or mentally infirm.—By sect. 463 of the last Code, the provisions in sects. 440 to 462 of that Code were declared *mutatis mutandis* to apply in the case of persons adjudged to be lunatics under Act XXXV. of 1858 or any other lunacy law for the time being in force. It was held that the provisions of sect. 440 of the last Code were by that section to be applied to lunatics. Whatever might be the meaning of the word "guardian" in sect. 440, when minors were concerned, it was held that there was no reason to suppose that the Legislature intended to alter or affect the existing law in respect of the persons who alone are entitled to bring suits on behalf of the estate of a lunatic. The person denominated guardian must mean the person who is himself competent to sue. A guardian of the person only of a lunatic has no right to bring a suit in respect of the lunatic's estate. The manager of the estate is the person to do so, though under sect. 440, a person other than the guardian of the estate could also sue with the leave of the Court.(1)

Sect. 463 of the last Code applied in terms only to those adjudged to be of unsound mind, and therefore in other cases of unsoundness of mind a next friend or guardian could not be appointed under Chapter XXXI.(2) The provisions, however, of that Chapter were held not to be exhaustive and the Courts to have an inherent power to act in the interests of justice. Though a person alleged to be a lunatic, though not so found, might appear either in person or through a vakil; (3) if it was held that a person of unsound mind was not entitled to sue by a next friend or defend by a guardian until he had been adjudged to be a lunatic, serious failure of justice might result.(4) Where, therefore, a person

(1) Bai Divali *v.* Hiralal, 23 B. 403 (1898). As to execution against manager, see Omrao Singh *v.* Prem Narain, 24 W. R. 264 (1875).

(2) Jonnagadla *v.* Thatiparthi, 6 M. 380 (1883).

(3) Uma Sundari *v.* Ramji Holdar, 7 C. 242 (1881).

(4) See Nabbu Khan *v.* Sita, 20 A. 2, at pp. 4, 5 (1899); Kadala Reddi *v.* Narisi, 24 M. 504, at p. 507 (1901), where also it is

was admitted or was found to be of unsound mind, although he had not been adjudged to be so, he should, it was held, if a plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he was a defendant.(1) It had to be first ascertained whether the person in question was or was not of unsound mind, and in the case of a suit instituted by a next friend whether the suit was for his benefit.(2) It will be observed that the amended rule gives effect to these rulings, and the preceding rules are made directly applicable both to adjudged and non-adjudged lunatics. The rule also includes the mentally infirm so as to cover the case of a person incapacitated from protecting his interests by reason of his mental weakness or of his being a deaf mute.

Saving for **Princes and Chiefs.**

16. Nothing in *this Order shall* apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of the Governor General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

Princes and Chiefs.—Sect. 464 of the last Code, which this rule replaces, was substituted for the former section by sect. 53 (*e*), Act VIII. of 1890. The former section ran, after the word "name," "and *nothing in sects.* 442–462 *applies to any minor or person of unsound mind, for whose person or property a guardian or manager has been appointed by the Court of Wards* (3) *or by the Civil Court under any civil law.*"

pointed out that it was wrongly assumed, in Narayana *v.* Krishna, 8 M. 214, 217 (1885), that any suitor could obtain an adjudication in lunacy, the fact being that only certain specified persons can move in the matter.

(1) Nabbu Khan *v.* Sita, 20 A. 2 (1897); Venkatramana Rambhat *v.* Timappa Devappa, 16 B. 132 (1891); Kadala Reddi *v.* Narisi, 24 M. 504 (1901); Pransukhram Dinanath *v.* Bai Ladkor, 23 B. 653 (1899), where, as also in the first and third cases cited, it is pointed out that the rule as to next friends in England is no longer that stated in the passage of Daniell's Chancery Practice, which was relied on in Tukaram Anant *v.* Vithal Joshi, 13 B. 656 (1889). In Kirparam Jhumekram *v.* Modia Doyalji, 19 B. 135 (1894), the matter was queried; Rasik Lal Datta *v.* Bidhumukhi Dasi, 33 C. 1904 (1906); Lakhya Dasya *v.* Uma Kanto, 14 C. W. N. 256 (1909).

(2) Pransukhram Dinanath *v.* Bai Ladkor, 23 B. 653 (1899).

(3) See Sanku *v.* Puttamma, 14 M. 289, 293 (1890); Beresford *v.* Ramasubba, 13 M. 197 (1889); Bhoopendro Narain *v.* Baroda Prosad, 18 C. 500 (1891); Bireswar Roy *v.* Shoshi Shekar, 17 C. 688 (1889); Dinesh Chunder *v.* Golam Mostapha, 16 C. 89 (1888). Where a suit was brought by a manager under the Court of Wards and it was objected that he had no authority to sue, the Privy Council refused to entertain the objection on appeal: Hurdey Narain *v.* Rooder Perkash, 10 C. 626 (1884).

ORDER XXXIII.

Suits by Paupers.

Suits may be *instituted in formâ pauperis.*

1. Subject to the following *provisions*, any suits may be *instituted* by a pauper.

Explanation.—A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit.

"**Suit.**" "**Instituted.**"—It was held that the wording of this and the following rules indicate that the only kind of application contemplated by the Legislature is an application to *institute* a suit.(1) The word "instituted" has now been substituted for "brought." It was, however, held in the case last cited, that a Court had power to allow a suit instituted in the ordinary form to be *continued in formâ pauperis*.(2) It has been held that an order to give security for costs, obtained in a suit filed in the ordinary course, ceases to operate as regards antecedent costs if leave is given to continue the suit as pauper, provided the leave is granted before the time for giving security has expired.(3) Although the provisions in the Code only provide for suits to be brought by a pauper, it has been held that the Court has power to allow a defendant to defend in *formâ pauperis*.(4) Order XLIV., *post*, provides for pauper appeals, and as to cross-appeals in *formâ pauperis*, see notes to that order. Sect. 141 provides for the procedure in miscellaneous proceedings, and the provisions of Chapter XXVI. of the last Code, which these rules replace, have been held applicable to petitions for Probate,(5) and to suits sanctioned for removal of trustees under the Religious Endowments Act.(6)

"**Pauper.**"—The only question is whether an applicant is a pauper as defined in the Explanation. A person is not bound to try and raise funds by

(1) See argument in Thompson *v.* Calcutta Tramway Co., 20 C. 319, 320 (1893).

(2) Ib.; foll. Nirmul Chandra *v.* Doyal Nath, 2 C. 130 (1877); Revji Patil *v.* Sakharam, 8 B. 615 (1884).

(3) Bai Laxmi *v.* Harjivan Nathu, 36 B. 415 (1911).

(4) Doorga Churn *v.* Nittokally Dossee, 5 C. 819 (1880).

(5) *In re* Will of Dawubai, 18 B. 237, 239 (1893).

(6) Gurusami *v.* Krishnasami, 24 M. 419 (1901).

mortgaging his claims.(1) A Hindu father's wealth is not a bar to a son suing as a pauper to prove his adoption; (2) nor does a husband's wealth preclude a wife suing as a pauper when she cannot claim from him the means of carrying on the suit.(3) In the case of minors the English practice (4) appears to be not to allow a minor to institute a suit through his next friend, unless he gives proof not only that he is himself a pauper, but that the next friend is a pauper, and that he cannot get any substantial person to act as next friend.(5) Following this practice, the Calcutta High Court allowed a suit to be brought in *formâ pauperis* by a next friend who was also a pauper.(6) The question whether a minor might sue as a pauper by a next friend who was not a pauper was not decided in that case, but the right was subsequently affirmed by the Madras High Court,(7) which held that the English practice to the contrary was not justified by the Code. The Code does not exclude persons holding a fiduciary character, and therefore an executor or administrator can sue in *formâ pauperis*.(8) It has been held that there is no necessity for an inquiry whether an alleged representative of an admitted pauper is a pauper or not, and that the Court, if satisfied that he is the legal representative, should admit him to carry on the suit.(9) But the Bombay High Court has disagreed.(10) The conditions of pauperism are different (*a*) when the plaint requires a court-fee, and (*b*) when none is required. In either case the effect of pauperism is the same. As regards the first case the measure is the sum required to pay the fee on the plaint. In the second case Rs.100 is the measure. The intention in both cases is the same, viz. to fix a certain sum—in one case the fee on the plaint, and in the other case Rs.100, and to provide that if the petitioner has not this sum at his disposal, he will be exempt from court-fees.(11) So, property admitted to be the property of the petitioner is not the "subject-matter of the suit," although claimed in the petition.(12) The concluding portion of the Explanation, "other than his necessary wearing apparel," etc., do not govern its first part.(13)

Formerly excepted suits.—Under sect. 402 of the last Code a pauper could not sue to recover compensation for loss of caste, libel, slander, abusive language or assault. The suits excepted were strictly limited to those mentioned. Where it was argued that Chapter XXVI. of the former Code was

(1) Vedanta *v.* Perindevamma, 3 M. 249 (1881); distinguished in Kapil Deo *v.* Ram, 33 A. 237 (1910).

(2) Chutto Ram Tewari, Petitioner, S. D. Sum. Dec., 7th Sept., 1846.

(3) Laloonissa, Petitioner, S. D. Sum. Dec., 15th Dec., 1845.

(4) See English O. 16, rr. 22-31.

(5) Venkatanarasayya *v.* Achemma, 3 M. 3 (1881).

(6) Golaupmonee *v.* Prosonomoye, 11 B. L. R. 373 (1873). See also Misser *v.* Mutty Lall, Fulton, 490 (1844).

(7) Venkatanarasayya *v.* Achemma, 3 M. 3 (1881). As to payment of costs by next friend, see notes to r. 11, *post*.

(8) *In re* Bell, 7 M. 390 (1884); *In re* Will of Dawubai, 18 B. 237 (1893); for English rule, see case first cited, and Ann. Pr., notes to O. 16, r. 31; Oldfield *v.* Cobbett, 1 Ph. 615, D. C. Pr. 87, 88.

(9) Bhagbut Doss *v.* Baloram Doss, 3 W. R. Misc. 20 (1865); but see *In re* Dawubai, 18 B. 237.

(10) Manaji Rajuji *v.* Khandoo, 36 B. 279 (1911).

(11) Dwarka Nath *v.* Madhavrav, 10 B. 207, 209 (1886), in which it is suggested that the wording of the section might be amended. But see Fatmabai *v.* Dossabhoy, 34 B. 638 (1909).

(12) Ib.

(13) Krishnabai *v.* Manohar, 30 B. 593 (1906).

intended to apply only to suits for the enforcement of personal claims, and therefore not to suits under the Religious Endowments Act, or sect. 539 (now 92, 93) of the Code, it was *held*, that in that Chapter, and particularly in sect. 402 and the former section corresponding with r. 5, the restrictions on the liberty of the right to sue as a pauper were expressly prescribed, and that the Court would be adding to those restrictions if it held that a person should not be allowed to sue as a pauper when his suit is one that is brought under the Act mentioned.(1) There are, however, now, no excepted suits, as sect. 402 of the last Code has not been re-enacted. The Special Committee stated that in the light of the case-law it was misleading, so far as it suggested that a suit would lie for loss of caste or abusive language, and they saw no sufficient reason for withholding from a pauper a right to sue as such in respect of defamation or assault.

Contents of application.

2. *Every* application for permission to sue *as* a pauper shall contain the particulars required in regard to plaints in suits: a schedule of any moveable or immoveable property belonging to the *applicant*, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of *pleadings*.

Presentation of application.

3. Notwithstanding anything contained in *these rules*, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by *an* authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Presentation of application.—Where an applicant dies before leave is granted, the legal representative may present a fresh application or may institute a suit for the same relief, which the deceased sought to recover, if the right to sue survives in him.(2) R. 3 is imperative, and a petition to sue as a pauper must be presented in person, unless the pauper is exempted from appearing in Court under sects. 132, 133, *ante*.(3) So where a petitioner was in jail and did not present the petition in person it was rejected; (4) and the mere fact that several persons jointly present an application does not authorize the Court to entertain it on behalf of applicants who do not appear in person.(5) A pleader may be an authorized agent; (6) but in that case he must be specially authorized

(1) Gurusami *v.* Krishnasami, 24 M. 419 (1901).

(2) Lalit Mohan Mandal *v.* Satish Chandra Das, 33 C. 1163 (1906).

(3) *Ex parte* Devgir Guru, 4 B. H. C. R., A. C. J. 91 (1867). So a pardanashin is exempted: Wazir-un-nissa *v.* Ilahi Baksh, 24 A. 172, 173 (1901).

(4) Ib.

(5) Burgess *v.* Sidden, 10 M. 193 (1887).

(6) Kishoree Mohun *v.* Gour Monee, 15 W. R. 198 (1871).

as the pauper's attorney, an ordinary *vakalutnamah* not being sufficient.(1) If the applicant does not appear in person he may, under r. 4, be examined by commission.

Examination of applicant.

4. (1) *Where* the application *is* in proper form and duly presented, the *Court* may, if *it* thinks fit, examine the *applicant*, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

If presented by agent, Court may order applicant to be examined by commission.

(2) *Where* the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

Examination of applicant.—It was held under the corresponding section of the Code of 1859, that the examination referred to is that of the petitioner or his or her agent, and that at this stage the Court has no power to examine witnesses.(2) The present rule also speaks merely of the examination of the petitioner or his agent. If on the examination some of the grounds appear which are mentioned in the next rule, then notices are to issue as provided in r. 6, and they pave the way to the formal hearing mentioned in r. 7, at which the question of the applicant's pauperism has to be determined. The proceedings under this (3) and the next rule are of a preliminary character, and a rejection under them is not, as in the case of r. 7, of a final kind and a bar to a subsequent application.(4)

The rule directs the examination of an applicant regarding the merits, in order that it may be ascertained whether his allegations show or do not show a right to sue.(5) The mere statements in the plaint cannot be accepted as the sole material on which a decision as to this question can depend; for if this were so, the granting of an application would depend not on whether the pauper had in fact any merits to go upon, but on the skill of the person drafting his petition and plaint, and the examination as to the merits under this section would be superfluous.(6)

Rejection of application.

5. The Court shall reject *an* application *for permission to sue as a pauper*—

(*a*) *where it is* not framed *and* presented in the manner prescribed by *rules* 2 *and* 3, or

(1) Musst Bhugobutty *v.* Gunesh, 21 W. R. 308 (1874).

(2) *In re* Parkash Ojha, 25 W. R. 74 (1876).

(3) The case cited in next note says s. 405, but this appears to be a mistake.

(4) Chattarpal Singh *v.* Raja Ram, 7 A. 661, at pp. 663, 664 (1885).

(5) Koka Ranganayaka *v.* Koka Venkatachellapati, 4 M. 323, 324 (1881).

(6) Kamrakh Nath *v.* Sundar Nath, 20 A. 299, at p. 301 (1898); Nawab Bahadur *v.* Harish, 13 C. L. J. 593 (1910).

(*b*) *where* the applicant is not a pauper, or

(*c*) *where* he has, within two months next before the presentation of the application, disposed of any property fraudulently or *in order to be able to apply for permission to sue as pauper*, or

(*d*) *where* his allegations do not show a *cause of action, or*

(*e*) *where* he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

Rejection or application.—The provisions of this rule, operating as they do in derogation of the ordinary rights of a litigant, must be construed strictly, and the exercise of the Court's power to reject under this rule is limited to the grounds specified in the various clauses of the rule itself.(1)

There are conflicting decisions as to whether an appeal does (2) or does not (3) lie from an order rejecting an application to sue as a pauper. It has, however, been held in several cases (4) that such an order is subject to revision. As to limitation in the case of pauper applications, see below.(5)

Clause (*d*) in the last Code ran, "*that his allegations do not show a right to sue in such Court.*" The concluding words, "sue *in such Court*," lent some support to the argument that the paragraph referred to the jurisdiction of the Court, and not to the cause of action disclosed in the application.(6) It was, however, held that the words "show a right to sue" cannot be read as limiting the Court's discretion to merely ascertaining whether "the right to sue" arose within its jurisdiction, but have a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action capable of enforcement in Court, and calling for an answer, and not barred by the law of limitation or any other law.(7) This is now made clear in the amended clause.

(1) Chattarpal Singh *v.* Raja Ram, 7 A. 661, 670 (1885), *per* Mahmood, J.

(2) Baldeo *v.* Gula Kuar, 9 A. 129 (1887).

(3) Secretary of State *v.* Jillo, 21 A. 133, F. B. (1898). See Skinner *v.* Orde, 2 A. 241, at p. 245: "the question of pauperism is not a point in the cause; it is a mere matter of procedure," *per* Sir M. Smith. In Mumtazan *v.* Rasulan, 23 A. 364, 366 (1901), it was treated as clear that no appeal lay from an order granting leave to sue as a pauper.

(4) Chattarpal Singh *v.* Raja Ram, 7 A. 661 (1885), *per* Mahmood, J.; Muhammad Husain *v.* Ajudhia Prasad, 10 A. 467 (1888); Secretary of State *v.* Jillo, 21 A. 133, 136 (1898); Koka Ranganayaka *v.* Koka Venkatachellapati, 4 M. 323 (1881); Debo Das *v.* Mohunt Ram, 2 C. W. N. 474 (1898); Gopal Chandra *v.* Begoo Mistry, 8 C. W. N. 70 (1903), under s. 115, *ante*, but not under the Charter; Shaikh Babur *v.* Gokhul Lall, 24 W. R. 62 (1875).

(5) S. 4, Act XV. of 1877; Mitra's Limitation Act, 677, 4th ed.; Janardan Vithal *v.* Anant Mahadev, 7 B. 373 (1883) [application to sue as pauper; death of opponent; substitution of heirs].

(6) Amirtham *v.* Alwar Manikkam, 27 M. 37, 39 (1903); and see *per* Mahmood, J., in Chattarpal Singh *v.* Raja Ram, 7 A. 661, at p. 671 (1885).

(7) Chattarpal Singh *v.* Raja Ram, 7 A. 661 (1885), F. B.; Dulari *v.* Vallabdas, 13 B. 126 (1888); Vijendra *v.* Sudhendra, 19 M. 197 (1895); Kamrukh Nath *v.* Sundar Nath, 20 A. 299 (1898); Amirtham *v.* Alwar Manikkam 27 M. 37 (1903).

So the Court will see not only whether it has jurisdiction,(1) but whether there is a right to sue or cause of action to be entertained,(2) and, assuming so, whether the intended suit is barred by *res judicata* (3) or limitation,(4) or whether a previous application has been refused.(5) The Madras High Court in one case,(6) and apparently the Calcutta High Court,(7) have held that if the petitioner shows a right to sue, the Judge should allow the application without going into the merits of the claim, the examination as to the merits under r. 4 being merely for the purpose of ascertaining whether the allegations do or do not show a right to sue, or cause of action. Where a plaint in *formâ pauperis* has been admitted, but the Court holds that it has no jurisdiction, and returns the plaint to the plaintiff, it has no jurisdiction to make the plaintiff pay the court-fees.(8) An agreement by a plaintiff, about to sue to redeem a village, to pay his vakil a lump sum of Rs.1500, and in default to realize it out of the revenue of the property, was *held* to be an agreement within the scope of clause (*e*).(9) No leave to appeal in *formâ pauperis* will be given where there is subsisting such an agreement.(10)

Notice of day for receiving evidence of applicant's pauperism.

6. *Where* the Court sees no reason to *reject* the application on any of the grounds stated in *rule 5*, it shall fix a day (of which at least ten days' *clear* notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

Procedure at hearing.

7. (*1*) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(1) See *In re* Ganga Dass Adhikaree, 14 W. R. 281 (1870). In Brohmo Moyee *v.* Anund Chunder, 22 W. R. 120 (1874), the defendant was held on appeal estopped from raising the question of jurisdiction; and see Akbar Husain *v.* Alia Bibi, 25 A. 137 (1902), where it was held that there was an estoppel to objection to plaintiff's representative suing as a pauper.

(2) Vijendra *v.* Sudhindra, 19 M. 197 (1895).

(3) Ib.

(4) Ib.; Chattarpal Singh *v.* Raja Ram, *supra*; *In re* Parkash Ojha, 25 W. R. 74 (1876); Chundee Churn *v.* Ram Narain, Coryt. 8 (1864).

(5) Bisheshur Singh *v.* Moheshur Baksh, S. D. N. W. (1864) ii. 189.

(6) Koka Ranganayaka *v.* Koka Venkatachellapati, 4 M. 323 (1881).

(7) Debo Das *v.* Mohunt Ram, 2 C. W. N. 474 (1898), where, at p. 478, the Court said that if the Judge had stated that the allegations did not show a right to sue it was extremely doubtful whether the Court could interfere in revision; Gopal Chandra *v.* Bigoo Mistry, 8 C. W. N. 70 (1903).

(8) Collector of Ratnagiri *v.* Janardan, 6 B. 590 (1882).

(9) Manohar Ramchandra *v.* Lakshman Mahadev, 9 B. 371 (1885).

(10) Hanifa Bai *v.* Haji Siddick, 30 M. 547 (1906).

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in *rule 5*.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

Examine.—The examination must be conducted by the Judge in person.(1) As appears from the second paragraph, and was previously held,(2) the examination is not limited to the question of pauperism, but embraces all the matters referred to in r. 5, *ante*.(3) This paragraph enables the parties to argue the question if they so desire, but does not preclude the Court, if no argument is offered, from considering that question.(4) If a new defendant be added, an inquiry must be made in the presence of such new defendant.(5) *Semble*, that an order admitting a plaintiff to sue as a pauper made by one Court becomes ineffectual when the plaint is returned by that Court, and that it becomes the duty of the Court before which the petition is subsequently presented to pass orders *de novo* on the subject.(6) The inquiry into pauperism under this and the previous rule takes place before any suit is in existence, for until an application to sue as a pauper is granted there is no plaint, and consequently no suit.(7) As to appeal and revision, see notes to r. 5; and as to review, notes to r. 15.

Procedure if application admitted.

8. *Where* the application *is* granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted *in the ordinary manner*, except that the plaintiff shall not be liable to *pay* any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceedings connected with the suit. [s. 410

Admission of application.—When an application is granted no appeal lies.(8) The order cannot be set aside either on appeal or motion by a superior Court. If, subsequently to permission being granted, it appears that the order has been obtained improperly, application should be made to the Court out of which the order issued.(9) Limitation depends on the date of the application,

(1) *In re* Eknath, 1 B. H. C. R. 102 (1863).

(2) *In re* Gunga Dass, 14 W. R. 281 (1870).

(3) See notes to r. (5).

(4) Amirtham *v.* Alwar Manikkam, 27 M. 37 (1903).

(5) *In re* Hur Chunder Lahori, S. D. Sum. Dec. 26th July, 1847.

(6) Skinner *v.* Orde, 6 A. H. C. R. 225 (1874). This case distinguished on question of limitation in Kishavlal *v.* Mayathai, 9 Bom. L. R. 204 (1907).

(7) Dwarka Nath *v.* Madhavrav, 10 B. 207 (1886).

(8) Mumtazan *v.* Rasulan, 23 A. 364, 366 (1901).

(9) *In re* Khodejoonissa, 7 W. R. 486 (1867); as to whether the propriety of the order can be questioned, if and when the case is appealed, see notes to s. 105.

and not on the day when the application is granted and registered, otherwise a case might be barred whilst the Judge is considering whether the application to sue as a pauper should be admitted.(1) As to limitation in cases in which an application is withdrawn or refused, see notes to r. 15, *post*. There is no suit in existence until the application has been granted.(2) The exemption from liability upon that event only extends to the cases mentioned. So a pauper must pay the proper stamps and penalty (if any) on a document on which he relies.(3)

Dispaupering.

9. The Court may, on *the application of* the defendant, or *of* the Government Pleader, of which *seven days' clear* notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(*a*) if he is guilty of vexatious or improper conduct in the course of the suit;

(*b*) if it appears that his means are such that he ought not to continue to sue as a pauper; or

(*c*) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.

Dispaupering.—If it appears from facts that have been discovered after permission to sue in *formâ pauperis* has been granted, that the applicant ought not to be allowed to continue to litigate as a pauper, the remedy is by application under this rule to the Court which made the order, and not by appeal or motion in the superior Courts.(4)

Costs *where* pauper succeeds.

10. *Where* the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

Rights of Government.—As to the meaning of the word "*succeed*," see

(1) Vinayak Dhavle *v.* Samvat, 4 B. H. C., A. C. J. 39 (1867); Seetaram Gower *v.* Goluknath Dutt, Marsh. 174 (1862); in the last case the application was not admitted until more than one year after it was presented.

(2) Dwarka Nath *v.* Madhavrav, 10 B. 207 (1886); Janardan Vithal *v.* Anant Mahadev, 7 B. 373 (1883). But see Ambika Partap *v.* Dwarka Prasad, 30 A. 95 (1907) (there is a contentious proceeding as soon as the application has been filed).

(3) Golam *v.* Ekram, 10 W. R. 357 (1868).

(4) *In re* Khodejoonissa, 7 W. R. 486 (1867); as to orders when a pauper appeal is withdrawn, see Chandaba *v.* Kuver Saheb, 18 B. 464 (1894).

notes to next rule. The Crown has a right to receive fees at the institution of every suit. It temporarily foregoes (r. 8) its right in the case of pauper plaintiffs, and thus places means in their hands to proceed to judgment against their defendants. Without the forbearance of Government to insist on its ordinary rule, the suit in such a case could not have been brought or the money realized. It is therefore reasonable that the Crown, in consideration of its giving up its rights to these fees, should have for their defrayal the first claim on the proceeds of the pauper suit.(1) The order should not be a contingent one.(2) The amount of court-fees is a first charge (3) on the subject-matter (4) of the suit. To enforce it the Government need not bring a separate suit, but can realize the court-fee from the property by proceedings in execution.(5) The rule is enabling, and though it indicates the manner in which the Crown may proceed to realize the debt, it does not preclude the Crown or its representatives from urging its prerogative and insisting on its rights to precedence over all their creditors.(6) The period allowed to Government is the ordinary period allowed for execution to an individual under the Limitation Act.(7) The section provides that persons who have been successful as paupers shall, so far as the subject-matter of their success is concerned, be liable to satisfy, out of what they recover, the amount of the fees which have been for a time, pending the decision of their suit, remitted to them. But the Collector cannot sell the decree, that is, the whole of the plaintiff's right in the decree, which he has got without waiting for the recovery by the plaintiff of that for which he has got his decree.(8) An order under this rule for sale of property for the purpose of realizing court-fees, and a sale under such order, are *ultra vires* and a nullity when, in fact, there was no jurisdiction in the Court to make the order.(9) In addition to their being a first charge, they are also recoverable from any party ordered to pay. If the pauper succeeds, the fees payable to Government are, under this rule, recoverable from the defendant.(10) A defendant should not, however, be made liable to

(1) Ganpat Putaya *v.* Collector of Kanara, 1 B. 7, 9 (1875); the point here decided [foll. in Collector of Moradabad *v.* Mahomed Daim, 2 A. 196 (1879)] has since been made clear by the introduction of the words "shall be a first charge," etc., which were not in the Code of 1859. See Pran Kristo *v.* Collector of Moorshedabad, 15 W. R. 205 (1871); Ramchandra *v.* Pitcharkanni, 7 M. 434, at p. 436 (1883); Ragho Prasad *v.* Mewa Lal, 39 I. A. 62 P. C. (1912); 34 A. 223; 16 C. W. N. 433; 15 C. L. J. 327; 14 Bom. L. R. 212; 22 M. L. J. 457.

(2) Shostee Churn *v.* Collector of Chittagong, 13 W. R. 155 (1870), in which case, by reason of the form of the order, the Government could get nothing from either party until wasilat was determined, and the parties refused to carry on the proceedings for this purpose.

(3) See Janki *v.* Collector of Allahabad, 9 A. 64 (1886); Puthia Valappil *v.* Voloth Assenar, 25 M. 733 (1902).

(4) As to the meaning of this term, see Janki *v.* Collector of Allahabad, 9 A. 64 (1886).

(5) Ram Das *v.* Secretary of State, 18 A. 419 (1896).

(6) Gayanoda Bala Dassee *v.* Butto Kristo Bairagee, 33 C. 1040 (1906).

(7) Collector of Beerbhoom *v.* Sreehurry, 22 W. R. 512 (1874); Appaya *v.* Collector of Vizagapatam, 4 M. 155 (1881); Venubai *v.* Collector of Nasik, 7 B. 552 (1877); Collector of Broach *v.* Desai Raghunath, 7 B. at p. 549 (1883).

(8) Jotindro Nath *v.* Dwarka Nath, 20 C. 111 (1891).

(9) Balwant Rao *v.* Muhammad Husain, 15 A. 324 (1893).

(10) Jetha Mulchand *v.* Gulraj Jasrup, 8 B. 577, at p. 582 (1884).

pay court-fees on any sum greater than that decreed against him.(1) If the pauper fails, these fees are, under the next rule, recoverable from the plaintiff.(2) Government may be deemed to have been a party to the suit, and therefore orders deciding any matter between Government and the party charged are open to appeal under sect. 47, *ante*.(3) See r. 13, *post*.

Procedure where pauper fails.

11. *Where* the plaintiff fails in the suit or is dispaupered, or *where* the suit is *withdrawn or* dismissed,—

(*a*) *because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or*

(*b*) *because the plaintiff does not appear when the suit is called on for hearing.*

the Court shall order the plaintiff, or any person *added as a* co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

Failure of suit.—There has been some conflict as to the meaning of the word "fails." It has been held that r. 10 only applies where there has been a contest, or else an admission of the claim which has avoided a contest, and refers to cases of adjudicated success; and that, similarly, this rule applies only to cases of adjudicated failure, and to the other cases specified, as where the plaintiff has been dispaupered or the suit has been dismissed under O. IX. rr. 2, 3; *ante*.(4) It was held, therefore, not to apply where the parties came to an amicable arrangement under which the suit was to be dismissed.(5) And where an appeal in *formâ pauperis* was withdrawn, it was held that no order could be made either under this rule or r. 9, and that it was not open to the Court to order the respondents to pay any fees on the strength of any agreement between the parties.(6) The last decision but one has, however, been dissented from by the Madras High Court, which has held that the words "succeeds" in the last rule and "fails" in this, refer to the ultimate decision or the result of the suit, and not to the mode in which the decision is arrived at; that it would be doing violence to the language of the section to introduce the words "after contest;" and that a pauper plaintiff is liable to pay the stamp-duty if his suit is dismissed without trial.(7) A Full Bench of the Bombay High Court has more recently

(1) Chandrareka *v.* Secretary of State, 14 M. 163 (1890).

(2) Jetha Mulchand *v.* Gulraj Jasrup, 8 B. 577 (1884).

(3) Janki *v.* Collector of Allahabad, 9 A. 64 (1886); Secretary of State *v.* Bhagawanti, 13 A. 326 (1891); Secretary of State *v.* Narayan, 35 B. 448, 450 (1911).

(4) Collector of Kanara *v.* Krishnappa, 15 B. 77 (1890).

(5) Ib.

(6) Chandaba *v.* Kuver Saheb, 18 B. 404 (1894).

(7) Collector of Vizagapatam *v.* Abdul Kharim, 21 M. 113 (1897), in which case the Court interfered under s. 622 (now 115).

held that where there is a withdrawal as the result of a compromise, the plaintiff does not succeed within the meaning of the last rule, but "fails" within the meaning of this.(1) The section has now been amended to include a withdrawal.

The terms of this rule are mandatory, and it is obligatory upon the Court when it passes its decree to provide in that decree for payment by the plaintiff of the court-fees.(2) The decisions, however, are conflicting upon the question whether where the Court omits to make an order, the Government may,(3) or may not,(4) apply to rectify the decree. R. 12 now declares the right of Government to apply. An order under this rule amounts to a decree in favour of Government against the unsuccessful plaintiff for the amount of the court-fees, and can be executed by attachment and sale of any property he possesses.(5) This and the last rule only deal with the fees payable to Government. Costs, that is, costs of parties *inter se* against a pauper plaintiff, might, it was held, be awarded to a successful defendant under Chapter XVIII. of the former Code.(6)

Where a suit is instituted by a next friend on behalf of a minor, the latter is the plaintiff. It frequently is right to make a guardian or next friend liable for costs, but there are also cases in which it is not proper to do so. And it does not necessarily follow that because the suit is unsuccessful, the next friend is, as a matter of course, to be ordered personally to pay the costs.(7)

The origin of the last penal clause of sect. 142 of the last Code is to be found in sect. 53, Reg. IV. of 1827, known as Elphinstone's Code, where, however, it is made applicable to all plaintiffs alike. It was omitted from the Code of 1859, but re-enacted in that section with respect to pauper plaintiffs, not for the purpose of exempting them from paying costs to a successful defendant, but because it was deemed necessary to provide a special protection to defendants against being harassed by persons who, *ex hypothesi*, are not likely to be influenced by the fear of having to pay costs.(8) It has now been altogether omitted.

12. *The Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10 or rule 11.*

Government may apply for payment of court-fees.

"**May apply.**"—See notes to last rule. An order passed on an application by Government under this rule for payment under rr. 10 or 11 of this Order is under sect. 47 and appealable.(9)

(1) Secretary of State *v.* Bhagirathibai, 31 B. 10 (1906); and see Secretary of State *v.* Narayan Balkrishna, 29 B. 102 (1904); Secretary of State *v.* Narayan, 35 B. 448 (1911).

(2) Secretary of State *v.* Bhagwanti Bibi, 13 A. 326, 329 (1891).

(3) Collector of Kanara *v.* Krishnappa, 15 B. 77 (1890); Collector of Kanara *v.* Rambhat, 18 B. 454 (1893).

(4) *In re* Secretary of State, 2 C. L. R. 461 (1878); Shusti Churan *v.* Karmar Ali, 1 Shome, 266 (1878), on the ground that Government is not a party to the suit.

(5) Jwala Sahai *v.* Masiat Khan, 26 A. 346, at p. 348 (1904); as to order for payment where the Court has no jurisdiction, see notes to r. 5, *ante*.

(6) Jetha Mulchand *v.* Gulraj Jasrup, 8 B. 577 (1884), F. B.

(7) Brijessuree Dossia *v.* Kishore Doss, 25 W. R. 316 (1876).

(8) Jetha Mulchand *v.* Gulraj Jasrup, 8 B 577, at pp. 580, 581 (1884).

(9) Secretary of State *v.* Narayan, 35 B. 448 (1911).

13. *All matters arising between the Government and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.*

Government to be deemed a party.

"**Between the parties.**"—See *ante*, note to r. 10.

14. *Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.*

Copy of decree to be sent to Collector.

15. An order refus*ing* to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by *the* Government *and by the opposite party* in opposing his application for leave to sue as a pauper.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

Bar to subsequent application.—There must be a "refusal." Therefore the rule does not apply where the Court has not passed such an order, as, for instance, if it returns the application to have the question of pauperism tried by a Court of concurrent jurisdiction; (1) or strikes off "for the present" the application for default by non-appearance. Under such circumstances the application may be renewed.(2) The provisions, moreover, of this rule do not affect the right of a person against whom an order of refusal has been made to obtain a review; and an order under r. 7, refusing leave to sue as a pauper, is subject to review under sect. 114.(3) Assuming, however, that there is an order which is final, the bar under this rule being one to jurisdiction, a Court is competent and bound to take notice of it at any stage of the suit.(4)

On the rejection of an application for leave to sue as a pauper, the only course open to the applicant is that declared in this rule, viz. to institute a suit in the ordinary way, and the date of the institution of that suit for the

(1) Skinner *v.* Orde, 6 A. H. C. 225 (1874).

(2) Bhoj Singh *v.* Maha Koonwer, 3 Agra Misc. 1 (1868); as to whether an unsuccessful application to sue in *formâ pauperis* is a demand by way of action, see Rance Khajoo-roonissa *v.* Rance Ryeesoonissa, 2 I. A. 235 (1875).

(3) Adarji Edulji *v.* Manikji Edulji, 4 B. 414 (1880) [but as to the application being accompanied by copy of judgment, etc., see Wajid Ali *v.* Nawal Kishore, 17 A. 213, 214 (1893)]; Ranchod Morar *v.* Bezanji Edulji, 20 B. 86, 90 (1894)] in which it was also held that both the applications were made in respect of "the same right" to sue]; *In re* Rani Umasundari, 5 B. L. R. App. 29 (1870) [in which the Court interfered under s. 15 of the Charter]; and as to court-fee, see Umda Bibi *v.* Naima Bibi, 20 A. 410 (1898).

(4) Ranchod Morar *v.* Bezanji Edulji, 20 B. 86 (1894).

purposes of limitation is the actual date thereof, and not the date when the application to sue as a pauper was made.(1) *Aliter*, when leave to sue as a pauper having been granted, the applicant is dispaupered.(2) The rule does not expressly provide for the case of withdrawal by the petitioner of his application for leave and payment by him of the court-fees. It has, however, been held by the Calcutta High Court,(3) dissenting from the opinion of the Allahabad High Court,(4) that if an application for leave to sue as a pauper is made, and, upon the defendant opposing it, the applicant puts in the proper court-fee and asks the Court to treat his application as a plaint, the application should be deemed for the purpose of limitation to be a plaint presented on the date on which it was filed.

Costs incurred.—Although this rule makes it a condition precedent in the institution of an ordinary suit by a person whose application to sue *in formâ pauperis* has been rejected that he should first pay the costs incurred by Government, the suit ought not to be dismissed for default in payment of such costs when no demand for the payment has been made either on behalf of the Government or by the Court.(5)

Costs.

16. The costs of an application for permission to sue as a pauper and of an inquiry into pauperism *shall be* costs in the suit.

(1) Keshav Ramchandra *v.* Krishnarao Venkatesh, 20 B. 508 (1895); Naraini Kuar *v.* Makhan Lal, 17 A. 526 (1895); Aubhoya Churn *v.* Bisseswari, 24 C. 889 (1887); Keshavlal *v.* Mayabhai, 9 Bom. L. R. 204 (1907).

(2) Naraini Kuar *v.* Makhan Lal, 17 A. 526 (1895).

(3) Janakdhary Sukul *v.* Janki Koer, 28 C. 427 (1900); foll. Skinner *v.* Orde, 2 A. 241 (1879), P. C.

(4) Abbasi Begam *v.* Nanhi Begam, 18 A. 206 (1896).

(5) Mrinalini *v.* Tinkauri, 16 C. W. N. 641 (1912).

ORDER XXXIV.

Suits relating to Mortgages of Immoveable Property.

Parties to suits for foreclosure, sale and redemption.

1. *Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.*

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

Mortgage suits.—This Order is taken (with the exception of rr. 9 and 11, which are new) from sects. 85–90, 92–94, 96, 97 of the Transfer of Property Act (IV. of 1882). R. 14 is a provision analogous to sect. 100 of that Act, both dealing with charges. Certain amendments, chiefly by way of addition, have been made, to which notice will be drawn. The object of the introduction of this Order was stated to be that hitherto some confusion had been occasioned by the co-existence of the provisions of the Transfer of Property Act and of the Code in regard to execution in mortgage suits. The incorporation of this Order in the Code would, it was said, be welcomed by every one who is familiar with the almost endless controversies which have gathered round the applicability of the provisions of the Code to the enforcement of decrees for sale under the Transfer of Property Act. It was considered that the provisions relating to execution in mortgage suits—that is, questions of *procedure*—should be dealt with in their entirety in the Code, and this Order has been introduced to give effect to this view. As a consequence of this the sections above mentioned of the Transfer of Property Act, as also sect. 99 (as to which, see r. 14), and a portion of sect. 100 of that Act, have been repealed by the fifth schedule. The general effect of this order, therefore, is that the ordinary provisions of the Code apply to mortgage suits and the execution of mortgage decrees, unless there be some special exception to the contrary. It has been said that the effect of the incorporation of these sections of the Transfer of Property Act is that the Original Side of the Calcutta High Court should discard any independent practice based on the old procedure.(1) The subject of this Order has already been fully dealt

(1) Sarat *v.* Nahapiet, 37 C. 907 (1910); and see Amlook Chand *v.* Sarat, 38 C. 913 (1911).

with by Dr. Rash Behary Ghose in his work on mortgages and by Mr. H. S. Gour in his Law of Transfer in British India. It is not necessary, therefore, to go over the same ground. We therefore content ourselves with noting the amendments and additions effected by the present Code.

R. 1 is taken from sect. 85 of the Transfer of Property Act, but after the word "interest" substitutes, in lieu of the words "*in the property comprised in a mortgage*," (1) the words "*either in the mortgage security or in the right of redemption.*" The former phrase, "Having an interest in the property," etc., has been the subject of numerous cases, which will be found collected in Mr. Gour's work. It was proposed to add at the end of the first paragraph of the rule the words "and the decree shall not bind any person not so joined." Sect. 85 of the Act contained the proviso following: 'Provided *that the plaintiff has notice of such interest.*" It was pointed out that this proviso had given rise to certain doubts which it was sought to remove by substituting for it the words cited with a view to making it clear (2) that a person not a party is not bound by a decree. It has been recently held that a mortgagee who is made a defendant, and who omits to set up a mortgage, is barred from suing on such mortgage where in consequence of his omission the property is ordered to be sold free from the mortgage which had not been pleaded (3) As regards the former proviso it was said (4) that the proviso subordinating the obligation to join, to notice, was unnecessary and misleading. For, in the absence of any discriminating equity affecting the right of excluded interests, it was not clear what object the proviso was intended to serve. Could it be supposed that if the plaintiff had omitted to join a necessary party because he had no notice of his interest, then his interest would be differently affected to what they would be if he was excluded, even though the plaintiff did have notice of his interest? Notice may sometimes affect the question, but it does not always do so. The proviso has now been omitted, but the proposed addition has not (probably as being unnecessary) been made. It has been held that a son in a Mitakshara joint-family is a person having an interest in the mortgage and is a necessary party.(5) But in a suit for sale on a mortgage, where the defendant-mortgagors were the managing members of a Mitakshara joint-family, who in that capacity had purchased the mortgaged property, it was held by the Allahabad High Court that the family was sufficiently represented by them and that the suit would not fail through non-joinder of the other members.(6) The Calcutta High Court has recently dissented from this, holding that under this rule a mortgage-suit brought by the *karta* of a joint family without making the other members of the family parties is not maintainable.(7) It has also been

(1) See Jaggeswar Dutt *v.* Bhuban Mohan Mitra, 33 C. 425 (1906).

(2) Cf. Ram Nath Rai *v.* Luchman Rai, 21 A. 193 (1899); Ram Taran Goswami *v.* Rameswar Malia, 11 C. W. N. 1078 (1907).

(3) Nallu Krishnama *v.* Annangara Chariar, 30 M. 353 (1907).

(4) H. S. Gour, Law of Transfer in British India. Notes to sect. 85 of Act IV. of 1882.

(5) Biswanath *v.* Jagdip, 40 C. 342 (1912).

(6) Hari Lal *v.* Munman, 34 A. 549 (1912); Madan Lal *v.* Kishan Singh, 34 A. 572 (1912); cf. Kishan Prasad *v.* Har Narain, 33 A. 272 (1911).

(7) Sidheswari Prosad *v.* Dharamjit Narain, 19 C. L. J. 437 (1914), p. 440; following Lala Surja Prosad *v.* Golab Chand, 27 C. 724 (1900); dissenting from Hari Lal *v.* Munman Kunwar, and Madan Lal *v.* Kishan Singh, *supra.*

held that the effect of an intentional non-joinder of a subsequent mortgagee in a suit on a prior mortgage would not be the dismissal of the suit but only of so much of it as relates to property affected by the subsequent mortgage.(1)

Even if the non-joinder as a party defendant who ought to have been made a party to a suit for sale on a mortgage is by itself a defect fatal to the suit, such defect is cured if the Court acting under O. I. r. 10, sub-rule (2), adds such person as a defendant.(2)

The Explanation to r. 1 is new. There were a number of decisions on the question whether a prior mortgagee was a necessary party in a suit to enforce a subsequent mortgage, a question the determination of which depended upon the meaning to be attached to the word "property" in sect. 85. Was all that was involved in the puisne mortgagee's suit the equity of redemption, in which case the prior mortgagee not being interested therein need not be joined, or was the interest involved something more than the equity? in other words, the mortgaged property subject to the rights of the prior mortgagee, in which case the latter was a necessary party. This question has now been settled by the exclusion of the ambiguous word "property" in the body of the rule and the addition of the Explanation, which removes the doubts which have arisen from the conflict of authorities on the point.

In r. 2 (*c*) the words "*if so required*" have been added before "retransfer." The special Committee stating that according to Mofusil practice a retransfer was not ordinarily required, and being of opinion that this practice should not be altered. It has been held that a Court passing a preliminary decree in a mortgage-suit under this rule has no power to award interest at other than the contractual rate up to the time fixed for payment unless for some legal reason it sees fit to interfere with the contract as to the rate of interest.(3)

The same Committee as regards r. 3 omitted a proposed provision as to the defendant paying money to the plaintiff; considering it better that in every case he should pay into Court. Clauses (*a*) and (*b*) of the same rule are new, as are also the similar clauses in rr. 5 and 8. R. 5 (2) deals with an application by the plaintiff only. The concluding words of sect. 89, "and thereupon the defendant's right to redeem and the security shall both be extinguished," have been omitted.

Clause (3) of r. 8 appears to be an addition. The question which may be raised in connection with this rule, whether one suit for redemption has the effect of barring a second suit for the same relief, has already been dealt with. See notes to sect. 9, O. II. r. 2, sects. 11–14, and Index.

R. 9 is new. It is a recognition of existing practice and remedies, and is an obvious omission in the Transfer of Property Act.

So also is r. 11, which has been inserted in compliance with the suggestion of the Privy Council.(4) This rule was in the Transfer of Property Bill, but

(1) Alam Singh *v.* Gokal Singh, 35 A. 484 (1913).

(2) Kuadan Lal *v.* Faqir Chand, 27 A. 75 (1904).

(3) Rajwanta Kunwar *v.* Shiam Narain Singh, 36 A. 220 (1914); Rameswar Koer *v.* Mahomed Mehdi, 26 C. 39 (1898).

(4) Gopi Narain Khanna *v.* Babu Bansidhar, 32 I. A. 123 (1905); Sundara Reddiar *v.* Subbiah Koundan, 24 M. L. J. 28 (1912).

was omitted by the Select Committee in that Bill on the ground that it ought to find a place in the Civil Procedure Code.

The third paragraph of r. 13 has been amended.

Preliminary decree in foreclosure-suit.

2. *In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—*

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree, and directing—

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.

Final decree in foreclosure-suit.

3. *(1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule* 10, *the Court shall pass a decree—*

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,

(b) ordering him to retransfer the mortgaged property as directed in the said decree,

and, also, if necessary,

(c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree

that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property:

Power to enlarge time. *Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment.*

Discharge of debt. (3) *On the passing of a decree under sub-rule* (2) *the debt secured by the mortgage shall be deemed to be discharged.*

Clauses (a) and (b), sub-rule (1).—See notes to r. 1, *ante*. The Transfer of Property Act did not contain any provision for the passing of a final decree in cases where payment was made in accordance with the terms of the preliminary decree. This was an omission which has been supplied in the first clause of this rule, and of rr. 5 and 8, *post*. These provide for the passing of final decrees in such cases.

Extension of time.—As to appeal, see O. XLIII. r. 1 (*o*).

4. *Preliminary decree in suit for sale.* (1) *In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in clauses* (*a*), (*b*) *and* (*c*) *of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale* (*after defraying thereout the expenses of the sale*) *be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance* (*if any*) *be paid to the defendant or other persons entitled to receive the same.*

Power to decree sale in foreclosure suit. (2) *In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree* (*in lieu of a decree for foreclosure*) *on such terms as it thinks fit, including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.*

5. *Final decree in suit for sale.* (1) *Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule* 10, *the Court shall pass a decree—*

(*a*) *ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,*

and, if so required,

(*b*) *ordering him to retransfer the mortgaged property as directed in the said decree,*

and also, if necessary,

(*c*) *ordering him to put the defendant in possession of the property.*

(*2*) *Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule* 4.

Clauses (a) and (b), sub-rule (1).—See notes to rr. 1 and 3, *ante*. It is now provided by this rule that the application which follows a preliminary decree for sale is for a decree for sale.(1) An application for a decree absolute for sale of a mortgage-charge, under the terms of a consent-decree which provided for satisfaction of the decretal debt by instalments, is an application under this order, and is governed by Art. 181, Sched. I. of the Limitation Act, and must be made within three years from the accrual of the right to apply.(2)

Recovery of balance due on mortgage.

6. *Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.*

In making a decree against the mortgagor personally under this rule, the Court may direct payment by instalments under O. XX. r. 11.(3)

Preliminary decree in redemption suit.

7. *In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—*

(*a*) *ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or*

(*b*) *declaring the amount so due at the date of such decree,*

and directing—

(*c*) *that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his*

(1) Amlooh Chand Parrack *v.* Sarat Chunder Mookerjee, 38 C. 913 (1911); and see Tara Prosanna Bose *v.* Nilmoni Khan, 41 C. 418 (1913); and for Court fee on appeal Bagranji Lal *v.* Mahabir Kunwar, 35 A. 478 (1913).

(2) Datto Atmaram *v.* Shankar Dattatrya, 38 B. 32 (1913).

(3) Bidhu Sudhury *v.* Mahatabuddin, 16 C. W. N. 44 (1911).

possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but

(*d*) *that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.*

Final decree in redemption-suit.

8. (*1*) *Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule* 10, *the Court shall pass a decree—*

(*a*) *ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,*

and, if so required,

(*b*) *ordering him to retransfer the mortgaged property as directed in the said decree,*

and also, if necessary,

(*c*) *ordering him to put the plaintiff in possession of the property.*

(*2*) *Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.*

(*3*) *On the passing of a decree under sub-rule* (*2*) *the debt secured by the mortgage shall be deemed to be discharged.*

(*4*) *Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same:*

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for payment.

Power to enlarge time.

Clauses (a) and (b), sub-rule (1).—Where in a suit for redemption of a mortgage, the plaintiff owing to a *bonâ fide* mistake paid into Court less than the sum due, it was held that under this rule the Court had power to extend the time limited for payment of the full decretal amount.(1) See notes to rr. 1 and 3, *ante*.

Extension of time.—As to appeal, see O. XLIII. r. 1 (*o*).

9. *Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to retransfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.*

Decree where nothing is found due or where mortgagee has been overpaid.

Nothing found due.—See notes to r. 1, *ante*.

10. *In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.*

Costs of mortgagee subsequent to decree.

11. *Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.*

Right of mesne mortgagee to redeem and foreclose.

Successive mortgages.—See notes to r. 1, *ante*.

12. *Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.*

Sale of property subject to prior mortgage.

(1) Het Singh v. Tika Ram, 34 A. 388 (1912); and see Kalian v. Sadho Lal, 35 A. 116 (1912).

13. (*1*) *Such proceeds shall be brought into Court and applied as follows :—*

Application of proceeds.

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale :

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(*2*) *Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.*

Prior mortgage.—See notes to r. 1, *ante*.

14. (*1*) *Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.*

Suit for sale necessary for bringing mortgaged property to sale.

(*2*) *Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.*

It has been said that this rule has merely effected a change of procedure in the manner in which mortgaged property must be realized in execution of money-decrees.(1)

Suit for sale.—The Code repeals sect. 99 of the Transfer of Property Act. In its place this rule has been enacted. The first part of that section provided that a mortgagee should not bring the mortgaged property to sale otherwise than by instituting a suit under sect. 67 of that Act. In so far as it precluded the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage-debt, it has been considered inexpedient. It was beyond doubt competent to a mortgagee to purchase the equity of redemp-

(1) Bai Ganga *v.* Rajaram, 35 B. 248 (1911); Mahant Ram *v.* Nathuni, 13 C. L. J. 664 (1911); Ashu *v.* Behari, 35 C. 61 (1907).

tion from the mortgagor by an agreement subsequent to, and distinct from, the mortgage transaction. There was no reason, therefore, why it should not be equally competent to him to have it sold in satisfaction of any claim which he might have against the mortgagor unconnected with the mortgage.(1) This has accordingly been enacted. Sect. 99 spoke of "any claim whether arising under the mortgage *or not*." The present rule is limited to claims *arising under the mortgage*. To this extent only the former provisions are retained. The Select Committee were also at one time of the opinion that sect. 99, in so far as it precluded the mortgagee from selling the property under a judgment for the mortgage-debt, served no useful purpose. As to this they wrote: "We understand that the provision was enacted to prevent mortgagees from suing their mortgagors on the debt as such, and in execution selling the mortgagor's interest in the property; we, however, think that no such provision was needed, seeing that under the law, as it stood prior to the Act, the Courts never allowed the sale of a bare equity of redemption under a judgment on the covenant." (2) It was, however, subsequently considered that as the mortgagor would be deprived of the benefit of the period of redemption given him by a mortgage-decree under the provisions of the Transfer of Property Act, unless the former provisions were maintained in respect of claims arising under the mortgage, the former restrictions should to this extent be retained in those territories to which that Act applied. Where a usufructuary mortgagee who had not obtained possession brought a suit for possession and this was compromised and by consent a simple money-decree was passed in his favour, it was held that the decree being one passed on a compromise, he was not precluded from bringing the mortgaged property to sale in execution of it.(3) Where usufructuary mortgagees obtained a decree for possession and costs, and then in execution of the decree for costs applied for attachment of part of the property, it was held that this application was not barred by this rule.(4) In a recent case where mortgagees, stating that they had relinquished their claim under the mortgage, obtained a simple money-decree, and when this was not satisfied, proceeded to put their mortgage into Court and prayed for a decree for sale on it, it was held that the former proceedings were not a bar to this suit.(5)

15. *Charges.* *'All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.*

(1) The Select Committee referred to Khiarajmal *v.* Daim, 32 C. 296 (1904); Lisle *v.* Reeve, 1902, A. C. 461.

(2) The Select Committee referred to Syed Emam *v.* Rajcoomar Doss, 23 W. R. 187 (1875); Khiarajmal *v.* Daim, 32 C. 296 (1904). Report of Select Committee, Feb. 12, 1908.

(3) Ganesh Singh *v.* Debi Singh, 32 A. 377 (1910). For limitation as regards payment of interest by instalments, see Abdul Ahad *v.* Mahtab Bibi, 35 A. 378 (1913). For limitation in case of usufructuary mortgage by conditional sale, see Bakhtawar Begam *v.* Husaini Khanam, P. C., 19 C. L. J. 477.

(4) Haribans Rai *v.* Sri Niwas Naik, 35 A. 518 (1913); distinguishing Khiarajmal *v.* Daim, *supra*

(5) Indarpal Singh *v.* Mewa Lal, 36 A. 264 (1914).

ORDER XXXV.

Interpleader.

Plaint in *interpleader*-suit.

1. In every suit of interpleader the plaint *shall*, in addition to the other statements necessary for plaints, state—

(*a*) that the plaintiff *claims* no interest in the *subject-matter in dispute other than for charges or costs;*

(*b*) the claims made by the defendants severally; and

(*c*) that there is no collusion between the plaintiff and any of the defendants.

Payment of thing claimed into Court.

2. *Where* the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff *may be required to* so pay or place it before he can be entitled to any order in the suit.

Procedure where defendant is suing *plaintiff*.

3. *Where* any of the defendants in an interpleader-suit is actually suing the *plaintiff* in respect of the subject-*matter* of such suit, the Court in which the suit against the *plaintiff* is pending shall, on being informed by the Court *in* which the interpleader-suit *has been instituted*, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and *in* so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

Procedure at first hearing.

4. (1) At the first hearing the Court may—

(*a*) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; *or*

(*b*) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) *Where the Court* finds that the admissions of the parties or other evidence enable it *to do so*, *it may* adjudicate the title to the thing claimed.

(3) *Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—*

(*a*) *that an issue or issues between the parties be framed and tried, and*

(*b*) *that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,*

and shall proceed to try the suit in the ordinary manner.

5. Nothing in this *Order* shall be *deemed* to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords. [s. 474.

Agents and tenants may *not* institute interpleader-suits.

Illustrations.

(*a*) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(*b*) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader-suit against A and C.(1)

6. *Where* the suit is properly instituted the Court may provide for the costs *of the original* plaintiff by giving him a charge on the thing claimed or in some other effectual way. [s. 475.

Charge *for* plaintiff's costs.

Interpleader.—Prior to the English Judicature Acts, the right of interpleader at Common Law differed from that in Equity. Common Law interpleader was regulated by the Interpleader Act (1 & 2 Will. 4, c. 58), and the C. L. P. Act of 1860.(2) The language of sects. 470 and 471 of the last Code was almost identical with that of the first-mentioned statute, and the English rulings, so far as the two enactments are the same, applied.(3) The English Acts, with the exception of sect. 17 of the C. L. P. Act, 1860, are now repealed, and the right of interpleader and practice in interpleader proceedings are regulated in England exclusively by O. 57. As to the form of an interpleader suit, see case last cited. The prohibition in r. 5 forbidding a tenant to bring a suit to compel his landlord to interplead with another person not claiming through

(1) Shelly Bonnerjee *v.* Raj Chandra, 37 C. 552 (1910).

(2) Annual Practice, O. 57.

(3) Bombay Baroda Railway *v.* Sassoon, 18 B. 231, 235 (1893). As to the earlier English decisions passed before O. 57 came into force, see Daniell's Ch. Pr., and Day's C. L. P. Acts. As to interpleader generally, see Seton, 509–514; Chitty, Arch., 1354–1377.

him does not apply where the title of the landlord to grant the lease is not disputed, but it is alleged by such other person that the landlord only acted as trustee in granting such lease.(1) In execution of a decree against *B*, the bailiff *A* seized certain goods, which were released on *C* paying under protest the sum mentioned in the warrant. *A* paid the money into the office. *Held*, that C's remedy was not by interpleading, but suing for money had and received.(2) An interpleader suit is not improperly constituted merely because one of the defendants does not claim the whole of the subject-matter.(3) An applicant may apply for relief before an action is commenced against him. In the case cited,(4) the plaintiffs sued, and were held to have properly sued, for an injunction restraining the defendants from suing them. The former section spoke of a person whose only interest was that of a stakeholder. The phrase has been altered, but the meaning remains the same. R. 3 provides for a stay where the stakeholder has been actually sued. In this connection, however, the proviso to sect. 88 is to be borne in mind. R. 1 requires that a person constituting an interpleader suit should have no interest otherwise than as a mere stakeholder; that is, no interest other than for charges and costs. A lien in respect of freight and charges is allowable.(5) And personal relief may be sought by way of an injunction restraining the defendants from suing the plaintiff.(6) There must be no collusion. This term does not entail anything morally wrong. Where plaintiffs had entered into an agreement with the stakeholders by which they bound themselves to defeat the claim of the other claimants to the fund, it was held that there was collusion within the rule.(7) Under r. 2, the subject of dispute may be required to be paid into or placed in the custody of the Court. In the case cited (8) the plaintiffs had not done so, and it was therefore held that their charge for wharfage and demurrage could not be allowed. There is an appeal from orders in interpleader suits under rr. 3, 4, 6. See O. XLIII.(9) As a general rule, a plaintiff in a properly instituted interpleader suit is entitled to his costs. In such case he is entitled to a lien for his costs on the fund, and is not forced to take his chance of getting them from the defendant, against whom the Court decides.(10) An interpleader suit with a prayer for declaration of the titles of the several acts of defendants in the disputed land by the tenant against the landlords in whose favour he has executed separate Kabulyats is not maintainable.(11)

(1) Orr *v.* Chidambaram, 33 M. 220 (1909).

(2) Cohen *v.* Mullick, 1 Gaspor, 139.

(3) Secretary of State *v.* Mir Muhammad, 1 M. H. C. R. 360 (1863).

(4) Bombay Baroda Railway *v.* Sassoon, *supra*; and see O. 57, r. 1 (a), and notes in A. P.

(5) Bombay Baroda Railway *v.* Sassoon, 18 B. 231 (1893).

(6) Ib., at p. 235.

(7) Murrieta *v.* South American Co., 62 L. J. Q. B. 396.

(8) Bombay Baroda Railway *v.* Sassoon, *supra*.

(9) An adjudication upon the claims of defendants in an interpleader suit is a decree and appealable under section 96: Maharaj Singh *v.* Chittar Mal, 30 A. 22 (1907). And an order dismissing such a suit is a decree: Orr *v.* Chidambaram, 33 M. 220 (1909).

(10) Secretary of State *v.* Mir Muhammad, 1 M. H. C. R. 360, 361 (1863); and see Bombay Baroda Railway *v.* Sassoon, 18 B. 231 (1893).

(11) Shelly Bonnerjee *v.* Raj Chandra, 37 C. 552 (1910).

ORDER XXXVI.

Special Case.

1. (*1*) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,— [s. 527.]

Power to state case for Court's opinion.

(*a*) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or

(*b*) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them; or

(*c*) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(*2*) Every case stated under this *rule* shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and *specify such* documents as may be necessary to enable the Court to decide the question raised thereby.

2. *Where* the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement. [s. 528.]

***Where* value of subject-matter must be stated.**

3. (*1*) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement. [s. 529.]

Agreement to be filed and *registered* as suit.

(*2*) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others

of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

Parties to be subject to Court's jurisdiction.

4. *Where* the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

Hearing and disposal of case.

5. (*1*) The case shall be set down for hearing as a suit instituted *in the ordinary manner, and* the provisions of *this Code* shall apply to such suit so far as the same are applicable.

(*2*) *Where* the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

(*a*) that the agreement was duly executed by them,

(*b*) that they have a *bonâ fide* interest in the question stated therein, and

(*c*) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so *pronounced* a decree shall follow.

Proceedings on agreement.—As O. XIV. rr. 6, 7, *ante*, deal with the stating by consent of an issue in a suit, upon the finding of which an agreement becomes absolute, so the present rules deal with the power of parties to state a case for the Court's opinion which shall be set down for hearing as a suit.(1)

(1) See ss. 328-331, Act VIII. of 1859; notes in Annual Practice to O. 24, and the following cases stated under this section: Fatma Bibi *v.* Advocate-General, 6 B 42 (1881); Bombay Burmah Co. *v.* Dorabji Cursetji, 10 B. 415 (1886); Kraal *v.* Whymper, 17 C. 786 (1890).

ORDER XXXVII.

Summary Procedure on Negotiable Instruments.

1. *This Order shall* apply only to— [s. 538.]

Application of *Order.*

(*a*) the High Courts of Judicature at Fort William, Madras and Bombay;

(*b*) the Chief Court of Lower Burma;

(*c*) *the Court of the Judicial Commissioner of Sind; and*

(*d*) any other Court *to which sections* 532 *to* 537 *of the Code of Civil Procedure,* 1882, *have been already applied.*

Small Cause Courts.—As Chapter XXXIX. of the last Code has been transferred to the rules, clause (*c*) of sect. 538 of that Code has not been reproduced, as its appropriate place will be in rules under the Presidency Small Cause Courts Act, 1882.

2. (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed *here*under, be instituted by presenting a plaint in the form prescribed; but the summons shall be in the form *No. 4 in Appendix B* or in such other form as may *be* from time to time prescribed. [s. 539.]

Institution of summary suits upon bills of exchange, etc.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter *provided* so to appear and defend; and, in default of his obtaining such leave or of *his* appearance and defence in pursuance thereof, *the allegations in the plaint shall be deemed to be admitted, and* the *plaintiff* shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and *such* sum for costs *as may be prescribed,* unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be *executed* forthwith.

Scope of rules.—In 1885 was passed the English Summary Procedure on Bills of Exchange Act (18 & 19 Vict. c. 67). Subsequently to the passing

of the Code of 1859, the Indian Bills of Exchange Act (V. of 1866) was passed. The words of the Indian Act were slightly larger than those of the English Act ; (1) but in spirit the two Acts were precisely the same.(2) The Code of 1877 consolidated the provisions of the Code of 1859 and of Act V. of 1866 from sect. 2, of which Act sect. 532 in the last Code was taken.(3) The intention of the Act was that where there was no pretence for a defence the party sued should not be allowed to defend, and the plaintiff should have judgment as of course ; but that if the defendant had a real, though it may not be a good, defence, he should have leave to appear and to set it up.(4) The effect of the provision therefore is, that where leave is refused, the plaintiff gets a decree on his allegations merely, unsupported by evidence, on proof of service of summons and on the usual certificate of the Registrar that no leave to defend has been obtained.(5) If leave is granted, the suit proceeds as one instituted in the ordinary course, evidence being taken on both sides.

"Suits upon bills of exchange," etc.—The rule is confined to suits on negotiable instruments,(6) and the plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal, and interest is, on the legal construction of the instrument, demandable.(7) As, however, already stated, the plaintiff, when no leave to defend is granted, gets his decree upon his simple statement in the plaint unsupported by any evidence. It was accordingly formerly held,(8) that it was not the intention of the Legislature that a summons served in the form prescribed by the former section should have the effect of enabling the plaintiff's statement of the fact, in his petition to prevail without evidence. The section, it was considered, applied only to those simple cases in which the negotiable instrument itself, together with mere lapse of time, was sufficient to establish for the plaintiff a *primâ facie* right to recover. Therefore the section was held not to apply where a promissory note was payable by instalments, and contained a stipulation that on default in payment of the first instalment the whole amount was to become due, and a suit was brought to recover the whole amount on default in payment of the first instalment, as in such case the plaintiff was obliged to allege the occurrence of another fact besides the lapse of time since the making of the bill, viz. that the first instalment had not been paid, which fact was necessary according to the terms of the bill in order to complete the plaintiff's right to sue.(9) The Explanation to the section of the last Code overruled this decision and declared that a suit

(1) The Act is now repealed in the High Court (O. II. r. 6), but is in operation in County Courts. In the former Court the procedure is by specially endorsed writ (O. III. r. 6 ; O. XIV. r. 1), which may be had in suits other than those on negotiable instruments to which the procedure is confined under the Code.

(2) Vonlintzgy *v.* Narayan Singh, 6 B. L. R. App. 64, 65 (1871).

(3) See Luckmidas Vithaldas *v.* Ebrahim Osman, 2 B. at pp. 648, 649 (1878).

(4) Vonlintzgy *v.* Narayan Singh, *supra* ; citing Bramwell, B., in Agra and Masterman's Bank *v.* Leighton, 2 L. R. Ex. 56.

(5) See Remfry *v.* Shillingford, 1 C. 130, at p. 131 (1876).

(6) See Bank of Bengal *v.* Kartick Chunder, 16 C. 804 (1889) ; East India Bank *v.* Vullie Goolwany, 1 Ind. Jur., N. S. 247 (1866).

(7) De Souza *v.* Rangaian, 6 M. H. C. R. 257 (1871).

(8) Remfry *v.* Shillingford, 1 C. 130, 132 (1876).

(9) Ib.

on a negotiable instrument was not limited to such cases. Thus, had the case cited occurred after the enactment of the Explanation, a decree would have been granted.(1) The last-mentioned case appeared, however, to throw doubt on the point, and with a view to clear it up the following amendments were suggested :—

"*The provisions of this rule shall not be deemed to be inapplicable to a suit merely because the cause of action includes facts which, if not admitted by the defendant, would have to be proved by the plaintiff.*"

Illustrations.

(*a*) *A sues B upon a promissory note bearing an endorsement of payment which has been cancelled. This section is not inapplicable merely because A must prove that the note was endorsed by inadvertence, but that payment was not made and the endorsement cancelled in consequence.*

(*b*) *A executes, in favour of B, a promissory note for Rs.1,000, payable in two equal instalments on the 1st July and 1st September, respectively, with a stipulation that, in default of payment of the first instalment, the whole amount shall become immediately payable. On the 13th July, B sues A for the whole amount. This section is not inapplicable merely because B must allege and prove that the first instalment was not paid on the 1st July.*

As regards, however, the proposed amendment, the Special Committee reported that the explanation to sect. 532 of the last Code was inserted to negative the effect of the decision in 1 Cal. 130, but its meaning as it stood was obscure. They therefore deleted the explanation, and added the words italicized in the body of the rule, "*the allegations in the plaint shall be deemed to be admitted,*" which will remove the doubts at which the explanation was aimed. Suits under this Order must be brought within six months from the time the instrument sued on becomes due and payable.(2)

Summons.—The plaint is in the ordinary form, but as evidence is not receivable, particular care must be taken to see that all the facts showing how the cause of action arose are stated in the plaint.(3) The summons, however, either follows the Form in the Schedule, or is in such other form as the High Court may from time to time prescribe. (See notes to next rule.) After the usual return of service and the expiration of the period mentioned in the summons, an order of Court for a decree should be obtained.(4) *Quære*—whether the Court has power to grant an extension of time if an application for such extension be made before the time fixed by the summons has expired. But the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time.(5) But see now sect. 148 and notes to next rule. The plaintiff is entitled to claim by his summons whatever sum,

(1) This view of the case was not considered in Bhupati Ram *v.* Sourendra Mohun, 30 C. 446 (1903). As to the actual point decided, *vide post.*

(2) Limitation Act, Art. 5.

(3) Chartered Mercantile Bank *v.* Seconde, 3 B. L. R., O. C. 146 (1869).

(4) Schiller *v.* Marker, 1 Ind. Jur., N. S. 283 (1866).

(5) Quazie Mahmudar Rohman *v.* Sarat Chandra, 5 C. W. N. 259 (1900).

principal, or interest is, on the legal construction of the instrument, demandable, though as to interest beyond the scope of the instrument the question is a different one, and out of the scope of the Act.(1) The rule, however, says that the plaintiff is entitled to a decree for a sum not exceeding that mentioned in the summons, together with interest at the rate specified (if any). Where a suit has been instituted under these provisions, which was held to be not maintainable under them, a fresh summons under the ordinary procedure may be ordered.(2)

Leave to defend.—See notes to next rule.

Payment into Court.—See notes to next rule.

Decree.—In a suit against the drawer, acceptor, and indorser, a decree containing a condition exempting the indorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is illegal.(3)

Defendant showing defence on merits to have leave to appear.

3. (*1*) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(*2*) *Leave to defend may be given unconditionally or subject to* such terms as to *payment into Court, giving* security, framing and recording issues or otherwise as the Court thinks fit.

Leave to defend.—Applications for leave to appear and to defend a suit must, according to the Limitation Act, be made within ten days from the date when the summons was served.(4) It has been held, however, that the Court, on granting leave to issue a plaint under these provisions, may fix a reasonable time, having regard to the residence of the defendant, within which the latter may apply for leave to defend, and that the ten days prescribed by the Form was not an unalterable limit.(5) In the last cited case twenty-eight days was

(1) De Souza *v.* Rangaian, 6 M. H. C. R. 257 (1871) [in this case the Registrar had refused to insert a claim for interest in the summons because the note sued on did not bear interest on the face of it]. In Bhupati Ram *v.* Sourendra Mohun, 30 C. 446 (1903); 7 C. W. N. 13, the case was held not to fall within the section, as no interest was specified in the note, and the claim for it was on an agreement *apart from* the note. The suit apparently was on two causes of action—the note and a separate agreement. In the case Remfry *v.* Shillingford, 1 C. 130 (1876), referred to, the stipulation in case of default was contained in the note itself.

(2) Remfry *v.* Shillingford, 1 C. 130, 132 (1876); Bhupati Ram *v.* Sourendra Mohun, *supra*.

(3) Bank of Bengal *v.* Kartick Chunder Roy, 16 C. 804 (1889).

(4) Limitation Act, Art. 159.

(5) An extension of time may be necessary [see Chandrakant Roy *v.* Pogose, 3 B. L. R., O. C. 83 (1869), the headnote of which is incorrect; Quazie Mahmudar *v.* Sarat Chandra, 5 C. W. N. 259 (1900); and see Grob *v.* Palmer, 1 Ind. Jur., N. S. 395 (1866)]; but *quære* whether such extension is consistent with the Limitation Act, under which application for leave to appear must be made, not within the time mentioned in the summons, but within ten days of the date of its service. See s. 148, *ante*.

fixed by the summons itself as the time within which the defendant might apply for leave. But where the time fixed by the summons itself is ten days, though it has been a question of doubt whether the Court has power to grant an extension of time if an application for such extension be made before the time fixed by the summons has expired, the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time.(1) But see now notes to last rule. It has been held that in an application for leave to appear and defend, the defendant cannot go into the question whether the summons was served on the date shown by the sheriff's return or not at all.(2)

When there is no pretence for a defence the party sued should not be allowed to defend, and the plaintiff should have judgment as of course; but if the defendant has a real (it is not necessary to say a good) defence, he should have leave to appear and set it up. As cases, however, sometimes occur where an apparently real defence is shown, but its sincerity is doubtful, there the defendant is let in to defend, only on the terms of his bringing the money into Court.(3) It was held under the English Act that it was not necessary that there should be a defence on the merits, and that if the defendant appears and discloses any defence, legal or equitable, he will be allowed to appear and defend.(4) In a summary suit, if a defendant has been arrested before judgment and claims compensation under sect. 95, he is entitled to apply for leave to defend, and if a *primâ-facie* case is made out, leave should be given.(5) Where there is a reason to doubt the *bona fides* of the defence, the condition of paying the money into Court, or giving security, will be imposed.(6) In giving leave to defend, the Court has a discretion to order security for costs, not only where there is a doubt as to the *bona fides* of the defence, but also where it appears unnecessary, though allowable.(7) If the plaintiff has not been heard at first against the defendant's application, he will be allowed to apply to have the leave rescinded.(8) Where a conditional order is passed, but the condition is not performed, the order is a nullity, and subsequent steps to set it aside are unnecessary.(9)

Power to set aside decree.

4. After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to *the defendant to* appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

(1) Quazie Mahmudar Rohman *v.* Sarat Chandra, 5 C. W. N. 259 (1900).

(2) Madhu Lall *v.* Woopendranarain, 23 C. 573 (1896), a somewhat peculiar case.

(3) Vonlintzgy *v.* Narayan Singh, 6 B. L. R. App. 64 (1871).

(4) Casella *v.* Darton, L. R. 8 C. P. 100. In Simon *v.* Hakim, 19 M. 368 (1896), leave to defend was refused, as it was held that the collateral agreement set up was no answer to the suit on the note.

(5) Roulet *v.* Fetterle, 18 B. 717 (1894).

(6) Vonlintzgy *v.* Narayan Singh, 6 B. L. R. App. 64 (1871). In Ram Lal *v.* Haran Chandra, 3 B. L. R., O. C. J. 130 (1869), leave was given on the terms of bringing the money into Court.

(7) Vonlintzgy *v.* Narayan Singh, *supra.*

(8) Ib.

(9) Gourdas Mistry *v.* Hewitt, Fulton, 18 (1845).

"**Special circumstances.**"—The Court will determine in each case what these are. The point is, is it reasonable that the decree should be set aside? Under this rule, though a defendant has not come in within the time required, yet he may appear and make his defence on the decree against him being set aside.(1) The question as to what took place upon the occasion of the service of summons by the Sheriff is one which may properly be taken into consideration on an application under this section to set aside the decree.(2) But irregular service of summons on two out of three defendants to an action brought on a joint promissory note, does not give the defendant properly served any ground to question the decree passed against him.(3)

Power to order bill, etc., to be deposited with officer of Court.

5. In any proceeding under this *Order* the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

Recovery of cost of noting non-acceptance of dishonoured bill or note.

6. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this *Order* for the recovery of the amount of such bill or note.

Procedure in suits.

7. *Save* as provided by *this Order*, the procedure in suits *hereunder* shall be the same as the procedure in suits instituted *in the ordinary manner*.

(1) Luckmidas *v.* Ebrahim, 2 B. 644, 647 (1878).

(2) Madhu Lall *v.* Woopendranarain, 23 C. 573, 575 (1896).

(3) Ewing & Co. *v.* Gosaidas, 3 B. L. R. App. 7 (1869).

ORDER XXXVIII.

Arrest and Attachment before Judgment.

Arrest before judgment.

1. *Where* at any stage of *a* suit, other than a suit *of the nature referred to in section 16, clauses* (*a*) *to* (*d*), *the* Court *is* satisfied, by affidavit or otherwise,—

Where defendant may be called upon to furnish security for appearance.

(*a*) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(*i*) has absconded or left the *local limits of the* jurisdiction of the Court, or

(*ii*) is about to abscond or leave the *local limits of the* jurisdiction of the Court, or

(*iii*) has disposed of or removed from the *local limits of the* jurisdiction of the Court his property or any part thereof, or

(*b*) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not *furnish* security for his appearance :

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim ; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

2. (1) *Where* the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer

Security

the claim against him, or to *furnish* security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, *or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.*

(2) *Every* surety *for the appearance of a defendant* shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

Application for security.—These rules amalgamate sects. 477, 478, 479 of the last Code. The object of the process in this and the following rules is to have some security for the execution of the decree when it is passed, and that the person of the defendant will be within reach at that time. A creditor is, however, not entitled, merely because he has a just demand against his debtor, to arrest him before judgment; (1) nor can a debtor be arrested simply to secure easy execution of the decree should one be obtained (2) The procedure is only intended to secure to a creditor his rights when it is shown that a debtor with one or other of the intentions (3) mentioned in r. 1, has done or is about to do the acts mentioned in clauses (i), (ii), (iii), or is about to leave British India (4) under the circumstances stated. And if a creditor procures the arrest of his debtor without reasonable or probable cause, he renders himself liable to a suit for damages or to summary proceedings under sect. 95. It is not the principles governing the English writ *ne exeat regno* which govern the matter, but the words of the Code.(5)

Warrant.—For a form of warrant of arrest before judgment, see First Schedule, Appendix F., No. I.

Order to give security.—In showing cause it may be shown that the suit is not a *bonâ fide* one, that the defendant has not done or is not about to do the acts charged in clauses (i), (ii), (iii) of r. 1, or that he is not about to leave India, or that, if he is about to leave, none of the circumstances mentioned exist, or that even if the suit is *bonâ fide* the institution of it has been vexatiously delayed till the defendant is about to depart from India in order to embarrass or coerce him.(6) It has been held that the word "claim" in sect. 479 of the last Code meant the amount of money claimed, and that the security required to be given by a defendant who is arrested before judgment did not include security for costs.(7)

(1) Goutière *v.* Charriol, 1 A. H. C. R. 91 (1869).

(2) Kelaram Majee *v.* Narain Dass, 13 W. R. 278 (1870).

(3) Teenarain *v.* Ram Rutton, 2 Hyde, 181 (1864); Goutière *v.* Charriol, *supra.*

(4) Agra Bank *v.* Minto, 1 Ind. Jur., N. S. 265 (1866); Goutière *v.* Robert, 2 A. H. C. R. 353, 358 (1876); Harrison *v.* Dickson, 1 Boulu, 33; Probodh Chunder *v.* Dowey, 14 C. 695 (1887).

(5) Probodh Chunder *v.* Dowey, *supra.*

(6) See Spence's Hotel *v.* Anderson, 1 Ind. Jur., N. S. 294 (1866).

(7) Reinhold *v.* Holloway, Suit 655 of 1877, November 26; cited in O'Kinealy, C. P. C., notes to this section.

Procedure *on* application by surety to be discharged.

3. (*1*) *A* surety for the appearance of *a* defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

(*2*) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(*3*) On the appearance of the defendant *in* pursuance *of* the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Procedure where defendant fails to *furnish* security or find fresh security.

4. *Where* the defendant fails to comply with any order under *rule 2 or rule 3*, the Court may commit him to *the civil prison* until the decision of the suit or, *where a decree is passed* against the defendant, until the decree *has been satisfied:*

Provided that no person shall be *detained in prison* under this *rule* in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees:

Provided *also* that no person shall be detained in prison under this *rule* after he has complied with such order.

Failure to give security.—It is, of course, only in the event of a defendant neither furnishing security nor offering a sufficient deposit that he can be committed to custody.(1) When committed, the Court can secure the defendant's appearance by a warrant to the jailor.(2) The defendant is to be committed until the suit is decided, or, where a decree is passed against him until the decree has been executed. The words in the former Code were "*until execution of the decree.*" These last words were somewhat obscure. It was said that they could not mean until steps were taken to execute the decree, as such a construction would put an immense power of oppression into the hands of the judgment-creditor. It was held, therefore, that execution meant complete execution—that is, until possession was given to the plaintiff of what was ordered by the decree. An arrest, therefore, under this section became, after decree, an arrest until the decree was satisfied or wholly executed. It therefore became subject to the limitation as to time imposed by sect. 342 (now 58), which forbade extension of such arrest beyond the period of six months.(3) The amendment gives effect to this view.

(1) Kelaram Majee *v.* Narain Das, 13 W. R. 278 (1870).

(2) Ib.

(3) Ghanashamdas *v.* Joharimull, 7 B. 431 (1883). In *Re* Kalla Chand, 1 Ind. Jur., N. S. 328 (1866), it was held that after decree the commitment becomes one in execution, and that after judgment the debtor must have subsistence money or be released. S. 48 of the last Code, however, provided for subsistence money.

Attachment before judgment.

Where defendant may be called upon to furnish security for production of property.

5. (*1*) *Where*, at any stage of *a* suit, the Court *is satisfied*, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(*a*) is about to dispose of the whole or any part of his property, or

(*b*) *is about* to remove the *whole or any part of his property* from the *local limits of the* jurisdiction of the Court,

the Court may *direct the defendant*, within a time to be fixed by *it*, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(*2*) The *plaintiff* shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(*3*) The Court may also in the order direct the conditional attachment of the whole or any portion of the property *so* specified.

Scope of rule.—This rule corresponds with sects. 81 and 83 of Act VIII. of 1859, and amalgamates sects. 483 and 484 of the last Code. Clause (*b*) of the former sect. 483 has been omitted. The main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree, supposing a decree is eventually made, from the defendant's property.(1) Though an attachment before judgment is directed by r. 7 to be made in the same manner as attachment in execution, the objects for which these two sorts of attachment are made are entirely different. An attachment prior to decree is not an attachment for the enforcement of the decree, but it is a step taken merely for preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed is sought to be executed.(2) An attachment after decree is an attachment made for the immediate purpose of carrying the decree into execution, and it presupposes an application on the

(1) Ganu Singh *v.* Jangi Lal, 26 C. 531, 33 (1899), by preventing alienation or removal; but the process is inoperative to charge the property in the subject of the attachment: Sarkies *v.* Bundhoo Baee, 1 A. I. C. R. 172, 185 (1869); and see Gamble *v.* Kholagir, 2 B. H. C. R. at p. 160 (1866); or create a lien: Sarkies *v.* Bundhoo Baee, 1 A. H. C. R. at pp. 184, 185 (1869). See notes to r. 6, *post*.

(2) Sri Rammanik *v.* Tincowri Rai, 4 B. L. R. 63, 67, 68, F. B. (1869); Basiram *v.* Kattyayani, 38 C. 448 (1911); 15 C. W. N. 795.

part of the decree-holder to have his decree executed.(1) The scope and object of this and the following rules are merely to protect a plaintiff against loss arising from the defendant making away with his property pending the suit. They do not ensure to the plaintiff payment, in any event, of whatever may be decreed to him. They do so only so far as that is ensured by preventing the defendant making away with property.(2)

The application.—The jurisdiction given to Civil Courts to attach before judgment should be exercised with great discretion, and no Court should grant such an attachment on light grounds or unless it is perfectly satisfied by trustworthy evidence that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court.(3) In all applications for attachment before judgment, there must be *uberrima fides* on the part of the plaintiff, and where the most perfect good faith is wanting the application should be rejected.(4) The application can be made at any stage of the suit, but can be entertained only so long as the suit is pending.(5) The facts mentioned in clauses (*a*) and (*b*) must have been done with the intent mentioned in the first paragraph, namely, to obstruct or delay the execution of any decree which might be passed.(6) Clause (*a*) says, is "*about to dispose of*," etc., therefore the section does not apply where the defendant has actually parted with the property.(7) The section does not refer exclusively to moveable property but applies to immoveable property also.(8) Where it was contended that the words in sect. 484 of the last Code, "*produce and place at the disposal of the Court*," show that moveable property only can be attached, it was held that the term "*property*," as used in the section, was wide enough to include property of every description, moveable and immoveable, whether in the actual possession of the defendant or of some other person on his behalf, and the words mentioned only referred to such property as is capable of being produced in Court.(9) Attachment of property covers its profits.(10) A Small Cause Court cannot, however, attach immoveable property.(11) Where the property is the property in suit, an injunction should be obtained under O. XXXIX. r. 1, clause (*a*), which may be enforced under r. 2 of that order by imprisonment or attachment. And where the property is not that in suit, an alternative remedy is given under r. 1 of the same order, clause (*b*), where the word "*property*" is not confined to property within the jurisdiction, or to property which is in dispute in the suit.(12) This rule has no application in divorce-proceedings.(13)

(1) Sri Rammanik *v.* Tincowri Rai, 4 B. L. R. (F. B.) 63, 68 (1869).

(2) Ib., at p. 74.

(3) Gamble *v.* Bholagir, 2 B. H. C. R. 146, 161 (1866).

(4) Ahmed Ali *v.* Gladstone Wyllie, 7 W. R. 508 (1867).

(5) Sri Rammanik *v.* Tincowri Rai, 4 B. L. R. (F. B.) at p. 68 (1869).

(6) See Ram Narain *v.* Levy, 2 Hyde, 183 (1864).

(7) Soorjee Kumar *v.* Issur Chunder, Bourke, 243 (1865).

(8) Bishambar *v.* Sukhdesi, 16 A. 186 (1894).

(9) Chedi Lal *v.* Kuarji Dichit, 17 A. 82 (1894).

(10) Ram Coomar *v.* Gobindnath, 12 W. R. 391 (1869); but if the owner is allowed to enjoy them the profits cease to be specifically liable: ib.

(11) *Vide post.*

(12) Raja Goculdas *v.* Jankibai, 5 Bom. L. R. 570, at p. 574 (1903), where it is pointed out that Joynarain Geeree *v.* Shibpershad, 6 W. R. Misc. 1 (1866), is not applicable, as s. 93 of the Code of 1859 was expressly limited to the "property in dispute."

(13) Phillips *v.* Phillips, 37 C. 613 (1910).

Property without the jurisdiction.—It was held under the last Code both that the section did not (1) and did (2) apply where the property sought to be attached was beyond the jurisdiction of the Court in which the suit was pending. A Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it. It was therefore held, under the Code of 1859, that a Court of Small Causes could not attach immoveable property under this section.(3) This is the law now. It was held that the Court had jurisdiction where the property was a chose in action due from the Collector who, like the judgment-debtor, resided within the jurisdiction of the attaching Court.(4)

Effect of attachment.—See notes to next rule.

Call for security.—For form of order calling for security, see Sched. I., App. F., No. 5. As to whether property beyond the jurisdiction can be attached under this rule, see last paragraph but one. Cause can be shown after security has been furnished to avoid attachment.(5) Sect. 145, *ante*, applies to sureties under this rule.(6) An order under sect. 483 of the last Code was not one of those in respect of which an appeal was given under sect. 588 of that Code,(7) though an appeal lay from an order of attachment under the following section. An appeal lies under the present section (see O. XLIII. r. 1 (*q*)). The words "*produce and place at the disposal of the Court*" refer only to such property as is capable of being produced in Court.(8)

"Conditional attachment."—"Conditional attachment" might mean an attachment to be made conditionally on the security not being furnished or cause shown by the prescribed day, or it might mean an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished or cause shown according to the terms of the order. The form shows that the latter was the intention of the Legislature.(9)

Attachment *where* cause not shown or security not furnished.

6. (1) *Where* the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the

(1) Haji Jiva *v.* Abubakar, 8 B. H. C. R., O. C. J 29 (1871); Balaram Mullick *v.* Solano, 8 B. L. R. 335 (1871); Krishnasami *v.* Engel, 8 M. 20 (1884); Kedar Nath *v.* Seeva Veyana, 1 C. L. R. 336 (1878); Ram Pertab *v.* Pokur Mull, Unreported, Suit 413 of 1898, Cal. H. C., referred to in 7 C. W. N. 216; Raja Goculdas *v.* Jankibai, 5 Bom. L. R. 570 (1903) [the Court, however, granted an injunction under s. 492, clause (b) of the last Code].

(2) *In re* Abraham, 6 B. H. C. R., A. C. J. 170 (1869) [but see Haji Jiva *v.* Abubakar, 8 B. H. C. R., O. C. J. at p. 37, where it is said the Judges afterwards considered that the ruling could not be sustained]; Ram Pertab *v.* Madho Rai, 7 C. W. N. 216 (1902) [under s. 648 read with s. 483]; and see remarks of Russell, J., in Raja Goculdas *v.* Jankibai, 5 Bom. L. R. 570, at p. 574 (1903).

(3) Marthamma *v.* Kittu, 6 M. H. C. R. 91 (1871).

(4) Ravji Moreshwar *v.* Narayan Ballal, 3 Bom. L. R. 462 (1901).

(5) Lotlikar *v.* Lotlikar, 5 B. 643 (1881).

(6) Baboo Ram *v.* Hurkhoo Singh, 7 W. R. 329 (1867).

(7) See Ahmed Ali *v.* Gladstone Wyllie, 7 W. R. 508 (1867).

(8) Chedi Lal *v.* Kuarji Dichit, 17 A. 82 (1894).

(9) Lotlikar *v.* Lotlikar, *supra*, at p. 644.

property specified, or *such portion thereof as appears sufficient* to satisfy any decree which may be passed in the suit, be attached.

(2) *Where* the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, *or make such other order as it thinks fit.*

Order of attachment.—This rule corresponds with sect. 84 of the Code of 1859. It is only on the defendant's failure to show cause or furnish security that attachment can be made. So the latter cannot be ordered unless security has first been demanded,(1) and on one or other of the grounds stated in r. 5, *ante*.(2) As to the form of an order under this section, see Sched. I., App. F, No. 7. An appeal lies from it.(3)

Effect of attachment.—The property in the goods attached is in nowise altered by the attachment, but remains as before in the defendant. The Court, as it were, locks up the goods, so that they cannot be disposed of or carried away in any mode that would delay or defeat the execution of the decree if obtained.(4) There is nothing in the Code which makes an attaching creditor a secured creditor, or creates any charge or lien in his favour over the property attached. The order does not purport to deal with any question of title. In other words, attachment prevents alienation, it does not confer title. The making of an order of attachment only operates so as to give the judgment-creditor certain rights in execution.(5) It has always been held that an attachment before judgment conferred on the plaintiff no right prior to that of the Official Assignee.(6) And it makes no difference whether the vesting order is before or after decree, for it cannot be contended that a decree *qua* decree simply constitutes the judgment-creditor a secured creditor, or gives him any charge or lien over the property of the judgment-debtor.(7) Under, however, the Code of 1859, an attachment, previous to the date of the vesting order, in the

(1) Gobind Persad Khan, S. D. A. Sum. Dec., 12th June, 1848.

(2) Bepin Behari Ghose, ib., 27th Sept., 1847.

(3) O. XLIII. r. 1 (*q*); Mir Ali *v.* Bihari Lal, 21 B. 273 (1895).

(4) Sava Ramji *v.* Jadavji Nathu, 2 B. H. C. R. 142, 143 (1865); property passes, not by seizure but by sale: Gamble *v.* Bholagir, 2 B. H. C. R. 146, at p. 155 (1866), though the judgment-creditor, by force of the seizure, has at least a security; but this does not impart present property, nor even beneficial interest: ib., at p. 159.

(5) Kristnasawmy *v.* Official Assignee, 26 M. 673, 678 (1903); Peacock *v.* Madan Gopal, 29 C. 428 (1902).

(6) Bank of Bengal *v.* Newton, 12 B. L. R. App. 1 (1873); Petumber Mundle *v.* Gocool Doss, 1 Ind. Jur., N. J. 327 (1866); Rampersaud *v.* Callachund, 1 Ind. Jur., N. S. 325, 373 (1866); Gamble *v.* Bholagir, 2 B. H. C. R. 149 (1866); Sarkies *v.* Bundhoo Bace, 1 A. H. C. R. 172 (1866); Sava Ramji *v.* Jadavji, 2 B. H. C. R., O. C. J. 142 (1865); Shib Kristo *v.* Miller, 10 C. 150 (1883); Sadagappa *v.* Ponnama, 8 M. 554 (1885); Miller *v.* Mon Mohun Roy, 7 C. 213 (1881); s. c., 8 C. L. R. 213; Turner *v.* Pestonji, 20 B. 403 (1895); Kristnasawmy *v.* Official Assignee, 26 M. 673 (1903).

(7) Kristnasawmy *v.* Official Assignee, 26 M. 673, at p. 679 (1903).

execution of a decree, conferred on the judgment-creditor a right prior to that of the Official Assignee.(1) This was so because under that Code the first attaching creditor had priority over other judgment-creditors. But no such priority is now allowed. In fact, there is now no question of priority in a matter of this description, for under sect. 295 (now 73) all decree-holders who have applied for execution of their decrees for money against the same judgment-debtor before the realization of assets from him are entitled to rateable distribution.(2) As already stated, an attachment creates no lien. Whether the attachment be before or after judgment, all creditors are entitled to share rateably, subject to the provisions of sect. 73. An attaching creditor has no exclusive claim until a sale at his instance has actually taken place. The amendments of the law of procedure in this country have been based upon the principle that so far as possible the creditors should be treated *pari passu*, and that nothing short of actual realization of the debt due should give rights of priority (3)

Save and except in the two classes of cases mentioned in rr. 9 and 10, the intention of the Legislature was that an attachment before judgment should be fully operative. The effect of such an attachment, whether made before or after a decree, is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. Therefore though there is no distinct provision such as that which is to be found in sect. 64, any private alienation of property attached before judgment during the continuance of the attachment is void as against all claims enforceable under the attachment.(4) An attachment does not affect rights of strangers. See r. 10, *post*. Where an attachment under the former section, issued by a Court at the instance of a third party, prohibited the creditor from recovering and the debtor from paying the debt, it was held that an order on those terms was not an order staying the institution of a suit within the meaning of sect. 15 of the Limitation Act.(5)

Mode of making attachment.

7. *Save as otherwise expressly provided*, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Mode of attachment.—This section corresponds with sect. 85 of the Code of 1859. As to attachment of property in execution, see O. XXI., *ante*. See also Forms in Sched. I.; the concluding words of the former section, "for money," have been omitted.

(1) Anand Chandra Pal *v.* Panchilal Sarma, 5 B. L. R. 691, F. B. (1870); s. c., 14 W. R. (F. B.) 33; Aga Mahomed *v.* Judah, 7 B. L. R. 50 (1871); s. c., 17 W. R. 234.

(2) Miller *v.* Mon Mohun Roy, 7 C. 213 (1881); Peacock *v.* Madan Gopal, 29 C. 428 (1902) [overruling Miller *v.* Lukhimani Debi, 28 C. 419 (1901)]; Soobul Chunder Law *v.* Russick Lall Mitter, 15 C. 202 (1888).

(3) Kristnasawmy *v.* Official Assignee, 26 M. 673, 680 (1903).

(4) Ganu Singh *v.* Jangi Lal, 26 C. 531 (1899); Sarkies *v.* Bundhoo Bace, 1 A. H. C. R. 172, 186 (1869).

(5) Beti Maharani *v.* Collector of Etawah, 17 A. 198 (1894); 14 A. 162 (1892).

Investigation of claim to property attached before judgment.

8. *Where* any claim *is* preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for *the payment of* money.

Claims to attached property.—This rule corresponds with sect. 86 of the Code of 1859.(1) The order dealing with the investigation of claims is O. XXI. rr. 58–63, which must therefore be applied to cases of attachment before judgment.(2) In the last-mentioned case it was said that this section, which prescribes the manner of investigation, is silent as to the result; the Court apparently considering that the sections following sect. 278 of the last Code had not been applied. But however this may be, if the defendant has ceased to have any interest in the property, as where a vesting order in insolvency has been made, it is clear that the attachment ought to be raised, for when the law directs the claim to be investigated it implies that if the claim is made good the attachment, which was intended merely to preserve the defendant's interest from the effect of private alienations, shall come to an end.(3) The omission to object to the validity of the attachment, on the ground that property sought to be attached is not transferable at the time when the application is made for attachment before judgment, does not operate as a bar to the investigation of the objection when an application has been made for execution of the decree made in the suit.(4)

Removal of attachment when security furnished or suit dismissed.

9. *Where* an order is *made for* attachment before judgment, the Court shall *order* the attachment *to be withdrawn* when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

Removal of attachment.—This rule, which corresponds to sect. 87 of the Code of 1859, indicates that in the event of the suit not being dismissed but decreed, the attachment shall subsist, and save in the case mentioned in this rule and in the next, the intention of the Legislature was that an attachment before judgment should be fully operative.(5) For the former words "the *Court which passed the order shall remove*," have been substituted the words italicized.

(1) See George *v.* Ram Ruttun, 3 Agra, 272; Ram Ruttun *v.* Gobind, 2 Agra, 141; Rammanik Shaw *v.* Scobram Pantool, 2 Hyde, 22.

(2) Turner *v.* Pestonji, 20 B. 403 (1895); Hashmat Bibi *v.* Bhagwan Das, 36 A. 65 (1913).

(3) Ib., p. 407. In Mir Ali *v.* Behari Lal, 21 B. 273 (1895), it was contended, though unsuccessfully, that the liquidator's sole remedy was under this section.

(4) Basiram *v.* Kattyayani, 38 C. 448 (1911).

(5) Ganu Singh *v.* Jangi Lall, 26 C. 531, 534 (1899).

Attachment *before judgment* not to affect rights of strangers, *nor* bar decree-holder from applying for sale.

10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Rights of third parties.—The attachment does not by this rule (1) affect the rights of persons not parties to the suit. Therefore the rights of rival creditors cannot be affected by it.(2) But these rights must now exist prior to the attachment.(3) The attachment does not prevent the property being sold in execution of another decree, whether that decree has been obtained before or after the attachment.(4) The main object of the attachment before judgment being to prevent the defendant from disposing of or removing his property from the jurisdiction, this rule, it has been said, proves that this prevention is not intended merely for the benefit of the attaching creditor, but may enure also to the benefit of other persons.(5) Though one person may have secured the goods, another decree-holder may apply for the sale of them.(6) In a recent case in the Bombay High Court, where the plaintiff had obtained a money-decree against a Mitakshara coparcener, after having obtained attachment before judgment of certain joint-property, and the debtor had died before execution; it was held on appeal that a subsequent application to execute the decree had been rightly dismissed, since an attachment before judgment is merely precautionary and creates no charge, and so could not defeat another co-parcener's title by survivorship.(7) As to insolvency, see notes to r. 6, *ante*.

Property attached *before judgment* not to be re-attached in execution of decree.

11. Where property is under attachment by virtue of the provisions of this *Order* and a decree is *subsequently passed* in favour of the plaintiff, it shall not be necessary *upon an application for* execution of such decree to *apply for a* re-attach*ment of* the property.

"**Re-attachment.**"—It has already been pointed out that the rules of which this is one differ in their respective objects and consequences.(8) Their

(1) As to the object of the introduction of this provision, which corresponds with s. 89 of the Code of 1859, see Sarkies *v.* Bundhoo Bace, 1 A. H. C. R. 172, at p. 185 (1869).

(2) Sri Rammanik *v.* Tincowri Rai, 4 B. L. R. (F. B.) at p. 69 (1869).

(3) See Gamble *v.* Bholagir, 2 B. H. C. R. 147, 160 (1866); Shib Kristo *v.* Miller, 10 C. at p. 165 (1883).

(4) Referred Case, 6 M. H. C. R. 135 (1871).

(5) Gamble *v.* Bholagir, 2 B. H. C. R. at p. 160 (1866).

(6) Sewdut Roy *v.* Sree Canto Maity, 33 C. 639, 643 (1906).

(7) Subra Mangesh Chandavarkar *v.* Mahadevi kom Manjibhatta, 38 B. 105 (1913); Ramanayya *v.* Rangapayya, 17 M. 144 (1893); Pallonji Shapurji Mistry *v.* Jordan, 12 B. 400 (1888).

(8) *Vide ante*, notes to r. 5.

object is to ensure to a plaintiff payment of his decree. Although they do not ensure this in any event, they do so only so far as that is ensured by preventing the defendant making away with property.(1) In other words, the attachment does not of necessity ensure the property to the person who attaches it, provided only he eventually gets a decree. The plaintiff must not only wait until he has obtained a decree, but he is not competent to proceed against the property attached until he has taken the preliminary steps the law requires for its enforcement.(2) He must, in other words, apply for execution just like any other creditor.(3) This is now made clear by the addition of the words "*upon an application for execution of such decree.*" When, however, an application for execution is made, by the terms of this rule no application for attachment is necessary, the attachment before judgment enuring and becoming upon and by virtue of the application for execution an attachment in execution.(4) And upon principle it would seem that the date to be assigned to the attachment as an attachment in execution is that on which application for execution is made.(5) It has been held that an attachment before judgment cannot be regarded as the inception of an execution, or as binding the goods in such a manner as to exclude the right of a third party (such as the Official Assignee) accruing after such attachment, but before judgment and warrant for execution.(6)

Agricultural produce not attachable before judgment.

12. *Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.*

"**Agricultural produce.**"—The exemption of a portion of growing crops

(1) Sri Rammanik *v.* Tincowri Rai, 4 B. L. R. (F. B.) 63, 75 (1869).

(2) Ib., at p. 68, namely, proceedings in execution, which are proceedings by which the judgment-creditor seeks to establish a right to have his money paid out of the property of the judgment-debtor: Aga Mahomed *v.* Judah, 7 B. L. R. at pp. 53, 54 (1871), and which though preserved by the attachment before judgment remains his until it is taken in execution for satisfaction of the decree.

(3) Pallonji *v.* Jordan, 12 B. 400 (1888); foll. in Sewdut Roy *v.* Sree Canto Maiti, 33 C. 639, 644 (1906). It is to be observed that the rule does not say that execution is dispensed with, but that it is not necessary to re-attach *in* execution; that is, when execution is applied for and granted. Further, execution is necessary if it desired to control the rights of rival decree-holders. (See Sri Rammanik *v.* Tincowri Rai, 4 B. L. R. at p. 67, F. B. (1869), though it is not now necessary to re-attach, as was held in that case.)

(4) Ib.; Bhagwan Chandra *v.* Chandra Mala, 1 C. L. J. 97 (1902); in this respect the law is now settled, it being previously a matter of doubt whether a new attachment was, Sri Rammanik *v.* Tincowri Rai, B. L. R. (F. B.) 63 (1869), or was not, Sarkies *v.* Bundhoo Baee, 1 A. H. C. R. 172, 186 (1869), necessary.

(5) See as to this, remarks in last case at p. 68, though the point of date has not the same importance now that rateable distribution is allowed under s. 73.

(6) Gamble *v.* Bholagir, 2 B. H. C. R. 146, at p. 159 (1866).

in execution of decrees necessitated a similar exemption from attachment before judgment. It was considered, however, that there were practical difficulties in the way of adopting the same procedure; and an agriculturalist possessing a growing crop is unlikely to abscond, and unable, except at maturity, to remove it. It has therefore been thought that the attachment of growing crops before judgment was productive of hardship, and that there was no sufficient reason for its retention.

ORDER XXXIX.

Temporary Injunctions and Interlocutory Orders.

Temporary Injunctions.

Cases in which temporary injunction may be granted.

1. *Where* in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or *intends*, to remove or dispose of his property with *a view* to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or *make* such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, *until the disposal of the suit or until further orders.*

Injunction to restrain repetition or continuance of breach.

2. (*1*) In any suit for restraining the defendant from committing a breach of contract or other injury *of any kind*, whether compensation *is* claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(*2*) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(*3*) In case of disobedience, *or of breach of any such terms, the Court granting an injunction may order the* property *of the person guilty of such disobedience or breach to be* attached *and may also order such person to be detained in the civil prison* for a term

not exceeding six months, *unless in the meantime the Court directs his release.*

(*4*) No attachment under this *rule* shall remain in force for more than one year, at the end of which time, if the *disobedience or breach continues*, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and *shall* pay the balance, if any, to the *party entitled thereto.*

Injunctions.—An injunction is a judicial process, whereby a party is required to do or to refrain from doing a particular thing according to the exigency of the order.(1) Remedies for the non-performance of a duty are either compensatory, that is by an award of damages (a remedy which is often useless or inadequate), or specific, that is by taking away the option to pay damages for non-performance and compelling the party in default to do or forbear the very thing which he is bound to do or forbear under sanction of the penalty, in case of disobedience, of imprisonment or attachment of his property, or both.(2) The issue of an injunction is then a form of specific relief. It is preventive relief. The exercise of the jurisdiction to grant relief is not *ex debito justitiæ*, but a matter of discretion, though such discretion is not arbitrary, but guided by judicial principles and capable of correction by a Court of appeal.(3) It is granted *quia timet*, that is because the party fears some future probable inquiry. It is, of course, therefore, not necessary that a wrong should have been actually committed before the Court will interfere.(4) The best guides in the matter of interference have been judicially stated to be the principles which determine the action of Courts of Equity in England; (5) though the peculiar circumstances of the country are also to be considered.(6) Injunctions are either perpetual or temporary. The perpetual injunction is a decree. Such an injunction is regulated by the Specific Relief Act.(7) Temporary injunctions are granted by interlocutory order at any period of a suit, and being intended merely to preserve the *status quo* pending the decision, are regulated as procedure by the Code. Apart, however, from the special circumstances which determine whether the Court should, in its discretion, grant an injunction before the hearing of the suit, the same general principles must equally apply to the granting of a temporary, as to a perpetual, injunction, and these principles must, therefore, be sought in the Specific Relief Act itself.(8) This statement has been qualified.(9)

(1) Woodroffe's Law of Injunctions, 3rd ed. p. 19, where the subject will be found treated in detail.

(2) Ib., 11.

(3) Ib., 16.

(4) Ib., 15.

(5) Ib., 3; Nusserwanji Merwanji Panday *v.* Gordon, 6 B. 266, 279, 284 (1889); Land Mortgage Bank *v.* Ahmedbhoy Habibhoy, 8 B. 35, 67 (1883); Chunilal Mancharam *v.* Manishankar Atmaram, 18 B. 616, 623 (1893); Ghanasham Nilkant Nadkarni *v.* Moroba Ramchandra Pai, 18 B. 474, 488 (1894); Shamnugger Jute Factory *v.* Ram Narain Chatterjee, 14 C. 189, 199, 200 (1886).

(6) Woodroffe, 7, and cases there *cited.*

(7) Act I. of 1877, ss. 52-57.

(8) Nusserwanji Merwanji Panday *v.* Gordon, 6 B. 266, 279 (1881).

(9) Subba Naidu *v.* Haji Budsha Sahib, 26 M. 168 (1902).

So it has been held that sect. 56 of the Specific Relief Act does not affect injunctions in restraint of sale in execution under sect. 492 (now r. 1) of the Code ; (1) whilst, on the other hand, the precise terms of that section (though it is submitted erroneously) (2) have been held to exclude the grant of an injunction in a case not falling within its express provisions.(3)

An injunction, whether perpetual or temporary, may be mandatory, that is, framed to compel the performance of a positive act, or non-mandatory, that is, a negative prohibition against the doing of a particular act.(4)

The subject-matter of an injunction is the actual or threatened infringement of some legal right. The grant is not limited to cases of injury to property. So the publication of libel or injury to personal status may be restrained.(5) The subject-matter is more particularly stated in the Code of Specific Relief Act. It may be classified as follows : (A) Injunctions in respect of Civil Judicial Proceedings being either actions or proceedings in execution ; (B) in respect of acts not being Judicial Proceedings, viz., in the case of obligations arising from (*a*) contract, (*b*) trust, (*c*) in tort.

An injunction will only be issued in favour of the person or persons whose legal right has been infringed, and against persons against whom the claim of the plaintiff is, in fact, rightly laid, provided they be within the reach of the Court, amenable to its jurisdiction, and bearing such a character as renders them personally so amenable.(6) In so far as it is a remedy against an individual it will be issued only in respect of acts done by him, against whom it is sought to be enforced. So an injunction cannot be obtained against executors on account of acts done by their testator, though they may be restrained in respect of acts done by themselves. Nor does an injunction run with the land.(7) And it has been held that in a representative suit an injunction will only be binding on those who are parties to the record.(8)

The essentials to the grant of relief by way of injunction are : (*a*) relief cannot be granted merely to enforce a penal law ; (*b*) there must be a civil (9) pending action in which it may be granted ; (*c*) the cognizance of the suit itself must not be barred ; and (*d*) the Court must otherwise have jurisdiction to

(1) Amir Dulhin *v.* Administrator-General, 23 C. 351 (1895).

(2) Rash Behary Dey *v.* Bhowance Charan Bhose, 34 C. 97 (1906), dissenting from case in next note ; Mungle Chand *v.* Gopal Ram, 34 C. 101 (1906).

(3) Jairam Das *v.* Zamon Lal, 27 B. 357 (1903).

(4) Woodroffe, 25. But in a recent case in the Bombay High Court it was doubted by one of the Judges whether a mandatory injunction can be considered as a temporary one under this rule, and whether a mandatory injunction can be granted on an interlocutory application under it : Basul Karim *v.* Pirubhai Amirbhai, 38 B. 381 (1914).

(5) Ib., 26.

(6) Ib., 31.

(7) Att.-Gen. *v.* Birmingham, etc. Drainage Board, 50 L. J. Ch. 786 ; Dayabhai *v.* Bapalal, 26 B. 140 (1901) ; Sakar Lal *v.* Bai Parvatibai, 26 B. 283 (1901).

(8) Sahib Thambi Marakayar *v.* Hamid Marakayar, 36 M. 414 (1911) ; Srinivasa Aiyangar *v.* Arayar Srinivasa, 23 M. 483 (1910).

(9) In Madhavrao Yeshwant *v.* Manecklal Pranshanhar, 2 Bom. L. R. 797 (1900), the Court stated that it was unnecessary to decide whether s. 647 of the last Code extended 492 of that Code to proceedings under the Probate Act of 1881, but that the Court should, in preference, follow the special powers given in s. 34 of that Act.

try the suit.(1) As to this, "Equity acts *in personam*," that is, the Court's directions are addressed to the defendant personally, and they are not regarded as directly affecting the subject-matter in dispute. The application of the maxim in India is subject to the statute. The Code (2) has given to Mofussil Courts the power to act *in personam*. The Presidency High Courts under their Charters have a similar, but in terms less restricted, jurisdiction.(3) Injunctions may be granted by all Civil Courts with the exception of Presidency and Provincial Small Cause Courts. The jurisdiction may be exercised either by a Court of first instance, or of appeal.(4) The Court of first instance has, *before* appeal, no jurisdiction to grant an injunction after the claim is dismissed, and it has no jurisdiction *after* the appeal has been admitted to issue an injunction during the pendency of the appeal. Nor *à fortiori* when a suit for an injunction is dismissed, can the Court which dismisses such suit take upon itself to stay by injunction the execution of a decree passed in another suit.(5) The Appellate Court has the same power in respect of the grant of an injunction as the first Court had.(6) The Court may also interfere in revision.(7)

The High Courts may enforce these orders by proceedings for contempt,(8) and the Code (r. 2) invests Courts with power to compel obedience.(9) The Code has also provided for the enforcement of decrees granting permanent injunctions.(10) An injunction operates from the date of the order being made and not from the time of the sealing of the writ or even from the time of its being drawn up, and a party who has notice of an order is bound by it from the time it is pronounced. An injunction must, however erroneous it may be, be obeyed until it is discharged. It has, however, no effect in altering the rights of property.(11)

Though the issue of an injunction is a matter of discretion, the latter is governed by certain general judicial principles.(12) As an injunction is not to be arbitrarily refused where a proper case for its issue is made out, so it is not to be granted merely on the ground that it can do no harm.(13) The subject-

(1) Woodroffe, 36-49, *et ib. casus*.

(2) S. 16, *ante*; Crisp *v.* Watson, 20 C. 689 (1893); Vithalrao *v.* Vaghoji, 17 B. 570, 572 (1892).

(3) Letters Patent, s. 19; 24 & 25 Vict. c. 104, s. 9; H. H. Holkar *v.* Dadabhai, 14 B. 353 (1890); Rajmohun Bose *v.* East Indian Ry. Co., 10 B. L. R. 241, 248 (1872); East Indian Ry. *v.* Bengal Coal Co., 1 C. 95, 100 (1875); Delhi and London Bank *v.* Wordie, 1 C. 249, 251, 263 (1876).

(4) Woodroffe, 54 *et seq.*; as to the power of the Court of first instance, see in particular Yamin-ud-Doulah *v.* Ahmed Ali Khan, 21 C. 561 (1894).

(5) Gossain Money Puree *v.* Guru Pershad Singh, 11 C. 146 (1884).

(6) Shaikh Moheeoddeen *v.* Shaikh Ahmed Hossein, 14 W. R. 384, 385 (1870); Gossain Money Puree *v.* Guru Pershad Singh, *supra*; Kirpa Dayal *v.* Rani Kishore, 10 A. 80 (1887); Kanahi Ram *v.* Biddya Ram, 549, 551 n. (1878); see s. 102, O. XXII. r. 11; s. 108, O. XLV. r. 13; O. XLIV. r. 1.

(7) Chandidhat Jha *v* Padmanand Singh Bahadur, 22 C. 459 (1895); Gossain Money Puree *v.* Guru Pershad Singh, 11 C. 146 (1884); Luis *v.* Luis, 12 M. 186 (1888); Israil *v.* Shamser Rahman, 41 C. 437; 19 C. L. J. 47 (1913).

(8) See notes, *post*, Woodroffe, 71 *et seq.*

(9) Ib.

(10) Ib.

(11) Woodroffe, 82.

(12) See Woodroffe, 80 *et seq.*, where the subject is more fully discussed.

(13) Dunn *v.* Bryan, 7 R. R. Eq. 143; Noyna Misser *v.* Rupikun, 9 C. 609, 611 (1882).

matter of a temporary injunction is the protection of legal rights *pending litigation*. Its object is to prevent future injury, leaving matters as far as possible *in statu quo* until the suit in all its bearings can be heard and determined.(1) In exercising jurisdiction the Court does not pretend to determine the legal rights, but merely keeps the property in its actual condition until the legal title can be established. It interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the Court for the protection of the legal right or of the property in question until the legal right can be ascertained. The Court upon an application for a temporary injunction will deal with the injunction upon the evidence before it, and will confine itself strictly to the immediate object sought, and as far as possible abstain from prejudging the question in the cause.(2) A temporary injunction is thus not decisive upon the merits, whilst a perpetual injunction, being in effect a decree, is conclusive upon all parties in interest.

The general rules governing the grant of relief are: (*a*) the applicant must show a fair *primâ facie* case in support of the right claimed; (3) (*b*) and an actual or threatened violation of that right; (4) (*c*) productive of irreparable or at least serious damage.(5) So a temporary injunction will not be granted to restrain a wrong which is a mere technical invasion of the plaintiff's rights and does not threaten serious injury.(6) As has been concisely said, the Court will not grant an injunction unless *real injury* is apprehended.(7) (*d*) The applicant's conduct should be such as not to disentitle him to assistance; it should be fair and honest, and free from acquiescence or delay.(8) A less degree of acquiescence or delay will bar relief on an interlocutory application than at the final hearing. Apart from the fact that delay is calculated to throw doubt upon the reality of the alleged injury, it is not really material unless it has prejudiced the defendant.(9) (*e*) There must be a greater convenience in granting then in refusing the injunction.(10) Where, however, there is a right it

(1) Stephens *v.* Trustees Port of Bombay, I B. 145 (1876).

(2) Gopeenath Mookerjee *v.* Kally Does Mullick, 10 C. 225, 231 (1883); Chandidat Jha *v.* Padmanand Singh Bahadur, 22 C. 549, 466 (1895); Moran *v.* River Steam Navigation Co., 14 B. L. R. 357 (1875).

(3) Woodroffe, 82 *et seq.*, and cases there cited, and, in particular, the Indian cases, Moran *v.* River Steam Navigation Co., 14 B. L. R. 352, 357 (1875); Gomes *v.* Carter, 1 Ind. Jur. N. S. 411, 412 (1866); Chandidat Jha *v.* Padmanand Singh Bahadur, 22 C. 459, 464, 465 (1895).

(4) Ib., 101; cf. Act I. of 1877, s. 54 [" invades or threatens to invade "]; Benode Coomaree Dossee *v.* Soudaminey Dossee, 16 C. 257 (1889); Bindu Basini Chowdhrani *v.* Jahnabi Chowdhrani, 24 C. 260 (1896); Kalidas Jivram *v.* Gor Parjaram Hirji, 15 B. 309 (1890); Chabildas *v.* Municipal Commissioners, Bombay, 8 B. H. C. R. 85 (1871); Krishna Ayyan *v.* Venkatachella Mudali, 7 M. H. C. R. 60, 71 (1872); Ghanasham Nilkant Nadkarni *v.* Moroba Ramchandra Pai, 18 B. 488 (1894).

(5) Woodroffe, 82.

(6) Spelling's Extraordinary Relief, s. 19.

(7) Hilliard, Inj., s. 14. The term "irreparable injury" must be considered with reference to the circumstances peculiar to the country: Anantnath Dey *v.* Mackintosh, 6 B. L. R. 571 (1871).

(8) Woodroffe, 96 *et seq.*

(9) Ib., at p. 103; Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 239.

(10) Ib. 104; Gomes *v.* Carter, 1 Ind Jur. N. S. 411, 412 (1866); Anantnath Dey *v.* Mackintosh, 6 B. L. R. 571, 573 (1871); Ruplul Khettry *v.* Mahima Chandra Roy, 5 B. L. R. 254, 257 (1870); Subba Naidu *v.* Haji Badsha Saheb, 26 M. 168, 175 (1902); Shamnuggur Jute Factory Co. *v.* Ram Narain Chatterjee, 14 C. 189, 200 (1886).

cannot, it has been said, be limited by the religious prejudices of neighbours.(1) (*f*) Lastly, equally efficacious relief must not be obtainable by any other usual remedy except in case of breach of trust.(2) In a recent case it was held that in deciding whether to grant a temporary injunction the Court should consider whether there was a substantial question pending decision as to the rights of the parties, and whether the nature of that question was such that it was proper that an injunction should meanwhile be granted and whether there would be a greater convenience in granting it.(3)

With certain exceptions the aforementioned principles apply equally to perpetual as well as to temporary injunctions. These exceptions are that whereas upon an application for a temporary injunction the plaintiff is required merely to show a clear *primâ facie* case ; in order to obtain a grant of a perpetual injunction, the legal right must have been *established* as well as the fact of its actual or threatened violation productive of serious damage.(4) In the case of alleged acquiescence a stronger case must be made than would be a bar upon an interlocutory application.

A mandatory injunction, that is, an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made, may be either temporary or perpetual, and, generally speaking, the principles regulating its grant are those which are applicable to preventive injunctions, temporary or perpetual as the case may be.(5) It has, however, been doubted by one of the Judges in a recent case in the Bombay High Court whether a mandatory injunction can in strictness be considered as a temporary injunction under this rule.(6) Prompt action is essential if a mandatory injunction is the desired remedy.(7)

Practice as to issue of injunctions.—See notes to rr. 3, 4, *post*.

Breach of injunction.—As already stated an injunction has operation from the time it is pronounced. With whatever irregularities the proceedings may be affected, or however erroneously the Court may have acted in granting the injunction, it must be obeyed until it is properly dissolved. In order

(1) Behari Dal *v.* Ghisa Lal, 24 A. 499 (1902).

(2) Woodroffe, 105.

(3) Israil *v.* Shamser Rahman, 41 C. 437 (1913). Cf. Dwijendra Narain Roy *v.* Purnandu Narain Roy, 11 C. L. J. 189 (1910) ; Walker *v.* Jones (1865), L. R. I. P. C. 50.

(4) Ib., 130 ; Krishna Ayyan *v.* Venkatachella Mudali, 7 M. H. C. R. 60, 71 (1872) ; Akilandammal *v.* Venkatachella Mudali, 6 M. H. C. R. 112, 116 (1871).

(5) Woodroffe, 110 ; see Kadarbhai *v.* Rohimbhai, 13 B. 674 (1889) ; Chandra Nath Pal *v.* Sree Gobind Chowdhuri, 6 C. W. N. 308 (1900) ; Jamnadas Shankarlal *v.* Atmaram Harjivan, 2 B. 137, 139 (1877) ; Shamnuggur Jute Factory *v.* Ram Narain Chatterjee, 14 C. 189, 200 (1886) ; Maganlal *v.* Chhotalal, 26 B. 136 (1901) ; Nandkishor Balgovan *v.* Bhagubhai Pranvalabhdas, 8 B. 98 (1883) ; Navroji *v.* Dastur, 28 B. 20 (1903), and cases in next note but one.

(6) Basul Karim *v.* Pirubhai Amirbhai, 38 B. 381 (1914). In this case plaintiff had obtained pending suit a mandatory injunction compelling defendant to remove a screen blocking up an opening which plaintiff had made in his wall, and the High Court held that the grant of such injunction was a material irregularity. But see Woodroffe on Injunctions, 3rd ed., pp. 188, 189.

(7) Ghanasham Nilkant Nadkarni *v.* Moroba Ramchandra Pai, 18 B. 492 (1894) ; Benode Coomaree Dossee *v.* Soudaminey Dossee, 16 C. 252 (1889) ; Haji Syed Mahomed *v.* Galab Rai, 20 A. 345 (1898).

to see whether the operation of an injunction has been interfered with, regard must be had to the terms of the injunction itself. If it has been disobeyed, then proceedings in the matter of the contempt will lie against those in active disobedience and those who abet them. The High Courts have all the powers of a Court of Equity in England for enforcing these decrees *in personam*. This jurisdiction has not been affected by the Code.(1) It has been held that a District Court is not a Court of Record, and as such has no inherent power to commit for contempt.(2) However this may be, the Code gives powers which according to the last cited case are only exerciseable when the Court is put in motion by a party who deems himself aggrieved. Sub-rule (3) has been remodelled. See Bombay decision, cited.(3) The Code, while providing a specific penalty for the breach of an injunction, does not provide that one of the penalties which result from infringement is that any dealing with property the subject of an injunction contrary to its terms is illegal and void. The words of the rule are not to be read as providing for any other penalty than that which is therein specially mentioned.(4) Sect. 188 of the Penal Code does not apply to an order made by way of injunction in a civil suit between party and party.(5)

As an injunction operates from the date of the order being made, a party may be committed for the disobedience of an order between the date it is made and the date of its issue, the reason being that if the rule were otherwise the party against whom the order was made would have all that time during which he might defeat it.(6) A party, therefore, who has notice of an order, is bound by it from the time it is pronounced, and any means of information whereby notice is actually received is sufficient, it not being requisite that a defendant should be officially apprised of the injunction or be served with process in order to render him liable for contempt.(7)

In order to decide whether there has been an actual breach of the injunction, it is important to observe the objects for which the relief was granted as well as the circumstances attending it. The violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the Court's orders.(8) On the other hand, when the conduct complained of, although literally a breach of the injunction, is not so in spirit, and where defendants have acted in good faith and there is no evidence of any intention on their part to violate the order, they will be held guiltless.(9) It is, however, no answer for a defendant to say that he has acted under advice.(10) Only the person against whom an injunction is issued may be committed for its breach, but a person who with knowledge of an injunction against a particular person, aids

(1) Hassonbhoy *v.* Cowasji Jehangir Jassawalla, 7 B. 1 (1881); Navivahoo *v.* Narotamdas Candas, 7 B. 5 (1882); H. H. Holkar *v.* Ashburner, 14 B. 353, 359 (1890); Martin *v.* Lawrence, 4 C. 655 (1879).

(2) Korsappa *v.* Sachi Dai, 26 M. 494 (1902).

(3) Advocate General, Bombay *v.* Ganji Akhai, 19 B. 152, 155 (1894).

(4) Delhi & London Bank *v.* Ram Narain, 9 A. 497, 499 (1887); Manchar Das *v.* Ram Autar Pande, 25 A. 431 (1903).

(5) *In re* Chandra Kanta De, 6 C. 445 (1880).

(6) Woodroffe, 74 *et seq.*

(7) Ib.

(8) Grand Junction Canal Co. *v.* Dimes, 17 Sim. 38.

(9) Fraas *v.* Bailement, 10 Green, 84 (Amer.); Woodroffe, 76.

(10) Pranjivandas Harjivandas *v.* Mayaram Samaldas, 1 Bom. H. C. R. O. C. J. 148 (1863).

and assists that person to commit a breach of the injunction may himself be committed for contempt though not for breach of the injunction.(1) As regards permanent injunctions, they are decrees, and are enforceable as such.(2)

Appeal, Review, Revisi on---An appeal lies from an order under rr. 1, 2, 4. See O. XLIII. r. 1 (*r*). And it has been held that since an order under r. 1 means any order passed under r. 1, and since under that rule a Court has the power of refusing an injunction, an appeal lies against an order refusing an injunction.(3) It is essential to prove a wrong exercise of discretion.(4) But in the under-mentioned cases (5) a second appeal was held not to lie. It has been held that no appeal lies from an order refusing to grant an injunction without notice.(6) A permanent injunction is appealable as a decree.(7) The Court may, under sect. 115, revise an order,(8) or under sect. 114, review.(9) Where on an application for the issue of a temporary injunction the Court ordered the defendants to furnish security, it was held that this was not an order under r. 1 of this rule, and was not appealable under O. XLIII. r. 1.(10)

Damage or alienation, waste.—Sometimes an injunction, whether temporary or perpetual, is the instrument by which the Court specifically enforces the obligation if arising on contract, or specifically restrains the violation of those other obligations which are the subjects of the law of tort. In other cases a temporary injunction is merely incident or ancillary to the general relief in this sense that it seeks merely to preserve the *status quo*, enjoining interference *pendente lite* by waste, damage or alienation with the subject of litigation or the fraudulent disposition of his property by a party defendant to a suit. These two rules regulate the grant of temporary injunctions, the latter relating to temporary injunctions in cases of contract or tort, the former relating to injunctions against interference with the subject of litigation here spoken of as injunctions *pendente lite*.

In the case of injunctions in matters of contract and tort, it is not necessary to separately consider temporary and perpetual injunctions in cases of contract, for the kinds of cases, whether of contract or tort, in which an injunction, either temporary or perpetual, may be granted, do not differ from each other. If the case, as alleged, be such that at the hearing a perpetual injunction would not be granted, then clearly a temporary injunction ought not to be granted before the hearing; though, of course, it does not follow that a temporary injunction

(1) Woodroffe, 76.

(2) See O. XIX. r. 32; Woodroffe, 65; Bhoobun Mohun Mundal *v.* Nobin Chunder Bullub, 10 B. L. R. app. 12 (1872); Protap Chunder Doss *v.* Peary Chowdhrain, 8 C. 174 (1881).

(3) Hari Lal *v.* Prayag Ram, 17 C. W. N. 996; 18 C. L. J. 39 (1913); and see Lachmi Narain *v.* Ram Charan Das, 35 A. 425 (1913).

(4) Umesh Chandra *v.* Nibaran Chandra, 19 C. L. J. 305 (1913).

(5) Ramchandra *v.* Janardhan, 1 Bom. L. R. 138 (1902); Venkatapathi Naidu *v.* Tirumalai Chetti, 24 M. 447 (1901).

(6) Luis *v.* Luis, 12 M. 186 (1888).

(7) As to application for execution, see Sadagopa *v.* Krishnamachari, 12 M. 364 (1889).

(8) See last case; Gossain Money Puree *v.* Gour Pershad Singh, 11 C. 146 (1884).

(9) See Dhuronidhur Sen *v.* Agra Bank, 5 C. 86 (1879).

(10) Sito Mahton *v.* Christian, 17 C. W. N. 318 (1912).

will be granted before the hearing, in every case in which a perpetual injunction might fitly be granted at the hearing, for to justify a temporary injunction, not only must the case be such that an injunction is the appropriate relief, but there must be the further ingredient that, unless the defendant is at once restrained by injunction, irreparable injury or inconvenience may result to the plaintiff before the suit can be decided upon its merits.

In the limited class of cases which are now to be considered, the injunctions are always from the nature of the case of a temporary character, and must thus be separately considered.

Injunctions may thus be roughly divided into (A) injunctions whether temporary or perpetual in cases of (*a*) contract or (*b*) tort (r. 2), and (B) temporary injunctions against (*a*) interference with the subject-matter of litigation, or (*b*) fraudulent disposition of property pending litigation (r. 1).

The power given by r. 1, clause (*a*), is substantially the same as that long exercised by English Courts of Equity. The object is to restrain the defendant from doing anything which may prevent the property remaining *in statu quo* during the pendency of a suit, upon the principle that when the plaintiff seeks to recover property in *specie* the defendant shall not be allowed to decide the question in his own favour by dealing or making away with the property, the right to which is the question in dispute. So the Court will restrain not only waste or damage to the subject of litigation whether moveable or immoveable property, but may also restrain the mere alienation of property whether moveable or immoveable. For in every case the plaintiff might be put to the expense of making the vendor a party to the proceeding, and at all events his title, if he prevails in the action, may be embarrassed by such new outstanding title under the transfer.(1) The Court, even though it acts on the doctrine of *lis pendens*, will prevent, if possible, the necessity of proceeding on such a principle and will not in a proper case deprive a suitor of the more effective protection of an injunction.(2) This clause deals with suits in which a claim is made for specific property in the hands of the defendants, and it is only in such suits that any question can arise of waste, damage or alienation. The object of the exercise of the jurisdiction is to secure the safety of that specific property which is in dispute in the suit pending the litigation, as also at its close to secure that any decree which may be made with reference thereto shall not prove unfructuous.(3)

The power, however, of issuing an injunction *pendente lite* ought to be most cautiously exercised. It is only in cases where property, which it is essential should be kept in its existing condition during the pendency of the suit, is in danger of being destroyed, damaged, or put beyond the power of the Court, that the latter ought to interfere so as to restrain persons who may turn out in the end event of the litigation to be the actual owners of the property from proper enjoyment and possession of it.(4)

(1) See Collett's Specific Performance, 265–273; Story, Eq. Jur., 906–908, 2nd English Edition.

(2) Hood *v.* Aston, 1 Russ. 412, one of the large number of cases dealing with Injunctions restraining the negotiation of negotiable instruments and the transfer of stock, securities and other like *indicia* of property.

(3) Goluck Chunder Gooho *v.* Mohim Chunder Ghose, 13 W. R. 95, 96 (1870).

(4) Mun Mohinee Dossee *v.* Ichamoyee Dassee, 13 W. R. 60 (1870), *per* Phear, J.

Immoveable property should always, if possible, be retained *in statu quo*, until the suit which is to determine the title to it shall have been decided.(1)

The restraint imposed need not necessarily be absolute, but should be such as the circumstances require. So where the subject-matter of the injunction comprised mortgage-bonds and Government promissory notes the order of injunction, while prohibiting any alienation of or dealing with the bonds or notes by the defendant, permitted him to sue upon the mortgage-bond and take steps to realize the amount covered thereby, and ordered the money when realized to be kept in Court, until the disposal of the suit; and as regards the promissory notes permitted him to draw the interest as it fell due from time to time.(2)

In granting a temporary injunction restraining the alienation of property, the subject of suit, the Court will, as in the case of other injunctions, first see that there is a *bonâ fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience (3) if the injunction do not issue, bearing in mind the principle (already alluded to) of retaining immoveable property *in statu quo*.(4)

The wrongful sale of property in execution of a decree is only one form of alienation which may be restrained *pendente lite*.(5) Even a judicial sale, if wrongful, will be restrained upon principles and circumstances which are hereafter dealt with.

In order to obtain an injunction under the rule there must be, (*a*) a *suit* in which the injunction may be granted,(6) and (*b*) the threatened danger of waste, damage, or alienation must be *alleged* and *proved*; (7) (*c*) in respect of property which is in *dispute* in that suit.(8)

"**Wrongfully sold in execution.**"—This is one of several forms of injunction in restraint of judicial proceedings.(9) Prior to the Specific Relief Act the High Court restrained by injunction proceedings to be instituted and pending; as also proceedings not instituted but threatened, and prohibited the execution of decrees which had been or might be obtained.(10) The matter is now as regards permanent injunctions governed by the Specific Relief Act and as regards temporary injunctions in part by the Code. An opinion has been expressed that temporary injunctions are limited to matters mentioned in sects. 492 and 493 (now rr. 1 and 2) of the Code. And on this ground the Court refused an interlocutory injunction restraining the defendant proceeding with a suit filed by the defendant against the plaintiff in the Small Cause Court until the hearing of a suit in the High Court in which an application for an injunction was made.(11) But this case has been dissented from.(12) It seems anomalous

(1) Gomes *v.* Carter, 1 Ind. Jur., N. S. 411 (1866).

(2) Chandidat Jha *v.* Padmanand Singh Bahadur, 22 C. 459, 467 (1895).

(3) Goluck Chunder Gooho *v.* Mohim Chunder Ghose, 13 W. R. 95, 96 (1870).

(4) Gomes *v.* Carter, 1 Ind. Jur.; N. S., 411 (1866), *per* Phear, J.

(5) Collett's *op. cit.* 265.

(6) R. 1.

(7) Ib.; Prosunno Moyee Dossee *v.* Wooma Moyee Dossee, 14 W. R. 409 (1870).

(8) R. 1, *vide post*; Goluck Chunder Gooho *v.* Mohim Chunder Ghose, 13 W. R., 95, 96 (1870).

(9) See Woodroffe, 162 *et seq.*

(10) Ib., 154.

(11) Jairamdas *v.* Zamonlal, 27 B. 357 (1903).

(12) Hart *v.* Grosser, 9 C. W. N. 748 (1905);

that a perpetual injunction may be granted, but not an interlocutory one, where to refuse it may be to make the proposed decree unfructuous. An injunction in respect of civil judicial proceedings may have reference to an action or to proceedings taken in execution of a decree obtained therein. R. 1 deals with the particular case of wrongful sale in execution, a provision which was not contained in the Code of 1859. Sect. 56 of the Specific Relief Act was not intended to and does not affect temporary injunctions applied for under sect. 492 (now r. 1) against the wrongful sale of property in execution of a decree. Therefore a subordinate Court may issue an injunction restraining proceedings in execution pending before a superior Court.(1)

The law does not say that a property is, or is about, to be wrongfully sold, but that it is in danger of being wrongfully sold.(2) These words are wide enough to include,(3) and the section is, in fact, most commonly applicable to claims in execution made under O. XXI. r. 58. If a claimant under that rule, whose claim has been disallowed, institutes a regular suit against the decree-holder, the Court has power to grant an injunction staying the sale pending the decision of the suit.(4) And the Code having been amended so as to admit of the grant of an interlocutory injunction in such a case, the procedure indicated by the rule should be followed, and a sale should, in case of applications by third parties, be restrained by injunction in the suit brought to try the title, and not by the order of the Court executing the decree.(5) And in the execution of a decree ordering the sale of property, it is not competent for a Court to refuse to sell it because a stranger who is in possession of such property impeaches the decree; the course open to him if he wishes a stay of execution being to file a suit and obtain an injunction for that purpose.(6) But though where property is in danger of wrongful sale the Court may issue an injunction restraining the defendant from enforcing his decree against the property, yet when the Court dismisses the suit in which the injunction is sought and has been granted, it has no right to further restrain the defendant from executing upon the mere possibility of the Appellate Court reversing its decree. Once the suit is dismissed the Court has, in point of law, no power at all to deal with the proceedings in the suit in which execution has issued.(7) Upon the dismissal of a suit for an injunction restraining the sale, the Appellate Court may issue a temporary injunction restraining the decree-holder from proceeding with execution pending the appeal; (8) and the application may be granted subject to the terms of the

Rash Behary Dey *v.* Bhowani Churn Bhose, 34 C. 97 (1906), where it was also pointed out that the High Court has a general Equity jurisdiction independent of the Code.

(1) Amir Dulhin *v.* Administrator General of Bengal, 23 C. 351 (1895).

(2) Brojendra Kumar Rai Chowdhury *v.* Rup Lall Dass, 12 C. 515, 517, 518 (1886); see Fulkumar *v.* Ghanshyam Misra, 31 C. 511 (1903), and as to an injunction being consequential relief as held in the latter case, see Kunj Behari *v.* Keshav Lall, 28 B. 567 (1904).

(3) Brojendra Kumar Rai Chowdhury *v.* Rup Lall Dass, 12 C. 515 (1886).

(4) Ib.; Abdullah *v.* Banke Lal, F. B., 33 A. 79 (1910).

(5) Ib.; a case which clearly emphasizes the difference between the former and the present law.

(6) Purshottom Vithal *v.* Purshottom Iswar, 8 B. 532 (1884).

(7) Gossain Money Puree *v.* Gour Pershad Singh, 11 C. 146 (1884); referred to in Yamin-ud-Dowlah *v.* Ahmed Ali Khan, 21 C. 561 (1894).

(8) Kirpa Dayal *v.* Rani Kishori, 10 A. 80 (1887).

applicant giving such security as the Court thinks fit.(1) This decision has, however, recently been dissented from, the Court holding that in a case like this it was impossible to say that the property was in danger of being wrongfully sold: that sect. 492 of the last Code required that it must be "*proved*" that the property was in such danger, and that to hold in such an application this was proved would be to decide an appeal which was not before the Court.(2) It is submitted that the question is rather one of fact than of law, though no doubt dealing with the matter as one of fact the decree appealed from would, unless it was clearly erroneous, prove a serious obstacle to the grant of an injunction. The Code directs that ordinarily before granting an injunction notice of the application should be given to the opposite party.(3) Where a Court made an order granting a temporary injunction without directing notice of the application for an injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex parte* without the other side being given an opportunity to show cause, it was held that the order was irregular.(4) The application should be made without unnecessary delay,(5) and should on the face of it disclose a sufficient ground to warrant an order being made as prayed.(6) The meaning of the word "*wrongfully*" may, in certain cases, be open to doubt.(7) It is, however, clear that the property is not in danger of being wrongfully sold, when the plaintiff has no title to or interest in it, or if he has an alleged interest, when such interest is not the subject of sale in execution.(8) So where ancestral property was attached in execution of a decree and a son of the judgment-debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, it was held that, inasmuch as what was advertised to be sold was the right and interest of the plaintiff's father in the property, it could not be said that the property was being wrongfully sold in execution of a decree, and the temporary injunction ought not to have been granted.(9) It has been said that in interpreting this portion of the Code a Judge cannot be too careful as to the mode in which he permits the machinery of the Courts to be used for the purpose of enabling a plaintiff in one suit to delay a decree-holder in another from obtaining the fruit of his judgment by executing his decree in ordinary course against the property of his judgment-debtor. At the same time, it is, of course, most desirable to guard, as far as possible, against a multiplicity of suits, which was one of the objects the Legislature had in view in enacting the provision in its present shape. The Courts will, therefore, amongst other things, consider whether the refusal to grant the application for an injunction will result in further litigation, and whether any practical injury will result to any one if the injunction be allowed.(10) It has

(1) Kirpa Dayal *v.* Rani Kishori, 10 A. 80 (1887).
(2) *In re* Chando Bibi, 26 A. 311 (1904).
(3) R. 3.
(4) Amolak Ram *v.* Sahib Singh, 7 A. 550 (1885).
(5) Ib., 552.
(6) Ib.
(7) Kirpa Dayal *v.* Rani Kishori, 10 A. 80, 82 (1887). See *In re* Chando Bibi, 26 A. 311 (1904), *supra*.
(8) Amolak Ram *v.* Sahib Singh, 7 A. 550 (1885).
(9) Ib.
(10) *Per* Straight, J., in Kirpa Dayal *v.* Rani Kishori, 10 A. 80, 82 (1887).

been held by the Allahabad High Court that the term "decree," as used in the Code,(1) does not include the decree of a Court of Revenue, and that therefore an application for stay of sale in execution of a decree of a Court of Revenue in a suit under sect. 93 of Act XII. of 1881 cannot be entertained by a Civil Court.(2)

Fraudulent disposition of property.—This provision differs from that enacted by clause (*a*), in that the property dealt with by the injunction is not the property in dispute in the suit, namely, that to which both parties lay claim and the title to which has to be decided, but is property whether moveable or immoveable,(3) the title to which is admittedly in the defendant, and, therefore, not in dispute in the suit. It presupposes a general intention on the part of the defendant to defeat and defraud his creditors and permits of an injunction analogous to the remedy of attachment before judgment.(4) The ordinary rule is that, pending a suit to enforce a general claim against a person there cannot be an injunction to restrain him from parting or dealing with his property, not being property specifically in dispute in the suit.(5) When, however, such intended parting and dealing with property is not done in the *bonâ fide* exercise of ownership, but with an intent to defraud persons, who, being creditors of the owner, have, or might have, the right to resort to such property in satisfaction of their claim, there arises in their behalf an equity to restrain such threatened dealing with the property even as against its legal owner. Both an attachment under O. XXXVIII. r. 6 and an injunction under this clause have as their subject-matter not the property in suit, but the property of the defendant; therefore applications under these provisions are clearly distinguishable from an application for an injunction under clause (*a*) against the waste, damage and alienation of property which is in dispute in the suit. And as applications under that Order and clause (*b*) are both distinguishable from an application under clause (*a*), so also, applications under that Order and clause (*b*) respectively, are clearly distinguishable from each other. O. XXXVIII. r. 6 is applicable only to cases where it is probable that the defendant is about to make away with his property so as to make it impossible for the plaintiff to execute any possible decree against him, and empowers the Court in such a case to make an order calling upon the defendant for security and, in default thereof, to attach the property. It has no application where the property is the *property in suit*, which must, if necessary, be followed under the provisions of r. 1, clause (*a*). The latter provision applies to a case where it is shown to the satisfaction of the Court that the defendant in possession is likely to damage and make away with any property in dispute in the suit, and empowers the Court in such a case to issue an injunction to the defendant to refrain from the particular act complained of.(6) But though O. XXXVIII. r. 6 and r. 1, clause (*b*), of this Order have both this in common, that the property to be dealt with by the Court is not that in dispute in the suit, the following important differences exist between

(1) S. 2.

(2) Onkar Singh *v.* Bhub Singh, 16 A. 496 (1894).

(3) Collett, *op. cit.* 265.

(4) See Robinson *v.* Pickering, 16 Ch. D. 606.

(5) Bishamber Sahai *v.* Sukhdev, 16 A. 186, 187 (1897).

(6) Joynarain Geeree *v.* Shibpersad Geeree, 6 W. R., Misc., 1 (1866).

these provisions. In the first place, the property is actually attached in the one case, while in the other the property is left in the owner's hands, subject only to the prohibition enjoined by the injunction. Secondly, the provisions as to attachment are generally limited to property sufficient to satisfy the decree which may be passed in the suits in which the application for attachment is made. Thirdly, questions have arisen as to the possibility of attachment where the property is beyond the jurisdiction of the Court in which the suit is pending; (1) whereas an injunction, in so far as its action is *in personam*, is not so limited. Lastly, any private alienation made subsequent to attachment is null and void; but such is not the case with alienations made subsequent to the issue of an injunction either under clause (*a*) or (*b*) of the first rule.(2)

"**Breach of contract.**"—See Woodroffe on Injunctions, Ch. VI., where the subject is fully considered. Whether or not there has been a breach of contract in any particular case depends on the facts of that case, and the substantive law governing it. The ordinary remedy for such breach is damages. Extraordinary remedies are specific performance, rescission, cancellation, receiver and injunction. With this last relief in its temporary form, the Order alone deals. The Court will interfere by injunction, to prevent the violation of contracts, and to compel parties to perform their covenants and agreements by injunction, temporary or perpetual, mandatory or otherwise. Certain common conditions are essential to the grant of this relief, viz. (*a*) the Court must be one of competent *jurisdiction* (3) to grant the relief prayed, (*b*) the agreement must constitute a *contract*,(4) (*c*) such contract must not be one the performance of which would not be *specifically* enforced,(5) for injunctions respecting contracts must be governed by rules relating to specific performance.(6) Where an agreement is of an affirmative character, the remedy lies in specific performance, and an injunction may also be granted both for the enforcement of negative terms, if any, and also in aid of and ancillary to the relief sought by way of specific performance of the contract. If, however, an agreement, though of an affirmative character, is such that the Court would not specifically enforce it, no injunction will be issued to prevent the breach thereof,(7) except in certain cases of negative agreements coupled with affirmative

(1) See notes to rules dealing with attachment before judgment.

(2) Delhi & London Bank *v.* Ram Narain, 9 A. 497, 499 (1887). [In this case the Lower Court issued an injunction under s. 492, cl. (*b*), but the facts proved do not appear to have warranted the order. The clause requires not only proof of attempted alienation, but of intent to defraud. The High Court appears to have considered that the injunction was not legally issued, but disposed of the case upon another point; foll. in Manohar Das *v.* Ram Autar Pande, 25 A. 431 (1903).]

(3) Woodroffe, 190–191.

(4) Ib., 191–194. So no injunction can be granted in respect of a void agreement: Bhikaji Sahaye *v.* Bapu Sayer, 1 B. 550 (1877). In the case of voidable agreements an injunction may be granted when the person at whose instance the contract is voidable has elected to ratify it, provided that ratification is not (as in the case of a minor) impossible.

(5) Woodroffe, 195.

(6) See Act I. of 1877, ss. 54, 56 (*f*); Joyce's Doctrines, 204. As to contracts which cannot be specifically enforced, see s. 21, Act I. of 1877; Woodroffe, 195; for whom contracts may be specifically enforced, ib. 237; against whom contracts may be so enforced, ib. 241.

(7) Act I. of 1877, s. 56, cl. (*b*).

agreements not specifically enforceable.(1) (*d*) The grant of ust not affect the operation of the Indian Registration Act.(2)

Particular principles are applicable in certain particular cases of contract or transfer of property: such as injunctions between partners; (3) against companies; (4) clubs, societies, castes; (5) between mortgagor and mortgagee; (6) lessor and lessee; (7) in cases of trust or other fiduciary relations; (8) against executors and administrators; (9) and against corporations.(10)

"**Or other injury.**"—That is, any legal injury other than that arising from breach of contract, as in the case of obligations arising from transfer of property or trust,(11) or in cases of tort.(12) As an injunction will only be granted to prevent the breach of an obligation that is duly enforceable by law, there must be in the first place a legal right and an invasion or threatened invasion of that right. This is a question which must be decided according to the particular facts of the case, and the substantive law of torts governing those facts. While it is not necessary in this or in any other case that actual injury should have been suffered, the Court should be satisfied that the apprehended injury will be either continuous or frequently repeated or serious.(13) In particular, an injunction will not be granted to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance.(14) The applicant must have a personal interest in the matter; (15) and he must not have acquiesced in the wrong complained of.(16) The conduct of the applicant and his agent will be considered,(17) and an injunction will not be granted when equally efficacious relief can otherwise be obtained, except in case of breach of trust.(18) The balance of convenience will be considered,(19) and in the exercise of the wide discretion with which the Court is vested the whole of the circumstances of the particular case.(20) Injunctions have been granted in cases of defamation, malicious words, and slander of title; (21) against trespass and waste; (22) against nuisances; (23) such as those in respect of air, light, water, support, way; against infringement of copyright, trademarks and patents,(24) and any other wrongful act, whatever may be its nature.(25) This is now made clear, though it ought not to have been ever doubtful,(26) by the addition of the words "*of any kind.*"

(1) Act I. of 1877, s. 57. As to affirmative and negative covenants, see Woodroffe, 209-224.

(2) Act I. of 1877, s. 4, cl. (*c*); Woodroffe, 204-209.

(3) Woodroffe, 243-247.

(4) Ib., 248-250.

(5) Ib., 251-256.

(6) Ib., 257-259.

(7) Ib., 261.

(8) Ib., 262-271.

(9) Ib., 269.

(10) Ib., 271-275.

(11) Ib., Ch. VI.

(12) Ib., Ch. VII.

(13) Ib., 283; as to threatened but incomplete acts, see Bindu Basini Chowdhrani *v.* Jahnab Chowdhrani, 24 C. 260 (1896).

(14) Act I. of 1877, s. 56, cl. (*g*).

(15) Ib., s. 56, cl. (*k*).

(16) Ib., cl. (*f*).

(17) Ib., cl. (*j*).

(18) Ib., cl. (*i*).

(19) See Clerk and Lindsell, Torts, 681.

(20) Woodroffe, Ch. VII., p. 287; Act I of 1877, s. 54.

(21) Ib., Ch. VIII.

(22) Ib., Ch. IX.

(23) Ib., Ch. X.

(24) Ib., Ch. XI.

(25) Ib., Ch. XII.

(26) The decision in Darab Kuar *v.* Gomti Kuar, 22 A. 449 (1900), that the section does not apply to cases of injury in tort and acts of trespass, is clearly erroneous.

[s. 494.] **Before granting injunction Court to direct notice to opposite party.**

3. The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

[s. 496.] **Order for injunction may be discharged, varied or set aside.**

4. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Practice. Notice.—The present Order contains the practice as regards temporary injunctions. The practice as regards perpetual injunctions is the same as that which governs the making of decrees generally.(1) Injunctions are granted upon suit, and should as a rule be specifically prayed for when the obtaining of this form of relief is a substantial object of the action. In urgent cases application for an injunction may be made *ex parte* without notice and before or after appearance. As, however, enacted by r. 3, notice as a general rule must be given to the opposite party. The power to issue an *ex parte* injunction no doubt exists, but the greatest care should be employed in its exercise, and only in cases where considerable mischief might ensue if the issue of the process were delayed until notice was given.(2) If the Court be of opinion, upon an application *ex parte*, that the case is not so urgent as to require its immediate interference, it will either grant a rule *nisi* or order notice of the application to be served on the defendant. Where an injunction is granted without notice the party aggrieved may apply either to have it discharged under r. 4 or he may appeal; (3) though the former appears to be the more proper course. No appeal lies from an order refusing to issue an injunction without notice to the opposite party.(4) In other than urgent cases application is generally made by motion for a rule *nisi* or upon notice before or after appearance of the defendant.

Instead of issuing an injunction in the first instance the Court may grant an *interim* order,(5) which is really an order in the nature of an injunction granted when the plaintiff, not showing quite a case for an *ex parte* injunction without more, shows a case for giving short notice of motion for an injunction and for protection in the meantime.

An *interim* order and a rule *nisi* may be, and ordinarily are, granted at the same time. In the case of every application it must be proved either (as is

(1) Woodroffe, 129 *et seq.*

(2) Ib., 130; Hari *v.* Secretary of State, 27 B. 424, 451 (1903); Freeman *v.* McArthur, 2 Tayl. & Bell, 10, 25 (1851); see Sohochurry Dossee *v.* Hurree Kisto Roy, 2 Boulu. 62 (1859); Amalak Ram *v.* Sahib Singh, 7 A. 530 (1885).

(3) Amalak Ram *v.* Sahib Singh, 7 A. 550, 552 (1885).

(4) Luis *v.* Luis, 12 M. 186 (1888).

(5) By which the defendant is restrained until after a particular day named, liberty being given to the plaintiff to serve notice of motion for an injunction for the day before such day.

usually the case) by affidavit, or otherwise, that sufficient grounds exist for the grant of the relief claimed.(1) The defendant's admission may, of course, be sufficient.(2) Particular care must be taken to state all material facts fully and fairly in applications for an *ex parte* injunction,(3) such as injury,(4) defendant's intention to waste, damage, alienate, or to commit some other threatened injury.(5)

If sufficient *primâ facie* evidence is given the Court may either grant an injunction absolutely or as provided for in r. 2 on terms. It may require the plaintiff or defendant to enter into terms as a condition of withholding an injunction. The most usual undertaking is to require a plaintiff as a condition of the Court's interference in his favour to abide by any order which it may make as to damages.(6) The undertaking is ordinarily given by Counsel or pleader on behalf of the party for whom he appears, or by the party appearing in person, and forms part of the order of injunction.

In some cases the motion for a temporary injunction is treated as a trial of the action, and the hearing of the cause is not proceeded with, the injunction being by consent made perpetual on the motion. In cases, however, where relief, additional to that by injunction, is sought, such a course is not feasible, and the trial proceeds, when upon judgment the injunction is made permanent or dissolved. If upon judgment the action is dismissed, any injunction which may have been granted goes as a matter of course. An injunction which has been granted upon an interlocutory application is superseded by the judgment in the action. If it is intended that it should remain in force it must be expressly continued.

Discharge, Variance and Dissolution. A marked feature of temporary injunctions, as distinguished from those which are final or perpetual, is that the former are liable to be dissolved on notice upon sufficient cause shown at any stage of the proceedings after, or perhaps even before, the coming in of the answer.(7) The application should be made on motion at any time before the hearing of the cause in which it was granted; (8) and before the Court by which

(1) See Jagjoran Nanabhai *v.* Shridhar Balkrishna Nagarkar, 2 B. 256 (1877).

(2) Golock Chunder Gooho *v.* Mohim Chunder Ghose, 13 W. R. 95 (1870); Appaji Patil *v.* Apa, 26 B. 735 (1902); or it may go a long way to remedy defects in the plaint: Kunj Behari *v.* Keshav Lall, 28 B. 567, 572 (1904).

(3) Freeman *v.* McArthur, 2 Tayl. & Bell, 10, 25; Joyce, Inj., 1263.

(4) Woodroffe, 137; Spelling, §§ 991, 993; High, Inj., s. 158; but see Kunj Behari *v.* Keshav Lall, 28 B. 567, 572 (1904), against too strict construction of Mofussil pleadings.

(5) Woodroffe, ib.; Chabildas Lallubhai *v.* Municipal Commissioner of Bombay, 8 B. H. C. R., 85 (1871); Prosunno Moyee Dossee *v.* Wooma Moyee Dossee, 14 W. R. 409 (1870); Roy Luchmiput Singh *v.* Secretary of State, 11 B. L. R. app. 27, 28 (1873); Chandidat Jha *v.* Pudmanund Singh Bahadur, 22 C. 459, 466 (1895); Moran *v.* River Steam Navigation Co., 14 B. L. R. 352 (1875).

(6) See as to injunctions on terms, Anantnatu Dey *v.* Mackintosh, 6 B. L. R. 571, 574 (1871); Moran *v.* River Steam Navigation Co., 14 B. L. R. 352, 361, 366 (1875); Ratanje Hormasje Bottlewalla *v.* Edalje Hormasje Bottlewalla, 8 B. H. C. R. 181, 184 (1871); Chandra Nath Pal *v.* Sree Gobind Chowdhury, 6 C. W. N. 308 (1900); Madras Railway Co. *v.* Rust, 14 M. 18, 22 (1890); Kripa Dayal *v.* Rani Kishori, 10 A. 80, 83 (1887).

(7) Woodroffe, 142.

(8) Joyce, Inj., 1265; Freeman *v.* McArthur, 2 Tayl. & Bell, 25 (1851); Sm.

the injunction was granted,(1) unless the cause has been transferred, when the application may be made to that Court to which the cause has become attached. The same rules of pleading and evidence apply both to applications for the grant and dissolution of injunctions. The injunction will either be continued or dissolved according to the merits as disclosed by the pleadings and the preponderance of the evidence.

If an injunction obtained *ex parte* is set aside on the ground of concealment of material facts,(2) or an injunction granted on notice is set aside as having been issued on insufficient grounds,(3) the plaintiff may apply again if he can make out a sufficient case.

An appeal lies under O. XLIII. r. 1 (*r*) from an order under this rule, the appeal not being limited to an affirmative but including also a negative order.(4)

Compensation for issue of injunction.—This in the last Code was dealt with in sect. 497, which is now incorporated in sect. 95, which see.

[s. 495.] **5.** An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Injunction to corporation binding on its officers.

Interlocutory Orders.

[s. 498.] **6.** The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject-*matter* of such suit, *or attached before judgment in such suit*, which is subject to speedy and natural decay, *or which for any other just and sufficient cause it may be desirable to have sold at once.*

Power to order interim sale.

Sale of perishable articles.—The benefit of the provisions of sect. 498 of the last Code should plainly be claimable in the case of attachment before judgment, and the section has accordingly been so amended. Words have been added so as to empower the Court to order a sale of securities where the state of the market requires such a course.

Sohochurry Dossee *v.* Hurree Kisto Roy, 2 Boulnois' Rep., 62 (1859); Kerr, Inj., 631.

(1) Woodroffe, 142.

(2) Fetch *v.* Rockfort, 18 L. J. Ch. 458; Freeman *v.* McArthur, 2 Tayl. & Bell, 26 (1851).

(3) Jagjivan *v.* Shridhar 2 B. 255, 256 (1877); Spelling, Extraordinary Relief, s. 1047.

(4) Zabada Jan *v.* Muhammad Taiab, 15 A. 8 (1892); Hari Lal *v.* Prayag Ram, 17 C. W. N. 996 (1913); Lachmi Narain *v.* Ram Charan Das, 35 A. 425 (1913).

7. (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

Detention, preservation, inspection, etc., of subject-matter of suit.

(*a*) make an order for the detention, preservation or inspection of any property *which is* the subject-*matter* of such suit, *or as to which any question may arise therein;*

(*b*) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and

(*c*) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this *rule*.

"**Application.**"—The application can only be made after summons has been served, and after reasonable notice of the intention to apply for the order has been given in writing to the defendant.(1) See next rule.

Inspection.—The principle upon which the right of inspection is justified is that wherever in respect of the property of an individual a right accrues to another which cannot be measured without inspection of the subject or property, the Court is competent to compel the proprietor to permit such inspection as indispensable for administering justice.(2) Under this rule the Court has jurisdiction to make an order for preparation of an inventory.(3)

Detention, etc.—An order for investment is not an order for detention, custody or preservation under this rule.(4)

"**Subject-matter of such suit.**"—The words of the English rule, "*or as to which any question may arise therein,*" were originally omitted because it was thought that the words marginally noted were sufficiently comprehensive to cover all matters in issue in the suit; (5) but they have now been inserted.

8. (1) An application by the plaintiff for an order under *rule 6 or rule 7* may be made after notice to the defendant at any time after *institution* of the *suit*.

Application for such orders to be after notice.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after *appearance*.

(1) Sengotha *v.* Ramasami, 7 M. 241 (1883).

(2) Dhoroney Dhur Ghose *v.* Radha Gobind Kur, 2 C. 117, at pp. 121, 122 (1896).

(3) Amjad *v.* Ali Hussain, 15 C. W. N. 353 (1910).

(4) Ib.

(5) Doraisingham *v.* Vyravan, 24 M. L. J. 404 (1913).

s. 501.] **9.** *Where* land paying revenue to Government, or a tenure liable to sale, is the subject-*matter* of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure;

When party may be put in immediate possession of land the subject-*matter* of suit.

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

Decree not containing order for adjustment.—It was held in the under-mentioned case (1) that a separate suit was not necessary, and that where a decree does not expressly direct an adjustment of accounts, such adjustment can be ordered in execution if it be shown from the nature of the decree that it could and should have contained such an order and is imperfect without it.

s. 502.] **10.** *Where* the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

Deposit of money, etc., in Court.

Deposit.—The rule applies only when the party making the admission holds the property or other thing which the party in whose favour the order is made seeks to have delivered to him. But even if this rule is intended to apply to a case where the property is not so held by the party making the admissions, it would not cover the case where the money was held by another Court to the credit of another suit.(2)

(1) Radhey Singh *v.* Mangni Ram, 6 C. W. N. 710 (1902).

(2) Rajah Partha Saradhi Appa Row *v.* Rajah Rengiah Appa Row, 27 M. 168 (1903) [Subrahmania Ayyar, J., diss.]; as to liability for interest for money not deposited, see Ram Dass Gossamee *v.* Prosunno Moyee Dossee, 16 W. R. 297 (1871).

ORDER XL.

Appointment of Receivers.

1. (1) *Where* it appears to the Court to be *just and convenient*, the Court may by order—

Appointment of receivers.

(*a*) appoint a receiver of *any* property, *whether before or after decree;*

(*b*) remove *any* person *from the* possession or custody *of* the property;

(*c*) commit the same to the *possession*, custody or management of *the* receiver; and

(*d*) *confer upon the* receiver all such powers as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of *documents* as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this *rule shall* authorize the Court to remove from the possession or custody of property any person whom *any* party to the suit has not a present right so to remove.

2. The Court *may by general or special order fix the amount* [*to be paid as remuneration for the services of the receiver.*

Remuneration.

3. Every receiver so appointed shall—

Duties.

(*a*) *furnish* such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(*b*) *submit* his accounts at such periods and in such form as the Court directs;

(*c*) pay the *amount* due from him as the Court directs; and

(*d*) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

4. *Where a receiver—*

Enforcement of receiver's duties.

(*a*) *fails to submit his accounts at such periods and in such form as the Court directs, or*

(*b*) *fails to pay the amount due from him as the Court directs, or*

(*c*) *occasions loss to the property by his wilful default or gross negligence,*

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

[s. 504.] **5.** Where the property is land paying revenue to *the* Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

When Collector may be appointed receiver.

Amendments.—The former Chapter XXXVI., dealing with Receivers, contained three sections, 503, 504, and 505. Sect. 503 has (subject to the amendments italicized) been incorporated in rr. 1–3. R. 1 corresponds with the first half and the last paragraph of sect. 503. R. 2 corresponds with the first portion of clause (*d*), the rest of that clause being retained in r. 1. R. 3 is the second half of sect. 503, less the last paragraph, which has been put in r. 1. R. 4 is new. R. 5 is sect. 504. Sect. 505 has been omitted. This is the most important change effected, as the former restriction of power to High Courts and District Courts has been removed. Other amendments of former provisions appear to be of a verbal character.

Just and convenient.—These words are derived from the English Judicature Act which greatly enlarged the powers which the Court of Chancery formerly exercised, and the Courts in India have the fullest jurisdiction to appoint, as well as to remove, a receiver in the exercise of judicial discretion.(1)

Definition and nature of the Office of Receiver.—A receiver is an indifferent person between the parties to a cause appointed by the Court to receive and preserve the property or fund in litigation *pendente lite* when it does not seem reasonable to the Court that either party should hold it; (2) or where a party is incompetent to do so, as in the case of an infant.(3) A receiver is a ministerial officer, originally of the Court of Chancery, and, as a general rule,

(1) Srimati Mathura *v.* Shibdayal, 14 C. W. N. 252 (1909); Ramjiram *v.* Saligram, 14 C. W. N. 248 (1909).

(2) High on Receiver, sect. 1; Kerr on Receiver, 3; with regard to this definition it must be noted that the Court sometimes appoints (not uncommonly in partnership cases) one of the parties to be receiver. See generally Woodroffe's Law relating to Receivers in British India

(3) Kerr, 3.

a mere custodian having no powers except those conferred by the order of his appointment, though with the growth of Equity jurisdiction it has become usual to clothe them with much larger powers than were formerly conferred.(1) A receiver is an officer of the Court through whom Equity takes possession of the property which is the subject of a litigation, preserves it from waste and destruction, secures and collects the proceeds, and ultimately disposes of them according to the rights and priorities of those entitled thereto, whether regular parties in the cause, or only coming before the Court in a reasonable time and in the due course of procedure to assert and establish their claims. As the representative of the Court he is subject to its orders, accountable in such manner and to such persons as the Court may direct, and has in his character as receiver no personal interest save that arising out of his fiduciary capacity and responsibility for the correct and faithful discharge of his duties. He is not the representative of a party or parties, but the representative of the Court.(2) A receiver can only be properly granted for the purpose of getting in and securing funds which the Court at the hearing, or in the course of the cause, will have the means of distributing among the persons entitled to those funds.(3) The receiver appointed in a particular suit is nothing more than the hand of the Court, so to speak, for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court in order to preserve the subject-matter of the suit *pendente lite*, and the possession of the receiver is simply the possession of the Court. To such an extent is this the case that any attempt to disturb that possession, without the leave of the Court, is a contempt of Court. The receiver has no personal rights in the property, and he cannot take any steps even for the purpose of defending his possession without the sanction of the Court. Also as a rule so little personal interest of any kind has he in the matter that he is not justified himself in making any application whatever to the Court. If it is necessary that he should take action of any sort, it is for the parties to the suit, or one of them, to come to the Court to put him in motion, and whatever the receiver rightly does with regard to the property, he does it simply in the character of agent for the owners of the property or the persons interested in it, and with certain exceptions in no sense as principal.(4) Although ordinarily a receiver does not himself apply for commencing proceedings for contempt, and although, generally speaking, the action is taken by the parties beneficially interested in the property, there is nothing to prohibit his doing so. Receivers have on occasions taken action themselves without the parties coming forward in the matter.(5) A receiver has no proprietary rights or interest whatever. Notwithstanding his appointment the proprietary right in the estate remains in the persons who are by law entitled to the estate.(6) The receiver's possession is not a possession by any personal right. It is the

(1) Beach on Receivers, sect. 1. He does not represent the estate, but is merely an officer of the Court: Miller *v.* Ram Ranjan Chakravarti, 10 C. 1014 (1884).

(2) Gluck and Becker, Law of Receivers of Corporations, sect. 1.

(3) Evans *v.* Coventry, 3 Drew, 80.

(4) Wilkinson *v.* Gungadhar Sirkhar, 6 B. L. R. 486, at pp. 487, 488 (1871).

(5) Grey *v.* Woogra Mohun Thakur, 28 C. 793 (1901); Mohamad Kasim *v.* Panchapakesa, 35 M. 578 (1911).

(6) Ram Lochun Sircar *v.* Hogg, 10 W. R. 430, 431 (1868).

possession of the Court, and he is totally devoid of any interest in the property.(1) A receiver should not be appointed in supersession of a *bonâ fide* possessor of the property in dispute unless there is some substantial ground for interference.(2)

The general objects sought by the appointment of a receiver may be described to be to provide for the safety of property pending a litigation, and until the hearing of the cause,(3) or during the minority of infants: to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or by persons having immediate but partial interest therein.(4) A receiver duly appointed is from the moment of his appointment to be considered as an officer of the Court itself. He will be protected by it in the proper discharge of the necessary duties of his office, the possession of the receiver not being permitted to be disturbed without the special leave of the Court,(5) and it will be treated as a contempt of the Court if any such interference takes place,(6) the reason being as explained by Lord Eldon,(7) that their possession is the possession of the Court,(8) and the Court being competent to examine the title will not permit itself to be made a suitor in a Court of law; but will itself examine the title, the mode being by permitting the party to come in to be examined *pro interesse suo*.(9)

The receiver's functions are to obey the orders of the Court, collect and account for the rents, and manage the estate; and the Court will see that this is done and protect the agent appointed under its order.(10) Under the last Code a receiver might have been appointed of any property moveable or immoveable, the *subject of a suit* or *under attachment*.(11) The words of the present rule are "any property," without either of these qualifications, which, however, doubtless still subsist. Where a receiver is required for the purpose not only of receiving rents and profits, or of getting in outstanding property, but of carrying on or superintending a trade or business, he is usually called a manager, or a receiver and manager,(12) though the terms are synonymous.(13) The appointment of a manager implies that he has power to deal with the property over which he is appointed manager, and to appropriate the proceeds in a proper

(1) Wilkinson *v.* Gungadhur Sirkhar, 6 B. L. R. 486, 493, 494 (1871).

(2) Srimati Mathura *v.* Shibdayal, 14 C. W. N. 252 (1909).

(3) Tullet *v.* Armstrong, 1 Keen, 428; Owen *v.* Homan, 4 H. L. 1032; Woodroffe, 4.

(4) Bennet on Receivers, 2.

(5) Brooks *v.* Greathead, 1 J. & W. 178; Angel *v.* Smith, 9 Ves. 335.

(6) Broad *v.* Wickham, 4 Sim. 571; Johnes *v.* Claughton, Jac. 573; Doulat Koer *v.* Rameswari Koeri, 26 C. 625, 629 (1899).

(7) Angel *v.* Smith, *supra*; in this case the rule was spoken of as applicable to sequestrators, which rule equally applies to receivers.

(8) So where a receiver is appointed to receive rents and profits of immoveable property, the tenants in possession become virtually *pro hac vice* tenants of the Court their landlord; Orr *v.* Muthia Chetti, 18 M. 501, 503 (1893). See also Doulat Koer *v.* Rameswari Koeri, 26 C. 625, 629 (1899). The Court is not concerned with any claims of or rights which may have accrued to any third party by reason of any assignment or transfer during the pendency of the suit.

(9) As to the practice with regard to an examination *pro interesse suo*, see 1 J. & W. 179.

(10) Dinonath Sreemonee *v.* Hogg, 2 Hay, 395, 397 (1863).

(11) Sect. 503.

(12) Kerr, 246; Woodroffe, 5.

(13) Orr *v.* Muthia Chetti, 17 M. 501, 504 (1893).

manner. He is bound to carry on in accordance with the general course of business adopted by the particular trade, and is the servant and officer of the Court, and must, upon any question arising as to the character or details of the management, be directed by the Court, which, on appointing a manager of a business or undertaking in effect, assumes the management into its own hands. Managers are responsible to the Court which appoints them, and no order of any of the parties interested in the business over which they are appointed managers can interfere with this responsibility. The Court will in no case assume the management of a business or undertaking, except with a view to the winding up and sale of the business or undertaking. The management is an interim management; its necessity and its jurisdiction spring out of the jurisdiction to liquidate and sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends. A manager may be appointed to carry on a private trade or business so as to wind it up for the benefit of the parties interested.(1) The Court, if it can appoint a receiver, has ample power to provide for the management of the property, and can deal with property which is under its control just as completely as the owner of the property can deal with it.(2) In cases where the manager of the estate must necessarily reside in the country where the estate is situated, it is usual in English practice to add to the order directing the appointment of a manager, an order for the appointment of one or more consignees (who are the paid agents of the Court to manage the estate which is in the hands of the Court) resident in England, to whom the produce of the property in question may be remitted and by whom it may be disposed of.(3)

The possession of the receiver is on behalf and for the benefit of all the parties to the suit in which he is appointed.(4) His possession is the possession of all the parties to the proceeding according to their titles. The property in his hands is in *custodia legis* for the person who can make a title to it. It does not follow that because wide powers are conferred upon receivers, including a power to remove the property in possession, his relation either to the Court or to the parties interested in the proceeding undergoes any change in proportion to the extent of his powers.(5) The appointment, though it may operate to change possession, has no effect itself upon the title to the property in any way, and determines no right as between the parties.(6) Although a receiver is an officer to hold property for the benefit of the party ultimately entitled to it,

(1) Kerr, 246; in Short *v.* Pickering, 6 M. 138 (1882), in which the Court directed a receiver to manage the business of a milliner's shop attached in execution of decrees, it was held that the servant of a firm, the business of which was being managed by a receiver appointed under sect. 503 of the last Code, had no preferential claim over the attaching creditor on the assets of the firm for wages due before the appointment of the receiver; in Orr *v.* Muthia Chetti, 17 M. 501 (1893), a receiver of attached property was appointed to superintend the harvest and to recover the *melvaram*.

(2) Poreshnath Mukerjee *v.* Omerto Nath Mitter, 17 C. 614, 615 (1890).

(3) Kerr, 253. As to the position and lien of consignees, see Moran *v.* Mittu Bibee, 2 C. 58 (1876); Woodroffe, 7.

(4) Kartick Nath Pandey *v.* Pudmanund Singh, 11 C. 496, 498 (1885); Orr *v.* Muthia Chetti, 17 M. 501, 506 (1893).

(5) Orr *v.* Muthia Chetti, 17 M. 501, 503 (1893).

(6) Beach, sect. 1; Orr *v.* Muthia Chetti, 504.

yet when such property is ascertained, the receiver is considered as his receiver.(1) He is not appointed for the benefit of strangers to the suit; but he is not to be regarded in any sense as the agent or representative of either party to the action,(2) though the ordinary law of principal and agent applies to this extent, that what the receiver rightly does he does in the character of agent for the owner (whoever he be) of the property; and this is so even in the case of parties who opposed his appointment or objected to his receiving particular powers.(3) It was held under the Code of 1859, which contained less extensive provisions than those of the last and present Code, that his duties as officer of the Court were confined in the case of property the subject of attachment to realizing, preserving, or managing the property for the collection of the moneys and money profits due to the debtors.(4) Where, however, the receiver of attached property acts in the exercise of powers conferred upon him by the Court, it is erroneous to regard him as the judgment-creditor's agent because on his application the appointment is made. The appointment is the act of the Court, and once made he is an officer of the Court and subject to its orders.(5) A receiver is frequently spoken of as the "hand of the Court," and the expression very aptly designates his functions as well as the relation which he sustains to the Court. The assets and property in his hands are as much in the custody of the law as if levied upon under an execution or attachment, it being held that the appointment of a receiver is in effect an equitable execution by means of which the Court makes a general appropriation thereof, leaving the question of who may finally be entitled to be determined thereafter.(6) When a party is declared entitled to the property by the final decree in a suit the Court has no option but to give that party possession of it. The Court having been in possession of the property on behalf of the parties to the suit is bound to give possession to the successful party in that suit. Any one else entering into possession would be a trespasser.(7) He has no estate or interest himself, and his power to manage is created simply by the order of the Court appointing him, and is binding only upon the persons

(1) Orr *v.* Muthia Chetti, 503. This principle is applicable in the case of a suit in which title to property is decreed, and not to attached property the title to which continues to vest in the judgment-debtor. See also Appasami Naickan *v.* Jotha Naickan, 22 M. 448, 451 (1899); Kerr, 156, 157; but see Beach, sect. 223, High, sect. 135; the person who has the title to the property must be deemed to be in possession: Tribhuwan Sundar Koer *v.* Sri Narain Singh, 20 A. 341, 344 (1898).

(2) Beach, sect. 2; he exercises his functions in the interest of neither plaintiff nor defendant, but for the common benefit of all parties in interest; High, sect. 1; on whose behalf he is appointed: Prem Lall Mullick *v.* Sumbhoonath Roy, 22 C. 960, 973 (1895).

(3) Poreshnath Mukerjee *v.* Omertonath Mitter, 17 C. 614, 616 (1890); referring to Wilkinson *v.* Gungadhar Sircar, 6 B. L. R. 486, as the leading case in this country on the position of a receiver: Woodroffe, 8. The appointment ordinarily gives no advantage or priority to the person at whose instance the appointment is made, over other parties in interest: High, sect. 5.

(4) Tiel *v.* Abdool Hye, 19 W. R. 37 (1872): distinguished in Orr *v.* Muthia Chetti, 17 M. 501, 502, 503 (1893). See *post*, "Receiver of attached property."

(5) Orr *v.* Muthia Chetti, 17 M. 501, 503 (1893).

(6) High, sects. 2, 5. See Administrator-General of Bengal *v.* Prem Lall Mullick, 22 C. 1015, 1016 (1895).

(7) Doulat Koer *v.* Rameswari Koeri, 26 C. 625, 629, 630 (1899).

before the Court.(1) His powers at best are no more than those which the parties to the suit turn out to be possessed of when the case is finally decided; but if he takes possession of property under colour of his appointment his conduct cannot be disputed by a motion to discharge or get rid of the attachment.(2) As the servant of the Court and not of the parties he has only such power as the Court may choose to give him, and it is a contempt for any of the parties to enter into an agreement with him restricting and controlling his powers.(3)

Appointment of receiver is a form of specific relief.—The appointment of a receiver pending a suit is a form of specific relief.(4) The last Code (5) further provided for the appointment of a receiver of property under attachment.(6) This can still be done by virtue of the words "*any property*" and "*before or after decree.*" Relief by specific performance, injunction, and receiver belong to the same branch of the law. Moreover, the appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the receiver except by permission of the Court,(7) and an order for an injunction is always more or less included in an order for a receiver. It is not necessary if a receiver be appointed, to go on and grant an injunction in terms.(8) All three forms of relief are dealt with by the Specific Relief Act. The issue of temporary injunctions and the appointment of receivers, together with the subject of arrest and attachment before judgment and interlocutory orders, were dealt with by the last Code under the single heading of "Provisional Remedies."(9) Relief granted by appointment of a receiver *pendente lite* bears in many respects a close analogy to that by temporary injunction. Both are extraordinary equitable remedies as distinguished from the ordinary modes of administering relief. Both are essentially preventive in their nature, being property used only for the prevention of future injury, rather than for the redress of past grievances. Both have one common object in so far as they seek to preserve the *res* or subject-matter of the litigation unimpaired, to be disposed of in accordance with the future decree or order of the Court.(10)

Whether, however, the negative duty or duty to abstain be contractual or general, the injunction which enforces it is the same in nature and form, The general grounds of similarity between relief by receiver and by injunction have been adverted to. Perhaps the principal element of difference between these two important remedies lies in this: that an injunction is strictly a conservative remedy, merely restraining action and preserving matter *in statu quo* without affecting the possession of the property or fund in controversy; while the appointment of a receiver is usually a more active remedy, since it changes

(1) Nilmadhub Mundul *v.* Gillanders, 2 Sev. 951 (1863).

(2) Bissessuree Debia *v.* Sookram Doss, Mohunt, 15 W. R. 347 (1871); Tiel *v.* Abdool Hye, 19 W. R. 37 (1872); as to the first case, *vide post.*

(3) Manick Lall Seal *v.* Surrut Coomary Dassee, 22 C. 648, 656 (1895).

(4) Act I. of 1877, sect. 5.

(5) Sect. 503; Woodroffe, 9.

(6) See from 168 in the fourth Schedule of the last Code.

(7) Mahomed Zohuruddeen *v.* Mahomed Noorooddeen, 21 C. 85, 91 (1893).

(8) Kerr, 10; Woodroffe, 10.

(9) Civil Procedure Code, Part IV.

(10) Story, Eq. Jur., sect. 826; High, Inj., 17-23; Woodroffe, 11.

the possession as well as the subsequent control and management of the property. The Court by an injunction ties up the hands of the defendants, and preserves unchanged not only the property itself but the relations of all parties thereto. But in appointing a receiver the Court goes still further, since it wrests the possession from the defendant, and assumes and maintains the entire management of the property or fund, frequently changing its form, and retaining possession through its officer, the receiver, until the rights of all parties in interest are satisfactorily determined.

From the point of resemblance already indicated, it is not to be inferred that the appointment of a receiver necessarily follows from the granting of an injunction, or that the two remedies are necessarily inseparable. And while it frequently happens that the Courts are called upon to administer both species of relief in the same action, and at one and the same time, yet it by no means follows that because an injunction is granted a receiver must be appointed, and the two are to be treated as distinct and independent matters. The Court, therefore, may refuse a receiver although the case presented is a fitting one for an injunction, and although an injunction has already been granted.(1) A distinction exists between the case in which an injunction and that in which a receiver will be issued and appointed respectively. "That distinction seems to be that, while in either case it must be shown that the property should be preserved from waste or alienation; in the former case it would be sufficient, if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case, a good *primâ facie* title has to be made out." (2)

Relief, whether it be given by the issue of an injunction or the appointment of a receiver, is granted generally upon the principle *quia timet*; that is, the Court assists the party who seeks its aid, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief.

Law relating to receivers.—The law relating to the appointment of receivers in Civil suits (3) in British India (4) is contained in this Code,(5) and in the Specific Relief Act,(6) which merely declares that the appointment of a receiver pending a suit rests in the discretion of the Court, and refers to the Code of Civil Procedure for the mode and effect of their appointment and for their rights, powers, duties, and liabilities. Both the earlier Codes (Act VIII. of 1859, and X. of 1877) dealt with the subject.(7) Act X. of 1877, however, contained provisions of a more complete character, and which were in fact,

(1) High, 17, 18; Woodroffe, 12; and see Hall *v.* Hall, 3 Mac. G. 85; where it was said that "the rights to those different remedies are essentially distinct and depend upon totally different grounds and circumstances."

(2) Chandidat Jha *v.* Padmunand Singh Bahadoor, 22 C. 459, 465 (1895).

(3) The Criminal Procedure Code in sects. 88, 146 (2), deals with the appointment of receivers of attached property. Specific relief by the appointment of a receiver cannot be granted for the mere purpose of enforcing a penal law. Act I. of 1877, sect. 7.

(4) For definition of these words, see Act I. of 1868, sect. 2 (8), as amended by Act XII. of 1891.

(5) Order XL. As to the appointment of receivers of property under attachment, *vide post*.

(6) Act I. of 1877, sect. 44.

(7) See Act VIII. of 1859, sects. 92, 94, 243; Act X. of 1877, sects. 503-505.

with some minor alterations in the sections relating to receivers, the same as those of the present Code. Sect. 92 of Act VIII. of 1859 enabled the Court to appoint a receiver or manager in all cases in which it might appear to the Court to be necessary for the preservation or the better management or the custody of any property "which is in dispute in a suit," and sect. 243 enabled the Court to appoint a manager to realize debts or rents and receipts of landed property where the debts or land were attached in execution of decree. Chapter XXXVI. of the Code of 1877, which, with some minor alterations,(1) was identical with the same Chapter of the last Code, supplied the place of both of these provisions, and going further, gave the Court very general powers as to the appointment of receiver.(2) Further, orders made under sect. 92 of Act VIII. of 1859, were appealable only at the instance of the defendant,(3) but orders made under sect. 503 of the Codes of 1877 (4) or 1882 (5) were appealable at the instance of either party. Prior to the establishment of the High Courts, the Supreme Courts of the Presidencies appointed receivers following the principles and practice of the Court of Chancery in England.(6) The provisions of the present Code are (with one important exception) the same as those of the last, with certain omissions which have been noted and additions which have been italicized, and the principal of which will be found in rr. 1, 2, and 4. The exception is the omission of sect. 505 of the last Code, as to which, see *post*.

Jurisdiction to appoint a receiver.—The jurisdiction of the Civil Courts in this country to grant relief by injunction or receiver is determined by the Code and Specific Relief Act. Certain common conditions are necessary to the existence of jurisdiction to grant either of these forms of relief. Shortly stated,(7) these conditions are as follows :—

(*A*) In the first place, specific relief, whether given by the issue of an

(1) In sect. 503, cl. (*d*), the words "*as the Court thinks fit*" were inserted after the word "*remuneration*" by Act VII. of 1888, sect. 42. In sect. 594, Act X. of 1877, the opening words of the section were "*if the property be*" instead of "*where the property is.*" In the same section Act VII. of 1888, sect. 43, substituted the words "*the Court may with the consent of the Collector appoint him*" for the words "*the Court may appoint the Collector*" in Act X. of 1877, so as to render the Collector's consent necessary to his appointment as receiver.

(2) Sects. 503–505 of Act X. of 1877 were, except as to the points mentioned in the last note, identical with the same sections of the last Code. As to sect. 504, see Act XIII. of 1859, sect. 92. Sect. 505 was first inserted in the Code by Act X. of 1887 A Mofussil Court of Small Causes could not appoint a receiver under the Code of 1877, as Ch. XXXVI. was not extended to those Courts, but it is otherwise under the present Code : Nursingdas *v.* Tulsiram, 2 B. 558 (1878).

(3) Act VIII. of 1859, sect. 94.

(4) Act X. of 1877, sect. 588 (*e*).

(5) Act XIV. of 1882, sect. 588 (24).

(6) See Kistonundo Biswas *v.* Prawn Kissen Biswas (1829), Clark's Rules and Orders, 1829. Notes of decided cases, 52. In the charter establishing the Supreme Court of Judicature, 26th March, 1774, cl. 18, given in Vol. I. of Smoult and Ryan's Rules and Orders, it is ordained that the Supreme Court be a Court of Equity with full power and authority to administer justice as nearly as may be according to the rules and proceedings of the Courts of Chancery. As to the High Courts, see High Courts Act, 1861, cls. 9–11, and Letters Patent, sect. 19. As to the former powers of District Courts to appoint receivers, see John Tiel *v.* Abdul Hye, 19 W. R. 37, 39 (1872); Joynarain Geeree *v.* Shibpersad Geeree, 6 W. R. Misc. 1 (1866) (Jurisdiction of Sudder Ameen). As to Mofussil Small Cause Courts, *vide ante*.

(7) Woodroffe, 16 *et seq.*

injunction or the appointment of a receiver, cannot be granted for the mere purpose of enforcing a penal law,(1) that is, such enforcement must not be the sole object of requiring specific relief, but the real object must be the protection of some civil rights or the prevention of a tort or civil wrong. Though, however, the Court cannot interfere for the purpose of giving a better remedy in the case of a criminal offence, yet if an act which is criminal touches also the enjoyment of the property, the Court has jurisdiction.(2) So the fact that an act complained of amounts to the criminal offence of misappropriation rather than to simple waste, is no ground for refusing relief by way of appointment of a receiver.(3)

(*B*) Secondly, assuming the matter to be of a civil nature, it is ordinarily a necessary condition to the grant of either form of relief that there should be a suit pending in which either of these reliefs may be granted.(4) Under the last Code, however, a receiver might have been appointed not merely of property the "*subject of a suit*," but also of property "*under attachment*." And though these words are omitted this is doubtless so now.(5) The suit must be pending in the Court from which either of these reliefs is sought. Thus, a District Court has no jurisdiction to appoint a receiver or manager in respect of property in dispute in a suit pending in a Subordinate Court; (6) and where a Court has thus no jurisdiction to make an order it can have no jurisdiction to modify such order.(7) R. 1 gives power only to the Court in which the suit is brought or by which the property has been attached. A Court cannot appoint a receiver except it has seisin of the property either by a suit being pending or by proceedings in execution of decree made in a suit being pending, and attachment having been made. It is only the Court in which a proceeding is pending, and which has thereby the property under its control, that can appoint a receiver. It was formerly only where the procedure contained in sect. 505 of the last Code had been adopted that a District Court could appoint a receiver in suits pending before or attachments made by subordinate Courts.(8) As to this now, *vide post*.

(*C*) Thirdly, not only must the matter be of a civil, as opposed to a criminal, nature and subject to what is above stated a suit be pending, but such suit must disclose a cause of action, and the Court must have general jurisdiction to entertain it. If it has not such jurisdiction it will plainly have no power to grant relief. The Court must not be barred by the Code or any other enactment from taking cognizance of the suit, which must further be not only of a civil nature generally, but within the meaning of that Code.(9)

(*D*) Lastly, the Court to which application for the relief prayed for is made, must be one which, assuming all the preceding conditions to have been fulfilled,

(1) Act I. of 1877, sect. 7.

(2) See Woodroffe's Injunctions, 35.

(3) Hanamayya *v.* Venkatasubbayya, 18 M. 23 (1894).

(4) A Court has no jurisdiction to appoint a receiver unless a cause be depending: *Ex parte* Whitfield, Bennet, 3; Woodroffe's Law of Injunctions, p. 36.

(5) Bai Jamnabai (*in re*), 36 B. 20 (1911); the operation of this rule is not confined to a suit.

(6) Dhundiram Santukram *v.* Chanda Nabai, 2 Bom. H. C. R. 103, 2nd Ed., 98 (1865); Latafat Hossein *v.* Anunt Chowdhry, 23 C. 517 (1895).

(7) Dhundiram *v.* Chanda, *supra*.

(8) Latafut Hossein *v.* Anunt Chowdhry, 23 C. 517, 519, 520 (1896).

(9) See Woodroffe's Law of Injunctions, pp. 37, 38.

has otherwise jurisdiction to try the suit in which that relief is sought. With regard to this, the extensive power of the Court of Chancery to act *in personam* must be considered with reference to the limitation on jurisdiction imposed by the Charter and by the Code. The Courts of this country have ordinarily no jurisdiction to try suits for immoveable property where such property is situate without the local limits of their jurisdiction, and it would appear to be doubtful whether the equitable jurisdiction of the High Courts in India is of the same extent as that which has been claimed by the Court of Chancery, namely, to take cognizance of any equity between persons residing within the jurisdiction respecting lands outside it. But whatever may be the precise extent of the jurisdiction, the Civil Procedure Code has given to the Mofussil Courts the power to act *in personam* when the person against whom relief is sought resides within the jurisdiction. The Presidency High Court under their Charter have a similar, but in terms less restrictive, jurisdiction.(1) In the case of receivers it is not necessary in all cases to authorize the Court to make an appointment that the property in respect of which the receiver is to be appointed should be within the local limits of its jurisdiction.(2)

The Presidency High Courts possess the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act of 1873, and the practice in respect of these matters should be the same.(3) Formerly while all Civil Courts, with certain exceptions, had jurisdiction to issue injunctions, on the other hand the powers conferred by the Code in respect of the appointment of receiver could be exercised by the High Courts and District Courts only: provided that whenever the Judge of a Court subordinate to a District Court (4) considered it expedient that a receiver should be appointed in any suit before him, he nominated such person as he considered fit for such appointment, and submitted such person's name with the grounds for the nomination to the District Court, and the District Court authorized such Judge to appoint the person so nominated or passed such orders as it thought fit.(5) The first step taken by the Subordinate Judge was to nominate, and from this proceeding there was no appeal; the Judge then approved and authorized the appointment, and from this also there was no appeal; then the Subordinate Judge appointed the receiver previously nominated, and from his order there was an appeal.(6) The Judge of the Lower Subordinate Court had first to satisfy himself that it was expedient that a receiver should be appointed in a

(1) See the subject fully discussed and cases cited in Woodroffe's Law of Injunctions, pp. 38–54.

(2) Juggodumba Dossee *v.* Puddomoney Dossee, 15 B. L. R. 318, 324, 325. 330 (1875).

(3) Jaikissondas Gangadas *v.* Zenabai, 14 B. 431, 434 (1890).

(4) As to the meaning of "District Court," see sect. 2.

(5) Sect. 505, Act XIV. of 1882. Sect. 503 extended to the Presidency Small Cause Courts (Act XV. of 1882, sect. 23, Sched. II., but see also the terms of sect. 23); and sects. 503–505 applied to Provincial Courts of Small Causes (Act IX. of 1887, sect. 17, Sched.; but *see* also the terms of sect. 17, Act IX. of 1887). It was otherwise under the Code of 1877. See Nursingdas Raghunathdas *v.* Tulsiram bin Doulatram, 2 B. 558 (1878). The Code is applicable to suits under the Bengal Tenancy Act (VIII. of 1885), *vide* ib., sects. 143, 148; and as to the appointment of receivers in such suits, see Kartic Nath Pandy *v.* Padmanund Singh, 11 C. 496 (1885).

(6) Sangappa *v.* Shivbasawa, 24 B. 38, 41 (1899).

suit before him ; for this purpose he had to inquire judicially, and satisfy himself upon evidence that the appointment of a receiver was necessary and recommend a proper person. He did this under sect. 503 of the last Code. If he refused to do it his order refusing the application was an order under the same section, and as such was appealable.(1) In the first of the last-mentioned cases, it was held that an order by a Subordinate Judge dismissing an application for the appointment of a receiver after obtaining sanction from the District Judge was appealable. But it was recently held that a Subordinate Judge when considering the expediency of the appointment of a receiver, was also acting under sect. 503, and whether he appointed or whether he refused to take the necessary steps preliminary to the appointment, he was equally acting under sect. 503 and an appeal lay.(2) After such inquiry he was to nominate such person as he considered fit to be nominated, and submit such person's name with the grounds for the nomination to the District Court, then, if the District Court authorized such Judge to appoint the person so nominated, but not otherwise, he was to appoint him. But the Judge of the District Court might decline to authorize the Judge of the Lower Court to make the appointment of the person so nominated, and might himself pass "such other order as he thinks fit." (3) These words in the last Code gave the Judge of the District Court full control over the matter of the appointment of a receiver. His duty was not only to approve or disapprove of the particular person nominated, but also to take into consideration the necessity for the appointment of a receiver at all.(4) These words gave full discretion to the District Judge to pass such order as the circumstances of the case, considered in all their bearings, required. He might give the proper directions to the Subordinate Court. Nomination in sect. 505 seemed to be equivalent to the conditional appointment of a receiver which the District Court could accept or reject or modify.(5) In the latter case the District Judge made an *ex parte* order for the appointment of a receiver under sect. 505. Subsequently, the District Court made an order admitting a review. The plaintiff appealed to the High Court. Without deciding whether an appeal would lie against the order of the District Judge, the High Court dismissed the appeal, holding that the order of the District Judge having been in the first instance *ex parte*, he had clearly the power to review it.(6) But these words, it was held, must be read as controlled by the words preceding them, and did not confer upon the District Court the power itself to appoint a receiver not nominated by the Subordinate Court.(7) The Judge of the Lower Court, in making his inquiry, had all the power conferred upon him that might be necessary for such

(1) Gossain Dulmir Puri *v.* Tekait Hetnarain, 6 C. L. R. 467, 468 (1880); Venkatasami Stridavamma, 10 M. 179 (1886); Boidya Nath Adya *v.* Makhan Lall Adya, 17 C. 680 (1890).

(2) Sangappa *v.* Shivbasawa, 24 B. 38 (1899).

(3) Gossain Dulmir Puri *v.* Tekait Hetnarain, *supra*, 468. The Subordinate Judge might nominate, but he could not go further and appoint a receiver: Latafut Hossein *v.* Anunt Chowdhry, 23 C. 517, 519, 520 (1896).

(4) Birajan Kooer *v.* Ram Churn Lall Mahata, 7 C. 719, 721 (1881) [see Appeal against Order 115 of 1885, cited in note to 10 M. 180, 181], followed by case in next note: Bai Mani *v.* Khimchand, 33 B. 104 (1908).

(5) Chunilal *v.* Sonabai, 21 B. 328 (1895).

(6) Chunilal *v.* Sonabai, *supra*.

(7) Amar Nath *v.* Raj Nath, 18 A. 453 (1896).

inquiry. He might adjourn the case from time to time, and he might hear fresh evidence at any time before he made the appointment. He might even abstain from appointing when he had received the necessary authority, if he had good grounds for so doing, otherwise he might be appointing an unfit person when he had facts before him to show that the appointment would be most improper. Sect. 505 of the former Code was not imperative. It merely enabled the Judge of the Lower Court to appoint when authorized by the District Court to do so.(1) As already stated, sect. 505 of the former Code has now been omitted. It was considered that its effect in practice was often to defeat the purpose for which an application was made, and that having regard to their standard of efficiency there was no longer any reason to withhold from Subordinate Judges the power to appoint receivers.

The jurisdiction to appoint a receiver may be exercised either by a Court of first instance or by a Court of Appeal.(2) In order to give the Court jurisdiction there must be a pending suit; (3) and the Court cannot, in so far as its power to appoint a receiver extends only to the better management or custody of any property which is the subject of a suit, appoint or continue the previous appointment of a receiver when the suit comes to an end by its dismissal; (4) but when a suit is decreed, there is nothing in the Code of Civil Procedure which limits the power of the Court to appoint a receiver after the decree, when this course is necessary or proper. This is now expressly stated. As long as the order appointing a receiver remains unreserved, and as long as the suit remains a *lis pendens*, the functions of the receiver continue until he is discharged by order of the Court.(5) Although the dismissal of a suit may operate as a discharge of the receiver appointed in it,(6) yet the Court has ample jurisdiction without the aid of a pending process to require accounts from its own officer; to permit parties interested to intervene in the examination of these accounts; to make just allowances to its officers for his administration; and to deal with all questions of costs connected with the investigation of his accounts as between him and any parties interested who may be allowed to appear and take part in it.(7)

The Court, if it can appoint a receiver, has ample powers to provide for the management of the property; and can deal with property which is under its control just as completely as the owner of the property can deal with it.(8) The subject-matter of the appointment was in terms of the last Code (*vide* now *ante*) property moveable or immoveable, which was "the subject of the suit," (9)

(1) Gossain Dulmir Puri *v.* Tekait Hetnarian, *supra*, 469.

(2) Jaikissonda Gangadas *v.* Zenabai, 14 B. 431 (1890). See also Shaik Mohecoodbeen *v.* Shaikh Ahmed Hossein, 14 W. R. 384, 385 (1870).

(3) *Vide ante.*

(4) Shaik Mohecooddeen *v.* Shaik Ahmed Hossein, *supra.*

(5) Dinonath Sreemonee *v.* C. S. Hogg, 2 Hay, 395, 396 (1863).

(6) Prem Lall Mullick *v.* Sumbhoo Nath Ray, 22 C. 960, 973 (1895).

(7) Administrator-General of Bengal *v.* Prem Lall Mullick, 22 C. 1011, 1015, 1016 (1895).

(8) Poreshnath Mookejee *v.* Omirto Nath Mitter, 17 C. 614, 615 (1890).

(9) Sect. 503. See Sundaram *v.* Sankara, 9 M. 334 (1886); Jaynarain Geeree *v.* Shibpersad Geeree, 6 W. R. Misc. 1 (1865); Kartic Nath Pandy *v.* Padmanund Singh, 11 C. 496 (1885); Yeshwant Bhagwant Phatarpakar *v.* Shankar Ram Chandra Phatarpakar, 17 B. 388 (1892); Poreshnath Mookerjee *v.* Omirto Nath Mitter, 17 C. 614 (1890).

or "under attachment," which latter words applied to property taken for the first time in execution of any decree.(1) Where the property to be managed is not the subject of the suit no manager can be appointed before attachment.(2) Where, owing to the value of the subject-matter of a suit, the Court has no power to try the same, any order made therein by way of appointment of a receiver is passed without jurisdiction.(3) The fact that the acts complained of, and which form the ground of an application for a receiver, amount to a criminal offence rather than to a civil wrong, will not deprive the Court of jurisdiction, if such acts affect a right to property.(4) It was held by the Allahabad High Court that the fact that there exists, in respect of any immoveable property, an order of a Magistrate passed under sect. 145 of the Code of Criminal Procedure, is no bar to the exercise by a civil Court of the power conferred on it by r. 1 of appointing a receiver in respect of the same property; for the Magistrate's order under sect. 145 is only intended to control any period up to the time when the Civil Court takes seisin of the matter, and passes such order as may be necessary for the protection of the property.(5) But it has been recently held by the Calcutta High Court that the appointment of a receiver by a Civil Court under r. 1 of this order cannot supersede an appointment by a Magistrate, and that the Court should either appoint as its receiver the person appointed by the Magistrate or should make a conditional appointment and inform the Magistrate of it so that he may have an opportunity to withdraw his attachment.(6)

The appointment may be made either by a Court of first instance or by a Court of Appellate or revisional jurisdiction. Where a Court of first instance dismisses a suit it becomes *functus officio* save that it may stay execution of its own decree or order for costs. An application, therefore, made to a Court of first instance after dismissal of the suit, but *before* appeal filed, asking that a receiver might be restrained from parting with funds in his hands, pending an appeal, was held to be one which the Court had no jurisdiction to grant. The Court's jurisdiction extends no further in regard to a suit which has ceased to be a pending suit.(7)

An Appellate Court may also appoint a receiver. If, therefore, a party whose suit has been dismissed desires to have any measure taken for the realization, preservation, better custody or management of property claimed by him, he is at liberty after filing his appeal to apply to the Appellate Court which has authority to make or continue the appointment pending the determination of the appeal. If a receiver has been appointed, but the facts proved only warrant the issue of an injunction, the Appellate Court will set aside the order appointing a receiver, and in lieu thereof will issue an injunction.(8) When a receiver of a property has been appointed by an Appellate Court pending an

(1) See form No. 168 in the fourth Schedule of the last Code. Woodroffe, 27.

(2) Bunwaree Lall Sahoo *v.* Baboo Girdharee Singh, 16 W. R. 273 (1871).

(3) Boidya Nath Adya *v.* Makhan Lal Adya, 17 C. 680 (1890).

(4) Hanumayya *v.* Venkatasubbayya, 18 M. 23 (1894).

(5) Barkat-un-Nissa *v.* Abdul Aziz, 22 A. 214 (1900).

(6) Bidya Prasad Narsin Singh *v.* Ashrafi Singh, 40 C. 862 (1913); 17 C. W. N. 1070.

(7) Yamin-ud-Doulah *v.* Ahmed Ali Khan 21 C. 561 (1894); Woodroffe's Injunctions, p. 54.

(8) Chandidat Jha *v.* Padmanund Singh Bahadur, 22 C. 459 (1896).

appeal to the Court, he must, even when the appeal is no longer pending, be regarded as the receiver of the property of which he has been put in possession until he is finally discharged, and the Appellate Court has jurisdiction to deal with matters relating to the receiver, including proceedings for contempt, until he has had his accounts passed by it.(1)

The grant of preventive or protective relief is purely discretionary.—The exercise of the jurisdiction to appoint a receiver or issue an injunction (2) is not a matter *ex debito justitiæ*, but one which is purely within the discretion of the Court. The latter is not bound to grant such relief merely because it is lawful to do so. But the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.(3) All questions of discretion are usually questions of degree.(4) Where there is a discretion exercisable the Court is bound to look at all the circumstances of the case.(5) The jurisdiction of the Court to interfere being equitable is governed on equitable principles. And, therefore, the Court will, amongst other things, look to the conduct of the person who makes the application.(6) Where an appeal attacks the exercise of discretion, before the Appellate Court will interfere on this ground in favour of the appellant, the latter must satisfy such Court that the discretion has been improperly exercised.(7)

The appointment as well as the removal of a receiver is also a matter which rests in the sound discretion of the Court.(8) In exercising its discretion the Court should proceed with caution (9) and be governed by a view of the whole circumstances of the case.(10) The power conferred by the Code to appoint a receiver is not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a receiver, that it can do no harm to appoint one.(11) The discretion given by the Code is one that should be used with the greatest care and caution,(12) and the appointment of a receiver is a step which should not be taken without special reasons, particularly in the

(1) Grey *v.* Woogra Mohun Thakur, 28 C. 790 (1901).

(2) Act I. of 1877, sects. 44, 52; Woodroffe 31.

(3) Ib., sect. 22. "Discretion when applied to a Court of law means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague and fanciful but legal and regular;" *per* Lord Mansfield in Wilkes's case, 4 Burr., 2539, cited in Harbuns Sahai *v.* Bhairo Pershad Singh, 5 C. 259, 265 (1879); see also remarks in Queen Empress *v.* Chagan Dayaram, 14 B. 331, 344, 352 (1890), *per* Jardine, J.

(4) Ghanashan Nilkant Nadkarni *v.* Moroba Ramchandra Pai, 18 B. (1894) at p. 493.

(5) Ib., p. 484; Bhupendra Nath Basu *v* Ranjit Singh, 41 C. 384 (1913).

(6) Act I. of 1877, sect. 56 (J.); Kerr, 8.

(7) Shadi *v.* Anup Singh, 12 A. 438 (1889).

(8) Act I. of 1877, sect. 44; Kerr, 3; Sideswari Debi *v.* Abhoyeswari Debi, 15 C. 818, 822, 823 (1888); Chandidat Jha *v.* Padmanund Singh Bahadur, 22 C. 459, 464, 465, (1895); *Ex parte* Jijai Amba, 13 M. 390 (1890) [removal of receiver]; Weatherall *v.* Eastern Mortgage Agency Co., 13 C. L. J. 495 (1911).

(9) Mun Monihey Dassee *v.* Ichamoyee Dassee, 13 W. R. 60 (1870); Prosonomoyo Debi *v.* Beni Madhub Roy, 5 A. 556 (1883).

(10) Owen *v.* Homan, 4 H. L. 1033; Sideswari Debi *v.* Abhoyeswari Debi, *supra*; Chandidat Jha *v.* Padmanund Singh Bahadur, *supra*.

(11) Prosonomoyo Debi *v.* Beni Madhub Ray, 5 A. 556 (1883).

(12) Ib.

case of a *bonâ fide* possessor with legal title.(1) The main principles upon which such discretion should be exercised have been laid down in the case of Owen *v.* Homan,(2) and those principles have been held to be as equally applicable in this country as in England.(3) In that case Lord Cranworth said :—"The receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts of preserving property pending the litigation which is to decide the right of the litigant parties. In such cases the Court must of necessity exercise a discretion as to whether it will or will not interfere by this kind of *interim* protection of the property. 'Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration.(4) No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking it and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its *interim* interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the Court interferes by appointing a receiver of property in the possession of the defendant before the title of the defendant is established by decree, it exercises a discretion to be governed by all the circumstances of the case." (5)

As in the case of injunctions the Court will always look to the conduct of the party who makes the application for a receiver and will not interfere unless his conduct has been free from blame; (6) and parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to the Court for this form of relief.(7) A stronger case is generally required for the appointment of a receiver than for the issue of an injunction. It may well be that circumstances which will warrant the issue of an injunction will not warrant the appointment of a receiver. Accordingly, while the Court may in its discretion refuse to appoint a receiver, it may yet consider the case to be one which calls for an injunction. The opinion of the Court of first instance is, in these matters, of great weight. It has all the facts and the parties before it, and is probably the best tribunal to decide whether it is necessary or expedient, having

(1) Gossain Dulmir Puri *v.* Tekait Hetnarain, 6 C. L. R. 467, 469 (1880).

(2) 4 H. L. 1032, 1033.

(3) Sideswari Debi *v.* Abhoyeswari Debi, *supra*; Chandidat Jha *v.* Padmanund Singh Bahadur, *supra*; Ramjiram *v.* Saligram, 14 C. L. J. 215 (1909).

(4) See Joy Kally Debi *v.* Shib Nath Chatterjee, Bourke, Test. 5 (1865); Yeshwant Bhagwant Phatarpakar *v.* Shankar Ramchandra Phatarpakar, 17 B. 388 (1892).

(5) Owen *v.* Homan, *supra*, 1032, 1033.

(6) Kerr, 8; see Baxter *v.* West, 28 L. J. Ch. 169; cf. Wood *v.* Hitchings, 2 Beav. 297.

(7) Ib.; Gray *v.* Chaplin, 2 Russ. 147; Skinner's Society *v.* Irish Society, 1 M. & Cr. 162.

regard to the circumstances of the case, that a receiver should be appointed.(1) And a party who in appeal attacks the exercise of this discretion should show that the discretion has been improperly so exercised.(2) The exercise of the power being thus discretionary it would be difficult, even if it were possible, with any precision to make out the limits within which it is ordinarily circumscribed; but some of the principles which govern the discretion of the Court in such appointment will be found considered more fully and in detail in the work cited (3) in those Chapters which specially treat of the cases in which a receiver may be appointed.

The best guides in the matter of interference by way of injunction and receiver have been judicially stated to be the principles which determine the action of Courts of Equity in England.(4) It is, in fact, on these principles that the relief given in Indian Courts by injunction and receiver is in the main founded.

A judgment of the Court which is *in personam* may be enforced by process *in personam*, that is, by attachment of the person when the person is within the jurisdiction or by sequestration of the goods or lands of the defendant when these are within the jurisdiction of the Court until the defendant do comply with the judgment or order of the Court.(5) Under the authority conferred by the Charters of the Supreme Courts and continued by their own Letters Patent, the High Courts in India possess the power of enforcing obedience to their orders by attachment for contempt,(6) and they have all the powers of a Court of Equity in England for enforcing their decrees *in personam*.(7) The jurisdiction of the High Court to imprison for contempt is a jurisdiction that it has inherited from the old Supreme Court, and was conferred upon that Court by the Charters of the Crown, which invested it with all the powers and authority of the then Court of Chancery in Great Britain, and this jurisdiction has not been removed or affected by the Code.(8) The power of the Mofussil Courts to commit for contempt, otherwise than under the authority of special statutory enactments conferring, or of case-law recognizing, that power, is a matter of doubt.(9)

(1) The Oriental Bank Corporation *v.* Gobin Lall Seal, 10 C. 713, 737 (1884), *per* Garth, C.J. See also Ram Sunder Dass *v.* Kamal Jha, 32 C. 741 (1905), where it was also held that in considering an application for a receiver it was inadvisable to go into the general merits of the case.

(2) See Shadi *v.* Anup Singh, 12 A. 438 (1889).

(3) Woodroffe's Receivers.

(4) See Nusserwanji Merwanji Panday *v* Gordon, 6 B. 266, 284, 279; Sideshwari Debi *v.* Abhoyeswari Debi, 15 C. 818, 822, 823 (1888); Chandidat Jha *v.* Padmanund Singh Bahadur, 22 C. 459, 464, 465 (1895); and cases cited in Woodroffe's Law of Injunctions, pp. 3, 4.

(5) Penn *v.* Lord Baltimore, 1 Ves. 444, *vide ante*. Woodroffe, 39.

(6) Hassonbhoy *v.* Cowasji Jehangir Jassawalla, 7 B. 1 (1881); Navivahoo *v.* Naratam Das Candas, 7 B. 5 (1882).

(7) H. H. Shrimant Maharaj Yashvantrav Holkar *v.* Dadabhai Cursetji Ashburner, 14 B. 353, 359 (1890), *per* Sargent, C.J.; citing Martin *v.* Lawrence, 4 C. 655 (1879); Hassonbhoy *v.* Cowasji Jehangir Jassawalla, 7 B. 1 (1881).

(8) Martin *v.* Lawrence, 4 C. 655 (1879), *per* White, J.; Hassonbhoy *v.* Cowasji Jehangir Jassawalla, *supra*, 4; Navivahoo *v.* Naratam Das Candas, *supra*, 12, 13; R. *v.* Timmal Reddi, 24 M. 523, 548, Note (1900).

(9) See Hassonbhoy *v.* Cowasji Jehangir Jassawalla, *supra*, at p. 3; Navivahoo *v.* Naratam Das Candas, *supra*, at pp. 13, 14.

A receiver is an officer of the Court, and the Court will, therefore, see that he performs his function, and will protect the agent appointed under its orders.(1) Being such officer, his possession is simply the possession of the Court, and to such an extent is this the case that any attempt to disturb that possession without leave of the Court is a contempt of Court.(2) Thus an attachment of money in the hands of the receiver is an interference with the Court's possession through its officer the receiver, and may not, therefore, be made without the Court's leave first obtained.(3) The mere appointment of a receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the receiver except by permission of the Court.(4) The Court requires and insists that application should be made to it for permission to take possession of any property of which the receiver has taken, or is directed to take, possession. The rule is not confined to property actually in the hands of a receiver. The Court will not permit any one, without its sanction and authority, to intercept or prevent payment to the receiver of any property which he has been appointed to receive, though it may not be actually in his hands.(5) The form in which the Court usually enforces its order in the matter of receivers is, in extreme or aggravated cases, by committal to prison, or ordinarily by ordering the party in contempt to pay the costs and expenses occasioned by his improper conduct, and the costs of the application. In cases where the contempt consists in entering upon land in the possession of a receiver or in bringing an action against the receiver, or against a party over whose property a receiver has been appointed, the Court restrains by injunction the trespass or prosecution of the action, and orders the party in contempt to pay the costs of the application.(6) The High Courts in India being Superior Courts of Record have full powers to punish for contempt of their orders committed either directly or through interference with the action of officers appointed by them.(7) It has already been observed that the nature and extent of the powers of Mofussil Courts in the matter of contempt is doubtful in the absence of express statutory provisions on the subject. The Code does not directly provide for the case of the breach of or the enforcement of orders under r. 1 (otherwise than in execution of a decree) as it does in the case of interlocutory orders under O. XXXIX. rr. 1, 2. But the order appointing a receiver operates *per se* as an injunction, and if necessary, for the purpose of giving express effect to the order, an injunction may be granted in terms. Although ordinarily the receiver does not himself apply for commencing proceedings by way of contempt, and, generally speaking, action is taken by the parties beneficially interested, there is nothing to prohibit his doing so.(8)

When a receiver is appointed by an Appellate Court, the latter has, even

(1) Dinonanth Sreemonee *v.* C. S. Hogg, 2 Hay, 395, 397 (1863).

(2) Wilkinson *v.* Gangadhar Sircar, 6 B. L. R. 486, 487 (1871); Kerr, 139.

(3) Kahn *v.* Ali Mahomed Haji Umer, 16 B. 577 (1892); followed in Mahommed Zohuruddeen *v.* Mahommed Noorooddeen, 21 C. 85 (1893). The Sheriff may not disturb the possession of a receiver: Kerr, 173, 174; Woodroffe, 41.

(4) Mahommed Zohuruddeen *v.* Mahommed Noorooddeen, *supra*, at p. 91.

(5) Kerr, 160; Ames *v.* Birkenhead Docks, 20 Beav. 353.

(6) Kerr, *op. cit.* 171-173.

(7) *Vide ante*, and cases there cited.

(8) Grey *v.* Woogramohun Thakur, 28 C. 190 (1900).

although the appeal be no longer pending, jurisdiction to deal with matters relating to the receiver, including proceedings for contempt, until he has had his accounts passed by it.(1) A receiver, being a mere officer of the Court, is bound to obey every order of the Court, and if he neglects or refuses to comply therewith, he stands in no better position than any other person, and may be punished in the same way.(2)

Who may be appointed.—In cases other than those in which the Court Receiver or Collector is appointed any person may be selected subject to certain general rules which have their basis in the nature of the office of a receiver and the functions to be discharged by him. Inasmuch as a receiver is required to be an impartial person, the person chosen should, as a general rule, be wholly disinterested in the subject-matter of the suit. The Court may, however, with the consent of all the parties, or in very special cases without such consent, appoint as receiver a person who is mixed up in the subject-matter of the suit, if it is satisfied that the appointment would be attended with benefit to the estate. Where the defendant in a suit for partition made an application regarding the custody of the property, and the Court directed *suo motu* that pending the suit the plaintiff should have the control and management of one part of the property and the defendant should have the same power over the rest, it was held that this order was legal and proper and practically amounted to an order under r. 1.(3) Apart from the question of interest, the Court will consider the character and qualifications of the person proposed; his familiarity with the kind of property to be managed, his place of residence with reference to the estate to be managed, his ability to spare sufficient time for the duties of his office, and other similar facts bearing upon the appointment.(4) The second general rule is that the Court is averse to appointing as receivers persons occupying relations of trust as trustees, executors, or otherwise towards the property or estate which is the subject of the receivership. The reason of this rule is that the Court is exceedingly jealous of appointing any person to a receivership whose duty it would otherwise be to watch the proceedings of the receiver, or to call him to an account for his management.(5)

In all cases the selection of a particular person for the receivership is regarded as a matter of judicial discretion to be determined by the Court according to the circumstances of the case. The exercise of this, like all other matters of judicial discretion, will rarely be interfered with by an appellate tribunal, and it may be stated, as a general rule, that to induce an Appellate Court to interfere with the decision of an inferior tribunal in the selection of a receiver, it is necessary to show some "overwhelming objection in point of propriety of choice, or some objection fatal in principle," to the person named.(6)

(1) Ib.; *vide ante*: Woodroffe, 42.

(2) Beach, sect. 248, where also a liquidator is in possession the receiver will be in contempt if he move against him without leave. Kerr, 174, 175.

(3) Dan Prasad *v.* Gopi Kishan, 36 A. 19 (1913).

(4) Woodroffe, 46; High, sects. 64, 68, 69; Kerr, 119, 120.

(5) Woodroffe, ib.

(6) Cookes *v.* Cookes, 2 De G. J. & S. 526, at p. 528, *per* Knight Bruce, L.J.; Perry *v.* Oriental Hotels Company, L. R., 5 Ch. App. 420; High, sect. 65; Jibanessa *v.* Mafidunessa 17 C. W. N. 581 (1913).

A receiver may be appointed of *any* property, whether moveable or immoveable, provided it is the *subject matter of a suit* or *under attachment;* and probably, though the italicized words have now been omitted, the appointment will be limited to such cases. In, however, suits for partition of joint estates the Court has jurisdiction to place the whole of the estate out of which the plaintiff seeks to have his share partitioned, in the hands of a receiver, and to order that the latter shall be at liberty to raise money on the security of the whole of such joint estate.(1) Receivers have been appointed of undivided shares, though Equity is generally averse to extending the aid of a receiver, as between joint owners or tenants in common.(2)

Time when receiver may be appointed.—A receiver may be appointed during the pendency of the litigation at any time before decree. The application for a receiver may be made at any stage of the action, according as the urgency of the case requires it. Where proceedings are already pending an order for a receiver may be made in these proceedings without any fresh suit being instituted. If the appointment of a receiver is a substantial object of the action the plaint should contain such a prayer, and if it does not, upon amendment a receiver may be obtained.(3) A receiver may also be appointed or continued (4) by the decree; or the appointment may be made after the decree; (5) even though it had been previously refused, if a state of facts entitling the party to a receiver were made to appear in the proceedings in the cause.(6) Under r. 1 a receiver may be appointed of any property after its sale in execution of a mortgage-decree and before the confirmation of the sale.(7) The provisions of this rule are not controlled by sect. 95 of the Bengal Tenancy Act.(8) A receiver will be appointed at the instance of a mortgagee when the interest payable under the security is in arrear.(9)

Time from which appointment takes place.—Where an order is made that a certain person, upon his giving security, be appointed receiver, the order appoints the receiver conditionally upon his giving security only; a receiver becomes such on giving security. When he has done that he can take possession. He is not legally clothed with the character of receiver, nor able to perform its duties, until he has given security and his recognizances are perfected. It has been held that the appointment of a receiver as far as it affects the rights of creditors or third parties dates not from the order appointing him, but from the completion of the security required to be given by the order, and, accordingly, until the appointment has been completed, a judgment-creditor is not

(1) Poreshram Mookerjee *v.* Omerto Nath Mitter, 17 C. 614 (1890).

(2) High, sect. 606; Woodroffe, 50; Joynarain Geeree *v.* Shibpersad Geeree, 6 W. R. Misc. 1 (1866).

(3) Kerr, 128; H. *v.* H., 1 Ch. D. 276, Seton Decr. 652.

(4) Motivahu *v.* Premvahu, 16 B. 511, 512 (1892); Mathusri Umamba Boyi Saiba *v.* Mathusri Dipamba Boyi Saiba, 19 M. 120 (1895); *Ex parte* Jijai Amba, 13 M. 390 (1890).

(5) Shunmugan *v.* Moidin, 8 M. 229, 233 (1884); Kerr, 131.

(6) Att.-Gen. *v.* Mayor of Galway, 1 Moll. 95, 104; Kerr, 132.

(7) Madaneswar *v.* Mohamaya, 13 C. L. J. 487 (1911); 15 C. W. N. 672.

(8) Ib.

(9) Eastern Mortgage and Agency Co. *v.* Rakea Khatun, 16 C. W. N. 997 (1912).

debarred from proceeding to execution.(1) But in a later case it has been held that the appointment of a receiver is complete on the entry of an order of appointment, although he may not be able to take actual possession of the property until the security is approved.(2) If no security is required (which should appear upon the face of the order) the appointment is complete upon possession being taken under the order.(3) When, as will be done in urgent cases, an *interim* receiver is appointed for a limited time without security, he becomes an officer of the Court and is legally clothed with that character from the date of his appointment.(4) The receiver's liability, however, to account in respect of monies received and expended by him as receiver at once arises whether the security has been completed or not.(5) As far as respects parties to the action, the rents and profits of the estate over which a receiver has been appointed are bound from the date of the order for the appointment,(6) but the latter does not date back to the date of the application.(7) Though outsiders may not be affected until the completion of the security, the parties to the suit may, before such time, be restrained from touching the property.(8)

Duration of receivership.—Except (according to English practice) in the case of managers, there is often no limit of time fixed.(9) When this is the case, and the suit is dismissed, the dismissal of the suit will in general operate as a discharge of the receiver. But if the suit is decreed and no limit is fixed in the appointment of a receiver, it is not necessary for the judgment to direct that he be continued.(10) Sometimes the receiver is only appointed until judgment, that is, during the pendency of the suit or until further orders. When this is the case, if he is to continue receiver the judgment must so direct, and as this is practically a new appointment, further security must be given unless, as is usually the case, the security originally given is made applicable to any continuation of the appointment.(11) It is within the discretion of a Court appointing a receiver in a suit to order that the office should continue permanently after the decree when such continuance is necessary or for so long as it may be so.(12)

(1) Edwards *v.* Edwards, L. R. 2 Ch. D. 291, 296. In Defries *v.* Creed, 34 L. J. Ch. 607, it was held that there was no contempt, possession having been taken after the receiver was nominated, but before he had passed his recognizances and before he had been actually appointed; and see *Ex parte* Evans, *Re* Watkins, 13 Ch. D. 252, 255; High, sect. 121. A contrary rule generally prevails in the American Courts, in which it is held that upon the filing of the bond the receiver's title has relation back to the date of his appointment, and such title has been upheld against creditors levying upon the property between the date of the appointment and the filing of the bond: High, sect. 121A.; and see Beach, sect. 168.

(2) Rowland Hudson *v.* John Pierpont Morgan, 13 C. W. N. 654 (1909).

(3) Morrison *v.* Skerne Iron Works Co, 60 L. T. 588. As to forms of appointment, see Seton, 750.

(4) Taylor *v.* Eckersley, 2 Ch. D. 302; 5 Ch. D. 741.

(5) Smart *v.* Flood, 49 L. T. 457.

(6) Lloyd *v.* Mason, 2 M. & C. 487; Codrington *v.* Johnston, 1 Beav. 520. See Wickens *v.* Townshend, 1 R. & M. 361; *Re* Birt, 22 Ch. D. 604.

(7) *Re* Clarke, 1898, 1 Ch. 339.

(8) See Defries *v.* Creed, 34 L. J. Ch. 607.

(9) Kerr, 146; Woodroffe, 59 *et seq.*

(10) Kerr, 146.

(11) Ib. In Motivahu *v.* Premvahu, 16 B. 511, 512 (1892), the receiver who had been previously appointed was continued by the decree.

(12) Mathuri Umamba Boyi Saiba *v.*

Mode of appointment.—A receiver will not be appointed under the Code unless an action is pending, or the property be the subject of attachment (*vide ante*). A plaint should be filed claiming a receiver, where the obtaining of it is a substantial object of the action. Application should be made upon, or after, the filing of the plaint and before, or after, service of the writ. An application for a receiver may be made on motion or on petition. The party applying may either move to obtain a rule *nisi* or serve notice of motion. If the matter be urgent, he may apply for an *ad interim* receiver until the hearing of the application, or he may apply for leave to serve short notice of motion. It is submitted that under the Code the Court possesses the power of appointing a receiver at the instance of the defendant, but that the exercise of such jurisdiction will be limited to cases where the defendant's claim to relief arises out of the plaintiff's cause of action or is incidental to it: but that if the relief sought by a defendant is not connected with the subject-matter of the plaint, the defendant must, if he desires a receiver, institute an action of his own for such purpose.(1) Application for a receiver may be made either *ex parte* or on notice, but it is only in case of emergency that a receiver will be appointed upon an *ex parte* application, as where there is any risk of the defendant defeating the applicant's object by making away with the property on being served with notice of application for a receiver. The Courts, however, are very averse to the exercise of jurisdiction upon application *ex parte*.(2) The motion should be properly founded on affidavits, copies of which should be served with notice of the application; although, if the papers on which the moving party seeks relief are already in file on the cause, it is sufficient to refer to them in the notice. It is not regarded as necessary or essential to the appointment of a receiver that the facts upon which the application is based should be set forth in the pleadings, but it is sufficient if they are presented to the Court by affidavit upon the hearing of the motion. It is proper, on denying a motion for a receiver to give leave to the moving party to renew his motion upon additional proof, if it appears that he may, by obtaining new proof, present a strong case for the relief sought. And it is competent for a plaintiff to ask for and for the Court to appoint a receiver after a hearing and even after a rehearing, and refusal when an altered state of facts is presented showing an appropriate case for the relief. But when the application has once been before the Court and has been denied, a receiver will not be appointed upon a subsequent application upon a simple motion for that purpose founded upon the same papers as before without affidavits or additional proof, showing a necessity for the relief. The person whose property it is sought to place in the receiver's hands must be made a party to the suit in order that he may have an opportunity of resisting the application, the granting of which might result in irreparable injury to his interests.(3)

Security.—Every receiver appointed must give such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property.(4) As a general rule, security is required, but if, as in exceptional

Mathusri Dyamba Boyi Saiba, 19 M. 120 (1895); and see *Ex parte* Jijai Amba, 13 M. 390 (1880).

(1) See Woodroffe, 61.

(2) Kerr, 127, 128; High, sect. 111.

(3) High, sect. 17.

(4) R. 3; Woodroffe, 65.

cases, no security is to be given, it should be so stated in the order. Where a person is appointed receiver subject to his giving security, the order is not effective until security is given.(1) According to English practice, where there is evidence of immediate danger to the property and there is no time for the receiver to complete his security, an *interim* receiver may be appointed without security for a limited period, or until a receiver should be appointed under a reference for that purpose upon the undertaking of the person so appointed *interim* receiver, if he be the plaintiff, not to deal with the property except under the direction of the Court, and to abide by any order which the Court may think fit to make as to damages or otherwise. In other cases where the case is urgent and there is no time for the receiver to complete his security, the party moving the Court must enter into an undertaking as to damages and for the receipts of the receiver; or must undertake that the person so appointed receiver shall give such security as the Court can enforce that he will preserve intact the property of which he is appointed receiver.(2) There seems to be no reason why this course should not be followed in this country if necessary. In any case the Court might dispense with security or, in the case of the High Court, appoint the Court receiver. The Court has, moreover, where there was great danger to the property, appointed a receiver without security and directed him to take possession before the order of appointment was formally drawn up.(3)

Effect of appointment.—A receiver duly appointed is from the moment of his appointment an officer of the Court and entitled to the possession of the property comprised in the order appointing him. The effect of the appointment is to remove the parties to the action from the possession of the property,(4) subject to this that the Court cannot remove from the possession or custody of property under attachment any person whom the parties to the suit or some or one of them has or have not a present right so to remove.(5) The appointment, however, though it may operate to change possession, has no effect itself upon the title to the property in any way, and determines no right as between the parties.(6) Receivers and managers are only custodians of the property of which they take possession. The Court in an action for a receiver deals with the possession only until the right can be determined, if the right be the subject-matter in dispute between the parties or until the incumbrances have been cleared off, if the appointment has been made at the suit of an incumbrancer. The title is in no way prejudiced in theory or principle by the appointment,(7) and remains in those in whom it was vested when the appointment was made.(8) The possession of the Court by its receiver is the possession of all parties to the suit according to their titles. His appointment is not for the benefit of the

(1) Kerr, 138, 139; *In re* Roundwood Colliery Co., 1897, 1 Ch. 373; High, sect. 121; Rowland Hudson *v.* John Pierpont Morgan, 13 C. W. N. 654 (1909) (the appointment is complete on the entry of the order of appointment, although he may not be able to take possession).

(2) Kerr, 143.

(3) Woodroffe, 67.

(4) Kerr, 149; r. 1, *ante*.

(5) R. 1.

(6) Orr *v.* Muthia Chetti, 17 M. 504 (1893); Beach, sect. 1.

(7) Kerr, 149, 152.

(8) Beach, sect. 209; the object of the appointment is not to divest a rightful owner of the title but to protect the property by taking possession: ib., sect. 221.

plaintiff merely, but for all other persons who may establish right in the cause. He is not the particular agent of any party but an officer of the Court.(1) With regard to the limitations on his title, it is to be observed that his possession is subject to all valid and existing liens upon the property at the time of his appointment, and it does not divest a lien previously acquired in good faith.(2) The rights of the parties to an action are not interfered with by the appointment.(3) It is not averse to either party.(4) If at the time a receiver is appointed a party claiming a right in the same subject-matter under a title paramount to that under which the receiver is appointed is in possession of the right which he claims, the appointment of the receiver leaves him in possession.(5) The appointment of a receiver is a matter which does not concern mortgagees or prior incumbrancers, for a receiver in the exercise of his authority will be obliged to respect former orders of the Court; and prior incumbrancers are at liberty to take such proceedings in behalf of their own interests as they may think fit.(6) The appointment operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the receiver except by permission of the Court.(7) The order does not, however, create a charge, but it operates as an injunction to restrain the defendant from himself receiving the proceeds of sale.(8) A receiver of land never takes actual possession; he only receives the rent; nor does he receive such rent and profits by virtue of an estate or title vested in him, but he collects the same merely as an officer of the Court upon the title of some persons parties to the action.(9)

Possession and interference with possession of receiver.—The receiver being the officer of the Court from which he derives his appointment, his possession is exclusively the possession of the Court, the property being regarded as in the custody of the law, *in gremio legis* for the benefit of whoever may be ultimately determined to be entitled thereto. The possession being therefore that of the Court may not be disturbed without the leave of the Court, and any person who disturbs such possession is guilty of a contempt and liable to punishment therefor. No one is entitled to interfere with the possession whether he claims under, or paramount to, the right which the receiver was appointed to protect.(10) Thus an attachment of money in the hands of the receiver is an interference with the Court's possession and may not, therefore, be made without the Court's leave first obtained.(11) When the Court appoints

(1) Kerr, 153.

(2) High, sect. 138; Beach, sect. 202.

(3) Kerr, 151.

(4) Beach, sect. 222.

(5) Kerr, 149, 164; Evelyn *v.* Lewis, 3 Ha. 472; Bryant *v.* Bull, 10 Ch. D. 155.

(6) Bryant *v.* Bull, *supra*; the appointment of a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and as they choose to avail themselves of it: Kerr, 153, 154, 156.

(7) Foster *v.* Townshend, 2 Abb. N. C. 29, 45 (Amer.); Beach, sect. 211.

(8) Mahommed Zohuruddeen *v.* Mahommed Noorooddeen, 21 Cal., 91 (1893).

(9) *Ex parte* Evans, 13 Ch. D. 255; Vine *v.* Raleigh, 24 Ch. D. 243.

(10) High, sect. 134; Kerr, 158-160; Kahn *v.* Ali Mahomed Haji Umer, 16 B. 577, 579 (1892); Woodroffe, 71.

(11) Kahn *v.* Ali Mahomed Haji Umer, 16 B. 577 (1892); followed in Mahommed Zohuruddeen *v.* Mahommed Noorooddeen, 21 C. 85 (1893). A judgment-creditor cannot without leave execute against property in the hands of the receiver: Jogendra Nath

a receiver it requires the parties to the action to give up the possession to the receiver of all property comprised in the order, and treats them as guilty of contempt if they refuse to do so.(1)

As a general rule appointment of more than one receiver whether by the same or a different Court, except in case of joint receivers, is not allowable.(2) If at the time a receiver is appointed a party claiming a right in the same subject-matter *is in possession* of the right which he claims, the appointment of the receiver leaves him in possession of the right, and does not interfere with the exercise of it.(3) If, on the other hand, the claimant is *out of possession*, he must apply to the Court before he institutes any legal proceedings affecting the possession which the receiver has acquired,(4) even where the receiver has been appointed without prejudice to the rights of persons having prior charges.(5) So, too, where a receiver has been appointed over the estate of a tenant in possession, though the appointment does not affect the rights of the landlord, the latter will not be permitted to exercise these rights, as, for example, the right of distraint without first obtaining the leave of the Court.(6)

Parties whose rights are interfered with by having a receiver put in their way may, on making a proper application to the Court, obtain all that they may justly require. The Court has the power, and will always take care to give a party who applies in a regular manner for the protection of his rights, the means of obtaining justice, and will even assist him in asserting that right and having the benefit of it.(7) The course of a party who claims a right paramount to that of the receiver, or rather to that of the party obtaining the receiver, is either to apply on notice in the action in which the receiver was appointed and to come in and be examined *pro interesse suo*, or to apply for leave to proceed by action notwithstanding the receiver's possession.(8) The application in the suit is usually framed in the alternative that the receiver do accede to the plaintiff's demand or that the latter may be allowed to proceed.(9) In most instances a party aggrieved may have ample relief by application on motion to the Court appointing the receiver. In most cases of claims against a receiver the

Gossain *v.* Debendro Nath Gossain, 26 C. 127, 129 (1898); Hem Chunder *v.* Prankristo, 1 C. 403 (1876), and first two cases; Sarat *v.* Apurba, 15 C. W. N. (1911); 14 C. L. J. 55 (and each creditor must obtain leave).

(1) Woodroffe, 76.

(2) Ib., 78.

(3) Evelyn *v.* Lewis, 3 Ha. 472; Wells *v.* Kelpin, 18 Eq 298; Underhay *v.* Read, 20 Q. B. D. 209; Kerr, 164.

(4) Evelyn *v.* Lewis, *supra*, 475; Kerr, 164, 159.

(5) Bryan *v.* Cormick, 1 Cox. 422; Langton *v.* Langton, 7 D. M. and G. 30; Kerr, 165.

(6) Sutton *v.* Rees, 9 Jur. N. S. 456; Kerr, 165. See also as to distraint, ib., 168, 169.

(7) Kerr, 165, 166; Woodroffe, 80.

(8) Kerr, 166. As to form of notice of motion or summons for examination *pro interesse suo*, see Dan. Ch. Forms, 1698; with respect to the practice on examination *pro interesse suo*, see Brooks *v.* Greathead, 1 J. & W. 179; Hamlyn *v.* Lee, 1 Dick, 94; Gomme *v.* West, 2 Dick, 472; Hunt *v.* Prist, ib. 540; Anon., 6 Ves. 287. The effect of such an examination may generally be obtained on motion or petition when a reference to inquire into the claim will if requisite be ordered: Walker *v.* Bell, 2 Mad. 21; Dixon *v.* Smith, 1 Swan, 457; Dickinson *v.* Smith, 4 Mad. 177; Dan. Ch. Pr., 921, 1696. Bissessuree Debi *v.* Sookram Das Mohunt, 15 W. R. 347 (1871), appears to have been a case of this kind; but the report is so meagre that it is not clear why the application was refused.

(9) Kerr, 167.

remedy by motion is adequate, and any person having such a claim may resort to this summary remedy. The more common practice and that which has been generally commended by the Court, is to hear and determine all rights of action and demands against a receiver by petition in the cause in which he was appointed without remitting the parties to a new and independent suit. And it rests wholly within the discretion of the Court to grant leave to bring an independent action against its receiver or to determine the controversy upon petition in the original cause.(1)

Suits and applications against receiver.—It would be inconsistent with the main purpose of a receivership (to preserve property in controversy *pendente lite*) which devolves upon the Court the duty of protecting its possession, as well as incompatible with the dignity and authority of the Court, to allow its officer to be summoned before any tribunal in respect to the property in his hands, at the will of any and every person who has, or imagines he has, a just cause of action, or who for sinister purposes might institute a fictitious suit against him. On the other hand, to deny to those having just causes of action or claims which call for the adjudication of the Courts of Law or Equity, all opportunity for investigation and all right to a proper remedy, simply because the property to which they must look for reparation has been seized by the Court and is in its keeping, would violate the fundamental principles of personal rights. The difficulty thus presented has been overcome by requiring all those who desire to bring suit against a receiver first to obtain leave to do so from the Court which appointed him. The Court usually grants such leave unless it appears clearly from the application of the claimant that his demand has no legal foundation; the petition should therefore show a probable cause of action—one demanding adjudication by proceedings in Court.(2) If a receiver duly appointed and in possession of the property in controversy, be sued without the leave of the Court appointing him first obtained, the parties who bring the suit may be subjected to proceedings in contempt of Court and punished accordingly. The proceedings in a suit so brought will generally be restrained by injunction, or stayed or set aside on motion. Whether the party proceeding at law did or did not know that a receiver has been appointed over the property, or however clear his right may be, the Court will restrain the prosecution of the claim if it be instituted without leave.(3) It has even been held that the consent of the Court to an action against a receiver is a condition precedent to the right to sue, and cannot be rectified by a subsequent application for permission to continue the action brought without such permission.(4) But several later cases have disagreed with this.(5)

(1) See Woodroffe, 81; High, sects. 254, 254B; Kerr, 168, 170; Mahomed Mehdi Galistana *v.* Zoharra Begum, 27 C. 285 (1889).

(2) Beach, sect. 652; Miller *v.* Ram Ranjan Chackravarty, 10 C. 1014 [a receiver cannot be sued except with the permission of the Court]; Kerr, 170. It is not the course of the Court unless it is perfectly clear that there is no foundation for the claim to refuse liberty in any case to try a right which is claimed against its receiver: Randfield *v.* Randfield, 3 De G. F. & J. 766; but the application should show a probable ground of recovery: High, sect. 254; Woodroffe, 85.

(3) Beach, sect. 653; Kerr, 158, 172.

(4) Pramatha Nath Gangooly *v.* Khettra Nath Bannerjee, 32 C. 270 (1904), *sed qu.*

(5) Sarat *v.* Apurba, 15 C. W. N. 925 (1911); Banku *v.* Harendra, 15 C. W. N. 54

It rests in the discretion of the Court to allow a party claiming rights against its receiver to bring an independent action against him or to compel such party to proceed against him by petition in the action in which he is receiver.(1) When a Court is asked to give leave to sue its receiver, it may, and usually must, examine into the merits of the claim to ascertain whether a suit is necessary or proper for its adjudication, but such examination and the order made upon it cannot be used by either party as in any way affecting the merits of the case. The order simply permits a judicial investigation to be made; the examination is not itself a trial, nor is the decision an adjudication upon the merits.(2)

Generally a receiver cannot be held personally liable in an action brought against him in his official capacity, the judgment being entered only so as to affect the funds in his hands.(3) An action cannot be brought against a receiver by a person at whose instance he was appointed.(4) If a special case be made out, the Court will allow a party to continue an action, notwithstanding that it has been commenced without leave.(5)

An application for leave to sue a receiver may be made *ex parte* at the time of presenting the plaint and not in the suit in which the receiver has been appointed or on notice to the parties,(6) though it would appear that the latter course of applying in the suit has sometimes been followed.(7) Any order declaring that leave to sue is not necessary will not bind the parties who are not present.(8)

"**Any property.**"—A considerable portion of the text-books is occupied with a discussion of the cases or instances in which receivers will be appointed, and references are given to all the decisions in which receivers have, in fact, been appointed or refused. This mode of treatment had its origin in the fact

(1910); Maharaja of Burdwan *v.* Apurba, 15 C. W. N. 872 (1911); and see Satya Krisal Banerjee *v.* Satya Bhupal Banerjee, 19 C. L. J. 191 (1913) (Court after dealing with the contempt may give leave to proceed).

(1) Beach, sects. 654, 709; High, sects. 254, 254B, 255. It is common practice instead of asking leave to bring action to intervene in the original suit by petition, and some cases are more conveniently so tried than by separate action: Beach, sect. 654; Woodroffe, 86. In the suit of Suttya Sunkur Ghosal *v.* Rani Golap Monee Dossee, an application was made (3 Sept., 1900, cor. Ameer Ali, J.) for an order that the receiver who had put up property of the parties for lease and who had subsequently refused to grant a lease to the highest bidder, should grant a lease to the applicant or return his deposit money or be discharged as to $\frac{16}{35}$th share of applicant. In the affidavit filed against the application objection was taken that the matter was properly one for a suit, but the objection was not pressed at the hearing, and the Court disposed of the application.

(2) Beach, sect. 657.

(3) Ib., sects. 715, 718.

(4) Kerr, 160–161.

(5) Ib., 167: Gower *v.* Bennett, 9 L. T., 310. See Aston *v.* Heron, 2 M. & K. 397. If an action has been brought or the possession interfered with without leave, the order restraining these acts will also give leave or direct that the party be examined *pro interesse suo*: Johnes *v.* Claughton, Jac. 573.; as to whether leave to sue is jurisdictional, see High, sect. 254A.

(6) Ib.

(7) See Kumar Suttya Suttya Ghosal *v.* Rani Golapmoni Debi, 5 C. W. N. 27 (1897); Woodroffe, 89.

(8) Chartered Bank of India, Australia and China *v.* Hurish Chunder Neogy, *supra*. See also as to suits against receiver, Kumar Suttya Ghosal *v.* Golapmoni Debi, 5 C. W. N. 27 (1897); Surender Keshub Ray *v.* Doorgasoondry Dossee, 15 C. 253 (1888).

that in its inception the law of receivers was a case-made law of very gradual growth declared from time to time as necessity arose and with reference to the particular circumstances of the case in which the jurisdiction was exercised. Though precedent was added to precedent, there was yet no general statutory statement of the nature and extent of this form of jurisdiction which could only be ascertained by an enumeration of all the cases in which it had been exercised. This course is, however, no longer necessary or expedient. An excessive citation of case-law, even where it is not, as is sometimes the case, of doubtful authority or incapable to present circumstances, too often serves no other purpose than to confuse and to obscure the plain provisions of modern Statutes and Codes.(1)

The effect of the English Judicature Act was to enlarge very much the powers which the Court of Chancery formerly possessed, and there is now no limit to the power of the Court to appoint a receiver except that such power is only to be exercised where "*just or convenient.*" The words have now been adopted in r. 1, *ante*. Here again the question to be determined is one in the main, if not entirely, of fact. The Court may, in any pending litigation, appoint a receiver if the circumstances of the particular case require it. A Judge has, therefore, a wide discretion. But that discretion must be judicially exercised.(2) Though the discretion to grant relief will in the main be influenced by the particular facts of each case, it must also be guided by certain broad and well-established principles which have governed previous practice, and which, though unexpressed, may be said to underlie the provisions of the Code.(3)

In the first place, the jurisdiction thus given must not be lightly but most cautiously exercised.(4) The relief is not one *ex debito justitiæ* but one which is purely within the judicial discretion of the Court. The power to appoint a receiver is not to be generally exercised as a matter of course, and it is not a reason for allowing an application that it can do no harm to appoint a receiver. The appointment of a receiver is, in many cases, a matter for the most serious consideration, for the Court, by taking possession at the instance of a plaintiff, may be doing a wrong, in some cases irreparable, to the defendant. For if the plaintiff should eventually fail in establishing his right, the Court may, by its *interim* interference, have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation.(5)

In an application for the appointment of a receiver it is sufficient if a *primâ facie* title to the property over which the receiver is sought to be appointed is made out. The removal of property has been considered a sufficient ground.(6)

(1) Woodroffe, 96.

(2) Srimati Mathura *v.* Shibdayal, 14 C. W. N. 252 (1909); Ramjiram *v.* Saligram, 14 C. W. N. 248 (1909).

(3) Woodroffe, 97.

(4) Mun Mohince Dassee *v.* Ichamoyee Dassee, 13 W. R. 60 (1870).

(5) Woodroffe, 97, 98; see observations as to injunction which *d fortiori* apply in the case of the stronger remedy in Baddam *v.* Dhunput Singh, 1 C. W. N. 430-432 (1889).

(6) Sham Chand Giri *v.* Bhaya Ram Pandey, 5 C. W. N. 365 (1894). In this case a receiver was appointed of the property of the shrine of Tarakeswar, liberty being given to move to extend the rule on fresh materials. The Court directed that the conduct of the daily *Sheva* was not to be interfered with, and that the receiver was to pay for them out of the offerings he received; followed in Sree Ram Das *v.* Mohabir Das, 27 C. 279 (1899). And see as to removal of property, Chandidat Jha *v.* Padmanand Singh Bahadur, 22 C. 406 (1895).

It is, of course, no ground for refusing to appoint a receiver that the acts complained of amount to a criminal offence, and that a criminal prosecution is available to the petitioner.

Nextly, the situation of the property and parties must be considered.

The cases may be dealt with in the following classes :—(*a*) where the property is *in medio;* (*b*) where the plaintiff possesses an admitted interest; (*c*) where the plaintiff's title is disputed by the defendant claiming under legal title; (*d*) miscellaneous cases.(1)

Where the property is, as it were, *in medio*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble, as where there is litigation as to the right to probate or administration.(2)

The second case where plaintiff possesses an admitted interest is that of joint tenants and tenants in common in which the Courts are generally averse to interfere ; (3) partition suits in which receivers are frequently appointed ; (4) cases of tenant for life ; remainderman ; Hindu widow ; (5) partnership where such a state of facts is shown by the party complaining as if proven at the hearing will entitle him to a dissolution ; (6) cases of trust where there are substantial grounds for the exercise of the jurisdiction ; (7) infancy, the property and interests of infants being under the peculiar and exclusive care of the Court of Chancery ; (8) and lunacy.(9)

Thirdly, there are the cases of disputed title. If a right is asserted to property in the possession of the defendant claiming to hold under a legal title generally, a strong case is required to be made out. There must be some equity, danger of waste, fraud, abuse of trust, or the like, or want of reasonable appearance of title.(10)

Then, lastly, there are miscellaneous cases,(11) on contract, covenant, conveyance, lease, debtor and creditor, mortgages,(12) and other cases (13) in which

(1) Woodroffe, 101.

(2) See Owen *v.* Homan, 4 H C. 1032, 1033 ; Kerr, 23-25, 27-29 ; High, sect. 46 ; Beach, sect. 64 ; Yeshwant Bhagwant *v.* Shankar Ramchandra, 17 B. 390-392 (1892) ; In the Goods of Luchminarain Bogla, 5 C. W. N. celxi. (1901).

(3) Woodroffe, 112. See Kumara Tirumalai *v.* Bangaru Tirumalai, 21 M. 310 (1898).

(4) Woodroffe, 119 ; Beach, sect. 492 ; High, sect. 607 ; Poreshnath Mookerjee *v.* Omerto Nauth Motter, 17 C. 614 (1890).

(5) Woodroffe, 125 ; Beach, sect. 488 ; Kerr, 75, 76 ; Mt. Maharani *v.* Nanda Lal Misser, 1 B. L. R., A. C. J. 27 (1868).

(6) Woodroffe, 126, where subject is discussed ; Kerr, 80, 81 ; and as to attachment of property of a partnership, see Damodar *v.* Panalal, 9 Bom. L. R. 540 (1907).

(7) Woodroffe, 133 ; Beach, sect. 597. The same principles apply where a receiver is sought against an executor or administrator : Woodroffe, 137 ; Hafizabai *v.* Kazi Abdul Karim, 19 B. 83, 85 (1893) ; High, 664, 665 ; Bennet, 33.

(8) Bennet, 26 ; Woodroffe, 141.

(9) Kerr, 63-96.

(10) Woodroffe, 142, *et seq.* The leading Indian decision is Sidheswari Dabi *v.* Abhoyeswari Dabi, 15 C. 818 (1898) ; foll. Chandidat Jha *v.* Pandmanand Singh Bahadur 22 C. 459, 464, 465 (1893) ; see also Sree Ram Das *v.* Mohabir Das, 27 C. 279 (1899) ; Prosonomoye Devi *v.* Beni Madhub Rai, 5 A. at p. 561 (1883) ; Gossain Dulmir Puri *v.* Tekait Hetnarain, 6 C. L. R. 467, 469 (1880).

(11) See Woodroffe, 149.

(12) Tribhovan *v.* Jamuna, Bom. P. J. 184 (1889) ; Latafut Hossein *v.* Anunt Chowdhry, 23 C. 517 (1896) ; Jaikissondas *v.* Zenabai, 14 B. 431 (1888) ; Appasami Naickan *v.* Jotha Naickan, 22 M. 448 (1899) ; Woodroffe, 155 *et seq.*

(13) Woodroffe, 168 *et seq.*

general principles may receive some modification from the peculiar circumstances of the case.

Hitherto property the subject of a suit has been considered, but a receiver may also be appointed of property under attachment. The appointment of a receiver at the instance of a judgment-creditor is known in English practice as equitable execution.(1) A proceeding under the Code has nothing in common (beyond the fact that a receiver is appointed) with "equitable execution."(2) The application for a receiver may be made either by the judgment creditor or debtor, and in some cases it is as much to the interest of the first as of the second.(3) Attachments are not superseded by the appointment of a manager.(4) The proceeding does not change the property in the subject which is attached and affected by it.(5) The fact that property under attachment is in the hands of a receiver does not protect it from attachment of all other creditors.(6) A receiver may be appointed without the consent of the decree-holder.(7) The scope of the powers and duties of receivers of attached property are wider than those of managers under the Code of 1859.(8) "*Powers of the owner*," referred to in r. 1, must be read in connection with other provisions of the Code.(9) When a debt due from a third person to the judgment-debtor is attached in the hands of the person who owes it, the Court may, if necessary, appoint a manager to sue for it.(10) A receiver appointed in execution may sue for any debts attached;(11) in the term, however, only of the order appointing him;(12) or for contribution on contract;(13) or for the property of the judgment-debtor.(14) A receiver cannot waive a right to recover without the sanction of the Court.(15) A receiver does not represent the estate for all purposes. He has none of the powers which

(1) Fink *v.* Maharaj Bahadur Singh, 26 C. 772 (1899).

(2) Woodroffe, 174.

(3) See generally ib., 175; Huree Sunkur Mukerjee *v.* Jogendro Coomar Mookerjee, 19 W. R. 66 (1873); Din Dyal Lall *v.* Ram Ruttan Neogee, 16 W. R. 46 (1871); Brojender Narain Roy *v.* Kunwer Roy, 1 W. R. Misc. 15 (1864); Doorga Dutt Singh *v.* Bunwaree Lall Sahoo, 25 W. R. 33 (1876); Bunwaree Lall Sahoo *v.* Girdharee Singh, 16 W. R. 273, 274 (1871); Mohabir Pershad Singh *v.* Collector of Tirhoot, 13 W. R. 423 (1870); Bunwari Lall Sahu *v.* Mohabir Persad, 12 B. L. R. 297 (1873); Rednum Atchutara *v.* Khaja Mahomed, 5 M. H. C. R. 272 (1870); Mohunt Ram Rucha *v.* Doorga Dutt Misser, 13 W. R. 453 (1870); Ootum Singh *v.* Ram Surun Lall, 23 W. R. 287 (1875); Mohinee Mohun Dass *v.* Ram Kant Chowdhry, 15 W. R. 322 (1871); Umbica Churn Sarnakar *v.* Meik, 5 C. W. N. xxii.

(4) Mohabeer Pershad Singh *v.* Collector of Tirhoot, 13 W. R. 423 (1870); Bunwari Lall Sahu *v.* Mohabir Persad, 12 B. L. R. 297 (1873).

(5) John Tiel *v.* Abdool Hye, 19 W. R. 37, 38 (1873).

(6) Ib.

(7) Thakoor Chunder *v.* Chowdhry Chotee Singh, Marsh, 261 (1863); as to what must be shown, see Dinobundhoo Singh *v.* Macnaghten, 2 C. L. R. 185 (1878); Debkumari Bibi *v.* Ramlal Mukerjee, 3 B. L. R. app. 107 (1869).

(8) As to that Code, see John Tiel *v.* Abdool Hye, 19 W. R. 37, 38 (1872); Moran *v.* Muttu Bibee, 2 C. 72 (1876).

(9) Gopalasami *v.* Sankara, 8 M. 418 (1885).

(10) Rambutty Koocr *v.* Ramessur Pershad, 22 W. R. 36 (1874); Reasat Hossein *v.* Jugganath Singh, 21 W. R. 419 (1874); as to order on garnishee, see Toolsa Goolal *v.* Bombay Tramway Co., 11 B. 448 (1887).

(11) Ib.

(12) Benode Behary Mookerjee *v.* Rajnarain Mittor, 30 C. 699 (1903).

(13) Sundaram *v.* Sankara, 9 M. 334 (1886).

(14) Mirza Mahomed *v.* Widow of Balmukund, 3 I. A. 241, 245.

(15) Gopalasami *v.* Sankara, 8 M. 418, 420 (1885).

may be conferred under r. 1 in respect of property belonging to the judgment-debtor not attached in the suit in which the order was made.(1) If grounds be shown for such a course the receiver may, on the application of the parties, be removed.(2)

Rights and powers. (*a*) **General.**—It may be said in a general way that a receiver has no powers except such as are conferred upon him by the order by which he is appointed, and by the practice and usage of the Court. He is merely an officer of the Court; his holding is the holding of the Court: he is but a minister, and therefore has not the discretionary power of a person acting in a fiduciary character. In theory the Court itself has the care of the property in his hands. He can do nothing likely to seriously diminish the fund without the special leave of the Court. He is not, however, merely the assignee of him whose property is placed in his care, but he may exercise such power in dealing with the property as belong to a receiver according to the practice of the Court, and as are particularly conferred upon him by the order of his appointment.(3) Under the Code the Court may grant to the receiver all such powers as to bringing and defending suits and for the realization, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing *as the owner himself has* or such of those powers as the Court thinks fit.(4) A receiver is at all times subject to the control of the Court which possesses the power to make all necessary orders for the control of receivers appointed by it.(5) He has a right to the protection of the Court, and his possession will not be allowed to be disturbed.(6) The Court will see that he carries out his functions, and will protect the agent appointed under its orders.(7) The scope of the receivership may be extended.

(*b*) **Discretion.**—In many matters of care and management receivers are allowed to use their own discretion subject to the control and approval of the Court. But in all important matters a receiver should apply for and obtain the direction of the Court which appoints him.(8)

(*c*) **Application for instructions.**—A receiver has a right to apply to the Court for instructions when a question arises as to what may be his duty under its orders.(9)

(*d*) **Delegation.**—A receiver is not justified in delegating or entrusting to another a duty entrusted to him by the Court. If he does so, and thereby causes loss to the estate, he is bound to make it good.(10)

(1) Sundaram *v.* Sankara, 9 M. 334 (1886); as to general position of receiver, see Orr *v.* Muthia Chetti, 17 M. 501 (1893).

(2) See Huree Sunkur *v.* Jogendro Coomar, 19 W. R. 66 (1873); Bunwaree Lall Sahoo *v.* Girdharee Jingh, 16 W. R. 273, 274 (1871); Huree Sunkur *v.* Jogendro Coomar, 22 W. R. 220 (1874).

(3) Beach, sect. 249; Woodroffe, 204.

(4) Sect. 305.

(5) Beach, sect. 260.

(6) Ib., sect. 266.

(7) Dino Nath Sreemonee *v.* Hogg, 2 Hay, 395, 397 (1863).

(8) Balaji Narayan *v.* Ramchandra Govind, 19 B. 660, 662 (1894).

(9) Woodroffe, 208; Beach, sect. 259.

(10) Balaji Narayan *v.* Ramchandra Govind, 19 B. 660 (1894); Woodroffe, 208–210.

(*e*) **Possession.**—It is both the receiver's power and duty to take possession of the property whether moveable or immoveable over which he is appointed. Where a receiver is appointed by the Court to get in outstanding personal property, it is his duty to collect all he can get in. The power of a receiver to take property implies a correlative duty on the part of any one having it in his possession to deliver it to him, and such holder violates the law in resisting the exercise of the lawful authority of the receiver.(1)

(*f*) **Leases.**—If tenants in possession of property over which a receiver is appointed are directed by the order to attorn to him, the receiver should, as soon as his appointment is complete, call on them to attorn accordingly, and if they refuse, application should be made to the Court. The receiver is entitled to all the rents in arrear at the date of his appointment and to all the rents which accrue during the continuance of his receivership, and an order will, if necessary, be made for payment.(2) As to power to serve notice to quit and sue, see below.(3) As regards the power of leasing, it is created by the order appointing the receiver who has no estate or interest in himself which enables him to lease. It is common to grant such powers of lease for a limited period, usually three years, but whenever it is desired to lease for a longer term, the sanction of the Court must be obtained.(4)

(*g*) **Sales.**—As to the practice of the High Court in assisting purchasers at receiver's sales (5) and sale by receiver during administration,(6) see cases cited. Liens upon property held by a receiver are not divested by virtue of a sale made by him.(7) A sale by the receiver, made under the order of Court, cannot, in the absence of fraud, be attacked collaterally by persons who were parties to the proceedings or their representatives.(8) When a suit has been dismissed the Court has no jurisdiction to give the receiver any fresh power, as, for instance, liberty to sell.(9)

(*h*) **Borrowing.**—If a receiver requires money to discharge his duties the Court will give him leave to borrow upon the security of the property in his

(1) Woodroffe, 211.

(2) Ib., 212.

(3) Drobomayi Gupta *v.* Davis, 14 C. 323 (1883); dist. in Hari Das Kundu *v.* Macgregor, 18 C. 477 (1891); see matter more fully discussed in Woodroffe, *op. cit.* 213-219.

(4) Under the general permission the receiver may in his discretion let out property, but not for any period exceeding three years without obtaining special permission: Belchambers, R. and O., Note to R. 20; Krishna Chunder Ghose *v.* Krishnosokha Ghose, order dated 20th May, 1878 (Cal. H. C.): see Woodroffe, 219-223; Gonesh Chunder Dass *v.* Troylucko Nath Biswas, Suit 294 of 1881, Cal. H. C. O. O. C. J. 23 March, 1887; Surendro Keshub Roy *v.* Doorga Soondery Dossee, 15 C. 253 (1888); Suttya Sunkur Ghosal *v.* Golap Money Dabee, Suit 568 of 1871, Cal. H. C.; Nilmadhub Mundle *v.* Gillanders, 2 Sev. 955.

(5) Minatoonessa Bibee *v.* Khatoonessa Bibee, 21 C. 479 (1894); dissented from in Golam Hossein Ariff *v.* Fatima Begum, 16 C. W. N. 394 (1910).

(6) Netai Chand Chuckerbutty *v.* Ashutosh Chuckerbutty, 5 C. W. N. 408 (1901).

(7) Woodroffe, 231. See Gora Chand Lurki *v.* Makhan Lal Chakravarti, 6 C. L. J. 404, 409 (1907).

(8) Gora Chand Lurki *v.* Makhan Lal Chakravarti, 6 C. L. J. 404, 408 (1907).

(9) Rabeholm *v.* Smith, 34 C. 336 (1907).

hands.(1) Where a receiver of joint property mortgaged that property to another after a money decree had been obtained against the owners, but had executed the mortgage previous to the attachment, held that the attaching creditors were not entitled to priority over the mortgagee.(2)

(*i*) **Payment.**—As to payments out by receiver, see note.(3)

(*j*) **Suits by or defended by receiver.**—With regard to suits by a receiver, two questions require consideration, namely, as to his right to sue in general and as to the name in which he should sue. One of the most important functions exercised by receivers in the discharge of their official duties is that of bringing such actions as may be necessary to the proper discharge of their trust, as well as to secure and protect the assets and funds to whose control they are entitled by virtue of their appointment.(4) As a general rule all rights of action which belong to the party whose property is put into the hands of a receiver are transferred to the latter by virtue of his appointment.(5) The appointment does not affect existing contracts or rights of action between the party whose property is placed in the hands of a receiver and others; he has no greater rights or advantages than those possessed by his principal.(6) A receiver, therefore, cannot maintain an action upon a note or obligation running to the original party which he himself could not have maintained.(7) His right of action relates back to the beginning of the title in the party for whose property he is receiver: if substituted in place of the owners of the property he acquires all their rights by subrogation.(8) Inasmuch as for the purpose of actions and suits connected with the receivership, receivers occupy substantially the same relation which was occupied by the original parties against whom or over whose estate they were appointed, any defence which a defendant might have made to an action brought by the original party in interest is equally available, and may be made with like effect when the action is instituted by the receiver.(9) The fact that a person is an officer of the Court entitles him to no privileges not accorded to other suitors, and in seeking relief he must commence his actions by the same process that other suitors are required to employ.(10) A receiver's liability for costs in an action instituted by him on behalf of the estate is similar to that of any other trustee—as, *e.g.*, an executor or administrator—who sues for the interest of an estate, but being an officer of the Court, he usually receives special consideration.(11) Should he fail in his action he will, of course, be directed to pay the costs of the defendant; but as between himself and the

(1) Woodroffe, 231; Poreshnath Mookerjee *v.* Omerto Nauth Mitter, 17 C. 614, 619 (1890); Mohari Bibee *v.* Sharma Bibee, 7 C. W. N. cclxviii. (1903).

(2) Herumbo Nath Banerjee *v.* Satish Chandra Mukerjee, 33 C. 1175 (1905).

(3) Motivahu *v.* Premvahu, 16 B. 511 (1892); Kuppusami Chetti *v.* Rathnavelu Chetti, 24 M. 511 (1901); In the goods of Gopal Lal Seal, Cal. H. C. suit 11 of 1902, Order 9 March, 1903 [advance of money for defence of suit].

(4) High, sect. 200 *et seq.*; Woodroffe, 238 *et seq.*

(5) Beach, sect. 663.

(6) Ib., sect. 664; High, sect. 204.

(7) Williams *v.* Babcock, 25 Barb. 109 (Amer.); Bell *v.* Shibley, 33 Barb. 610 (Amer.)

(8) Beach, sect. 667.

(9) High, sect. 205; Beach, sect. 699-706.

(10) Beach, sect. 665 [verification of plaint by receiver's Muktear is probably sufficient: Drobomoyi Gupta *v.* Davis, 14 C. 339 (1887)].

(11) Ib., sect. 679.

estate he represents, he will, if he has acted properly, with care and in good faith, be allowed his costs out of any funds which are in, or may come to his hands.(1) Such an order in favour of a receiver will, however, generally, only be made in the suit in which he has been appointed, and not in the suit brought by him, unless in such latter suit the estate which he represents is fully before the Court. Since, however, a receiver sues in a representative capacity and not in his personal right, it is necessary that he should not only set out in his pleading the right of the party whom he represents, but also the authority under which he assumes to act. Courts are inclined to the exercise of a strict control over their receivers in the matter of allowing them to bring suits concerning their receivership, and an action brought by a receiver is considered as brought under the order of the Court itself. If, therefore, a suit is instituted without authority, the parties are entitled to the protection of the Court against such unauthorized proceedings on the part of the receiver, who will be directed to discontinue the action.(2) The usual practice, both in England and America,(3) and in this country, before instituting actions by a receiver in matters connected with his trust, is to apply to the Court, from which he derives his appointment, for leave to bring such action. And, although it is frequently the case that the order of appointment in general terms authorizes the receiver to sue for and collect all demands due, yet it is a common and a safe practice to first obtain special leave of Court before beginning the action. In order to avoid the necessity of frequent application to the Court for liberty to sue, it has become customary to give to the receiver in the order by which he is appointed general leave; but as the authority to sue conferred by the order of appointment is confined to such suits as are contemplated by the order,(4) and doubt may arise whether the particular suit brought is within the terms of the authority, it is customary, as above stated, to obtain special leave in each case. Proof of the appointment of the receiver and of leave to sue is generally given by the production of a certified copy of the respective orders. It seems to be established that the regularity, propriety, or necessity of the appointment of a receiver is not to be questioned in a merely collateral action at least by parties or privies to the action in which the appointment was made. As to the rights of other parties in this respect there seems to be a difference of opinion. It has been said to be probable that those who were entire strangers to the original proceedings should be allowed in a collateral action where their interests are affected by the appointment to attack the order on the ground that it was procured through fraud, collusion, or deception practised on the Court, but for no other reason.(5) The general doctrine recognizing a receiver as the officer of the Court is not to

(1) See Ib.; Seton, 4th Ed., 442; 5 Simon, 620; 2 Phillips.

(2) Beach, sect. 693; High, sects. 201, 202; as to the necessity for leave, see Kerr, 163–171. In Dinonath Sreemonee *v.* C. S. Hogg, 2 Hay 395, 399 (1863), it was said that in the absence of evidence the Court will assume that the receiver's suit was instituted by order of the Court, *sed qu.*, it being upon the receiver as plaintiff to establish both his case and authority to sue. As to cases where, having an independent cause of action, the fact that a person is receiver does not disqualify him from suing, and in which case he does not sue in his character of receiver, see Kerr, 164.

(3) High, sect. 183.

(4) Beach, sects. 659, 651.

(5) Ib., sects. 698, 702.

be understood as limiting or restricting his rights in the management of a suit which he has once undertaken, and after entering upon a litigation he is regarded as being entitled to all the freedom of action of any other suitor, and the fact that he appeals from a decision which is against him is not of itself evidence of bad faith or of mismanagement of his trust, and may be a meritorious rather than a censurable act.(1)

Some conflict of authority exists whether, in the absence of the special authority, a receiver may sue in his own name or in the name of the original party in whose favour the action accrued. In the first case a distinction must be drawn between the cases where, though the party suing may be a receiver, he has an independent cause of action entitling him to sue, and to sue in his own name, and in which cases he does not really sue in his character of receiver. So a receiver, who is holder of a bill of exchange, may by the law-merchant sue in his own name ; (2) also when, as bailee, he has a special property in the goods ; (3) or if he is possessed of chattels and those chattels are unlawfully detained from him. So, too, after a tenant has attorned to the receiver and so created a tenancy between him and the receiver, the latter may distrain upon the tenant in his own name, and on his own authority without leave obtained from the Court ; (4) and there may be other cases in which, having an independent cause of action, the fact that he is receiver does not disqualify him from suing.(5) In other cases, however, and where the receiver is suing in respect of a cause of action which has accrued to him in his representative capacity from the party whose estate he holds, the prevalent rule appears to be that where the matter is not controlled by statute or order of the Court, the receiver should sue, not in his own name, but in that of the parties whose estate he holds.(6) But this view is stated (7) to be losing ground and has not always been adhered to either in America (8) or England,(9) and it has been held in the former country that a receiver by virtue of his appointment is a quasi-assignee invested with title to

(1) High, sect. 207 ; and see as to appeals by a receiver, Beach, sect. 716.

(2) *Ex parte* Harris, 2 Ch. D. 423 ; Kerr, 185.

(3) Hills *v.* Reeves, 31 W. R. (Eng.), 209.

(4) Kerr, 181, *et ibi casas ;* Wilkinson *v.* Gungadhar Sirkar, 6 B. L. R. 491 (1871).

(5) *In re* Sacker, 22 Q. B. D. 185 ; in Wilkinson *v.* Gungadhar Sirkar, *supra*, at p. 491, it was said : "It may happen that matters arise out of the receiver's possession which are such as to render it necessary for him to sue personally in regard to them, *i.e.* such as it would be wrong for any of the parties themselves to sue, *e.g.* where tenants have attorned to him or he has let property in his own name." This was a suit for specific performance of a contract of sale executed by the receiver in his own name and the receiver was admitted as co-plaintiff.

(6) Beach, sect. 688 ; High, sect. 209 ; Wilkinson *v.* Gungadhar Sirkar, 6 B. L. R. 486 (1871) : "Now the application that the receiver should have leave to sue simply means this, that he should use the names of the owners of the property and come into Court on their behalf whether they consent to his doing so or not : " ib. at p. 490 ; Ram Lochun Sirkar *v.* Hogg, 10 W. R. 430 (1868). Suit in receiver's own name held to be an error of form only remediable in appeal where no objection had been taken : Juggannath Pershad Dutt *v.* Hogg, 12 W. R. 117 (1869).

(7) Beach, sects. 688, 689 ; High, sects. 209, 210.

(8) Beach, sects. 688, 689 ; High, sects. 209, 210.

(9) Kerr, 190, *et ibi casas ; see* also Evelyn *v.* Lewis, 3 Hare, 472 ; Armstrong *v.* Armstrong, 4 L. R. 12 Eq. 614 ; Paterson *v.* Gas Light & Coke Co., 2 Ch. (1896), 476.

such an extent at least as will enable him to sue in his official character.(1) Where the order appointing the receiver gives him power to sue in his own name or in the names of the parties to the suit, it might well be held that such an order merely entitles the receiver to sue in his own name in cases in which such action is proper, and in all other cases to use the names of the parties. It has, however, been decided that the Court had authority under sect. 503 (now r. 1) to confer on a receiver the power to sue in his own name, and that if the order appointing the receiver gives him liberty, he may do so in any case.(2) Where the receiver is permitted to sue in the names of the parties and does so, no action on their part is necessary.(3) A receiver of attached property may also sue. He does not represent the estate for all purposes. He would have none of the powers which may be conferred under r. 1 in respect of property belonging to the judgment-debtor not attached in the suit in which the order was made.(4) It has been held that where a receiver institutes proceedings, and is then replaced by another receiver, it is necessary that the new receiver should be made a party to those proceedings.(5)

The necessity for permission extends not merely to suits brought by, but also to suits defended by, the receiver.(6) The proper rule as regards applications in respect of the estate is that they should be made by the persons beneficially entitled, and not by the receiver; though it must be admitted that receivers have often originated proceedings in their own name.(7)

(*k*) **Indemnity.**—A receiver is entitled to be indemnified out of his estate in respect of all costs, and charges, and expenses, properly incurred by him in the discharge of his office or under the order of the Court.(8)

(*l*) **Salary and allowance.**—The receiver's allowance is either a percentage (in ordinary cases 5 per cent.) upon his receipts or a gross sum by way of salary. A receiver is entitled to his costs, charges, and expenses properly incurred in the discharge of his duties.(9) A receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expense.(10) The receiver is entitled to be paid next after the costs of realizing the estate. As the officer of the Court the Court is bound to see that he is paid.(11)

(1) Beach, sect. 689.

(2) W. R. Fink *v.* Maharaj Bahadur Singh, 25 C. 642 (1898); s. c., 2 C. 469. "It is such a convenience to suitors for the receiver to sue in his own name. Some of the parties may be dead, and if the receiver is to use the name of the parties he would have to get the suit revived, but if he sues in his own name no such difficulties arise:" ib.; *per cur.*, 615; it is often a great saving of time, trouble, and expense: ib., 446. In Fink *v.* Buldeo Dass, 26 C. 715, the receiver sued in his own name. The first-mentioned case was followed in Jagat Tarini Dasi *v.* Naba Gopal Chaki, 34 C. 305 (1907).

(3) Drobomoyi Gupta *v.* Davis, 14 C. 339 (1887).

(4) Sundaram *v.* Sankara, 9 M. 334, 337 (1886).

(5) Akula Paradesi *v.* Dhelli Jagannadha, 28 M. 157 (1904).

(6) Woodroffe, 247; Beach, sect. 708.

(7) Woodroffe, 248, 249.

(8) Ib., 249; Beach, sect. 771; Kerr, 261; Moran *v.* Mitter Bibee, 2 C. 69 (1876).

(9) Balaji Narayan *v.* Ramchandra Govind, 19 B. 660, 662 (1894); Woodroffe, 250 *et seq.*

(10) Kerr, 213, 214.

(11) Prem Lall Mullick *v.* Sumbhoo Nath Roy, 22 C. 960 (1895)

(*m*) **Lien.**—He has a lien on the estate for his claims and allowances.(1)

Duties and liabilities of receiver.—He is, as an officer of the Court, strictly amenable for his acts and accountable to the Court(2) which appoints(3) him. His first duty is to obey the order of the Court appointing him.(4) He is not liable for acts done under the order of the Court.(5) He should be strictly impartial, as he is appointed for the benefit not merely of the party on whose application the appointment is made, but equally for the benefit of all persons who may establish rights in the case.(6) Many of the receiver's duties have been alluded to in dealing with his rights and powers. So his right to take possession implies also a duty to do so. He is responsible for any loss occasioned to the estate from his wilful default or gross negligence.(7) He ought to appear and give all necessary information to the Court in all applications for payment of money.(8) He is liable to account.(9) He should keep correct and accurate accounts with vouchers,(10) and should file them with regularity and promptitude,(11) showing that all disbursements are payments properly made in respect of the estate.(12) A receiver may be ordered to account, although the suit in which he was appointed may be no longer pending.(13) R. 4 is new and contains important provisions in this respect. It has been drafted on the lines of sect. 18 (4) of the Provincial Insolvency Act of 1907. The original proposal to imprison receivers was considered too wide, and has been omitted.

Jurisdiction to remove and discharge.—The power to terminate flows naturally and as a necessary sequence from the power to create. The power of the Court to remove or discharge a receiver whom it has appointed may be exercised at any stage of the litigation. It is a necessary adjunct of that power of appointment, and is exercised as an incident to, or consequence of, that power; the authority to call such officer into being necessarily implying the authority to terminate his functions when their exercise is no longer necessary, or to remove the incumbent for an abuse of those functions, or for other cause shown, and the cases upon this branch of the subject will resolve themselves into two classes, viz. cases of removal or substitution for cause; and cases of final discharge because of the necessity of the appointment having ceased to exist.(14)

(1) Ib.; Moran *v.* Mittu Bebee, 2 C. 70 (1876); see Bertrand *v.* Davies, cited ib. and Woodroffe, 252 *et seq.*

(2) Woodroffe, 254.

(3) Buddinath Paul Chowdhry *v.* Bycaunt Nath Paul Chowdhry, 2 Tayl. & Bell, 192, 193.

(4) Woodroffe, 254.

(5) Ib., 255.

(6) Ib.

(7) R. 3 (*d*); Kerr, 302; Woodroffe, 256; Coomar Sattya Sankar Ghosal *v.* Ranee Golapmonee Debee, 5 C. W. N. 223 (1900).

(8) Chaitan Charun Mullick *v.* Gocool Chandra Mullick, 1 C. W. N. 303 (1897).

(9) Woodroffe, 259. See as to liability case cited in last note but one, and as to misappropriation by receiver's employees, Balaji Narayan *v.* Ramchandra Govind, *post.*

(10) Balaji Narayan *v.* Ramchandra Govind, 19 B. 660, 662 (1894).

(11) Gonesh Chunder Dass *v.* Troyluckonath Biswas, *Re* C. T. Davis, Suit 294 of 1881, Cal. H. C. 23 March, 1887.

(12) Mohini *v.* Ram Narain, 14 C. L. J. 445 (1911).

(13) Administrator General of Bengal *v.* Prem Lall Mullick, 22 C. 1011 (1895).

(14) High, sects. 820, 826; Woodroffe, 269 *et seq.*

A distinction indicated by the terms themselves is to be drawn between the removal and the discharge of a receiver. The discharge of the receiver is, in general, the termination of the receivership, while the removal of the receiver upon his own motion or for cause and the substitution of another person or persons in his stead, is a proceeding not inconsistent with the continuance of the receivership. The rules of law, however, which regulate the removal of a receiver are, in general, applicable to the case of his discharge. A receiver is removed when it is made to appear that the interests of the parties concerned require it, and a receiver is discharged when the objects sought to be obtained by his appointment have been accomplished. In the one case the property in litigation continues in the possession of the Court, subject to the final decree, while in the other case it passes pursuant to the decree to the party entitled. The power of removal being incident to the power of appointment, the Court, whose officer the receiver is, may in a proper case direct his removal, and may impose such conditions in connection therewith as seem just. The Court is not limited in respect of time in the matter of the removal of the receiver, but may act thereon whenever it seems proper and at any stage of the litigation.

As regards the power of the Court to remove a receiver for cause and to substitute another in his stead, it is to be observed that the exercise of the power is regarded as a matter properly vesting in the sound discretion of the Court, and hence to be governed by the circumstances of the particular case. It is difficult, therefore, to frame any definite rules susceptible of general application, and the power of removal for cause is referred to the broad and undefined region of the discretionary jurisdiction of Courts of Equity.(1) The removal of a receiver and the appointment of another in his stead does not have the effect of invalidating claims against the former receivership, since the management of the estate is one and the same, though it becomes necessary to change the receiver.(2) All proceedings which directly affect the receivership ought regularly to be commenced in the same suit and before the same Court in which the appointment of the receiver was made. Accordingly a proceeding to remove or suspend a receiver must be commenced by motion in the suit in which he was appointed. It was the early rule in Equity that the application for the removal of the receiver could be made only to the Court by which he had been appointed and whose officer he was.(3)

The application to remove or discharge a receiver is ordinarily made upon motion in the cause in which he was appointed on notice to all parties and the receiver, or the direction for discharge may be given in the decree at the hearing or in the order upon further consideration.(4)

(1) High, sect. 821; Beach, sect. 776.

(2) High, sect. 827.

(3) Ib.; it is here pointed out that this doctrine has been essentially modified in the United States, in which a receiver may under various circumstances be removed by Courts other than that by which he was appointed. This qualification of the rule was an almost necessary outgrowth of the complex system of State and Federal Courts and of the power of the removal of causes from one of these classes of Courts into the other. It is also sometimes provided for by Statute. See Buddinath Paul Chowdhry *v.* Bycaunt Nath Paul Chowdhry, 2 Tayl. & Bell, 192, 193 [a receiver is only amenable for his acts and accountable to the Court appointing him].

(4) Kerr, 238, 239.

Removal of the receiver.—As already observed, this may take place either upon the application of the receiver himself appointed in the cause or upon the application of the parties thereto, over whose property he has been appointed.

(*a*) **Upon his own application.**—It is not, in general, the policy of the Courts to remove a receiver upon his own application after he has once accepted the office and entered upon the discharge of his duties. This is the rule partly because of the unwillingness of the Courts to charge the estate with the expense of such a proceeding, and partly because it is contrary to the theory upon which justice is administered in a Court of Equity to allow changes of this nature, which necessarily cause delay in collecting and settling the affairs of the estate affected by the receivership. It may be laid down, therefore, as a settled rule that the Court will not remove or discharge a receiver except where good cause therefor can be shown, and it seems also that, generally, this must be something arising subsequently to the acceptance of the office.(1) Accordingly, where the receiver accepted the office at the request of the defendant, and was subsequently incapacitated from performing the duties of his office by reason of blindness, he was discharged upon his own petition; (2) but where the motion for relief was based upon the fact that the duties of the receivership interfered with the receiver's own private business, the application was refused.(3) In a case where the receiver wanted to go to Europe on his own affairs, and remain a year, the Court allowed the receiver to be discharged, gave him his costs, and appointed a new receiver.(4) A receiver who wishes to be discharged and cannot show any reasonable cause for putting the parties to the expense of a change, will not be discharged on his own request unless on the terms of his paying the costs of the appointment of another receiver and consequent thereon; but where a receiver had acted for many years and had paid in his balance, the Court would not charge him with the costs of the removal and the appointment of a new receiver.(5)

(*b*) **Upon the application of the parties.**—It is, as of course, an elementary proposition that a Court of Equity will not sanction or continue a receivership which has been created collusively or fraudulently, and that a receiver so appointed will be removed upon proof that the appointment was made by collusion between the parties, or in fraud of the rights of any of the parties in interest.(6) When it subsequently appears that the appointment was improvidently made, the Court may unquestionably vacate the appointment, and thus remove the receiver; but the Court may properly require as a condition precedent to an order vacating the appointment that the receiver's expenses and compensation be provided for by the moving party. Where the receiver's

(1) Beach, sect. 782; Kerr, 233, 234; High, sect. 838; Smith *v.* Vaughan, Cas. temp. Haudw, 251; Richardson *v.* Ward, 6 Madd. 266; Edwards on Receivers, 660.

(2) Richardson *v.* Ward, 6 Madd. ch. 266, where the receiver was allowed the costs of the proceedings.

(3) Beach, sect. 782, citing Beers *v.* Chelsea Bank, 4 Edw. Ch. 277.

(4) Purdy *v.* Rapalje, cited in Edwards on Receivers, 661, and referred to in Beach, p. 733.

(5) Kerr, 234, citing Cox *v.* Macnamara, 11 Ir. Eq. 356.

(6) Beach, sect. 784.

security is insufficient the Court may remove him summarily, and direct the delivery of all the assets to his successor, if he neglect or refuse to procure additional sureties.(1) Where a receiver becomes bankrupt he will be discharged and a new receiver appointed.(2) If a receiver has been wrongly appointed over property of a person not a party to the cause he will be discharged although there has been an abatement by the death of the sole defendant.(3) When a receiver has been appointed temporarily in an *ex parte* proceeding, or before answer, and it subsequently appears from the defendant's pleading or otherwise that the appointment ought not to have been made, or that the complainant has presented no case for the intervention of a Court of Equity, it is proper that the receiver should be removed. So where it is made to appear that there was no necessity for the appointment of the receiver, or where it is shown to the satisfaction of the Court that all the usual grounds for the appointment of a receiver—such as imminent danger to the property, fraud, insolvency, and the like—are wanting, the Court will remove the receiver and restore the *status quo*. But where a receiver enters in good faith upon the discharge of his duties and the parties in interest acquiesce for a considerable time, their laches may be such as to defeat a subsequent application on their part looking to the removal of the receiver.(4)

Since absolute impartiality as between the parties to the litigation is an indispensable qualification of a receiver, upon an application for his removal the Court may properly consider his past relations to the parties as well as his present sympathies. And when it is shown that he was the nominee of one hostile party and bitterly opposed by the other, and that he was appointed under the mistaken belief that all interests had united in his selection, and that by reason of his interest his efficiency as an officer of the Court is impaired, it is proper to remove him.(5) The mere fact of relationship between the receiver and the plaintiff in the action in which he was appointed, is not, of itself, sufficient ground for his removal, such relationship affording, at the most, merely a circumstance to be taken into consideration at the time of his appointment, it being the general rule that no relative of either of the parties ought to be selected as receiver. But where, in addition to relationship, bias and improper conduct are shown a ground is made for his removal.(6)

It is an established rule that a receiver will not be arbitrarily removed and another person substituted in his place in the absence of a substantial ground, merely because certain parties in interest desire it. But it is competent for the Court to remove one receiver, and to substitute another in his stead, by consent of all parties when the proceedings are *bonâ fide*, and when there is no attempt to traffic in the receivership.(7) Where a receiver had been appointed in an administration suit, another receiver who offered to act at a lower salary was, on the application of a mortgagee of a tenant-for-life of the property, ordered to be substituted for him.(8)

(1) Beach, sect. 775.
(2) Kerr, 236; Dan. Ch. Pr., 1716.
(3) Ib., 237, citing Lavender *v.* Lavender, I. 2 R. 9 Eq., 593.
(4) Beach, sect. 780.
(5) High, sect. 821.
(6) Beach, sect. 786; High, sect. 821; and as to where a party in interest has been appointed, see Beach, sect. 790.
(7) Beach, sect. 789; High, sect. 827.
(8) Stanley *v.* Coulthurst, W. N. (1868), 305.

The rule that a receiver may be removed for misconduct or breach of trust arises out of the nature of the office, and the supervising power of the Court of Chancery. Whenever the receiver is guilty of misfeasance or malfeasance in office it is the duty of the Court to call him to account, and in a proper case it has the undoubted right to order a summary removal.(1) Either mismanagement or incompetence is a ground for removing a receiver.(2) A receiver will be removed if his appointment has been an improper one,(3) if he is irregular in carrying in and passing his accounts; (4) if his conduct has been such as to impede the impartial course of justice; (5) or to amount to gross dereliction of duty; (6) and when a receiver appointed on behalf of incumbrancers has been guilty of gross negligence in the discharge of his duties, he may be removed upon their application, and may be required to pay interest upon the balances from time to time in his hands, and to pay the costs of the proceedings for his removal.(7)

Final discharge of the receiver.—The discharge of a receiver may take place either during the course of the proceedings or at the conclusion of the litigation. A receiver is generally continued until judgment, but according to the decision undermentioned,(8) if the right of the plaintiff ceases before that time the receiver may be discharged, and cannot be continued at the instance of the defendant. In this case the plaintiff claiming to be an equitable creditor or incumbrancer of the defendant had obtained a receiver of the rents and profits of defendant's real estate upon which he claimed to have a charge. Defendant having paid and plaintiff having received the amount claimed to be due the receiver was discharged, although other defendants claiming to have annuities or incumbrances upon the same property objected, and asked to be heard against the discharge. Lord Eldon said, "I apprehend that with the right of the plaintiff to have the receiver must fall the rights of the other parties. It would be most extraordinary if, because a receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a receiver appointed on his behalf. My decided opinion is that the order for the receiver must be discharged, and that all falls together." In, however, a subsequent case (9) the Master of the Rolls said: "There is no doubt that where a receiver is appointed under the authority of the Court he is appointed for the benefit of all parties interested; and therefore he will not be discharged merely upon the application of the party at whose instance he was appointed." (10) If during the course of the proceedings the continuance of a receiver becomes

(1) Beach, sect. 783.

(2) Gonesh Chunder Doss *v.* Troylucko Nath Biswas, *Re* C. T. Davis, Suit 294 of 1881, Cal. H. C., O. O. C. J., Cor. Trevelyan, J., 23rd March, 1887.

(3) *Re* Lloyd, 12 Ch. D. 448; Neilman *v.* Neilman, 43 Ch. D. 198; *Re* Wells, 45 Ch. D. 569; Brenan *v.* Morissey, 26 L. R. Ir. 618, cited Kerr, 236.

(4) Bertie *v.* Lord Abingdon, 8 Beav. 53.

cited in Kerr, 236.

(6) Ib., citing *Re* St. George's Estate, 19 L. R., Ir. 566.

(7) Ib.; High, sect. 829.

(8) Davis *v.* Duke of Marlborough, 2 Sw 167, 168; see Woodroffe, 278 *et seq.*

(9) Bainbrigge *v.* Blair, 3 Beav. 421.

(10) In other cases also of a somewhat similar character proceedings have been stayed without prejudice to the order appoint-

unnecessary, or the object of the receivership is attained, the receiver will be discharged.(1)

While the propriety of discharging a receiver, like that of appointing him, is to some extent a matter of judicial discretion, yet in some cases the right to a discharge becomes an absolute right which the Court has no discretion to refuse.(2) In such a case, therefore, the granting of the order of discharge is not a matter of discretion, but its refusal is error which may be reversed on appeal.(3)

In general a receiver will not be discharged until the object for which he was appointed has been fully accomplished, or until the Court is satisfied that the exigency calling for a receiver has ceased.(4) Since the final decree in the cause is generally decisive of the subject-matter in controversy, and determines the right to the possession of the fund or property held by the receiver, it is usually the case that such decree supersedes the functions of the receiver since there is then nothing further for him to act upon. If, on the other hand, the result be favourable to the defendant, the functions of the receiver are at an end, and it is proper to order him to account and be discharged.(5) An order of dismissal of the suit which follows on the reversal of an order appointing a receiver clearly operates as a discharge of the receiver.(6)

Under the Civil Procedure Code, once a suit has been dismissed, the Court dismissing it is *functus officio* except that it may stay execution of its own decree or order for costs. Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit.(7) If, on the other hand, the controversy terminates favourably to the plaintiff or the party at whose instance the receiver was appointed, it will usually devolve upon him to carry out the decree of the Court according to the nature of the receivership and his powers under the decree.(8) It has been said that the determination of the suit, however, will not, *ipso facto*, discharge the receiver, but his functions must be terminated by a formal order of Court.(9)

Unless the minutes of the order appointing or continuing a receiver and manager contain a provision for his discharge, an application to the Court is in general necessary to divest the possession of the receiver. The appointment of a receiver made previous to judgment will not be superseded by it unless the receiver is only appointed until judgment or further order.(10) The receiver may, however, be continued by the decree.(11) The Court has jurisdiction notwithstanding a receiver has been discharged, to surcharge him in his accounts; (12) or to order him to pay his balance together with the amount allowed him for his salary and interest.(13)

(1) See Woodroffe, 280.
(2) High, sect. 840.
(3) Ib.; Beach, sect. 793.
(4) See Smith *v.* Lyster, 4 Beav. 227.
(5) Beach, sect. 799.
(6) Prem Lall Mullick *v.* Sambhoo Nath Roy, 22 C. 960-973 (1895).
(7) Yamin-ud-doulah *v.* Ahmed Ali Khan, 21 C. 561, 563-565 (1894); see Woodroffe's Injunctions, 56-58.
(8) Beach, 799.
(9) Ib.; High, sect. 834.
(10) Kerr, 232.
(11) See Moti Vahu *v.* Prom Vahu, 16 B. 511, 512 (1892).
(12) *Re* Edwards, 31 L. R., Ir. 242, cited in Kerr, 240.
(13) Harrison *v.* Boydell, 6 Sim. 211.

The decree may direct a permanent appointment, in which case the discharge of the receiver is a matter of discretion.(1)

Discharge of sureties.—The sureties of a receiver will not be discharged at their own request, and no regard will be had to their application unless it is for the benefit of the estate or unless there be special circumstances in the case,(2) as for instance where underhand practice can be proved, and the person secured can be shown to be connected with such practice.(3) Where also a surety had become such in violation of partnership articles, he was discharged on his own application.(4) When a surety procures his discharge during his continuance of the receivership, the receiver must enter into a fresh recognizance with new sureties. When a surety becomes bankrupt the receiver is usually required to enter into a fresh recognizance with two or more sureties. If a surety dies without leaving any property available for the satisfaction of the recognizance, the Court will direct a new surety to be appointed; but the rule is otherwise where he leaves real property bound by his recognizance.(5) The condition of the bond is that if the receiver shall from time to time, and at all times so long as he shall continue as receiver, duly and faithfully in all respects discharge the duties and obligations which devolve upon him and duly pass his accounts, then the bond shall be paid, but otherwise it will remain in full force.(6)

If the receiver faithfully discharges his duties and passes his accounts and pays the balance due by him, the surety is discharged, and he is at liberty to apply to have the recognizance vacated as to him. Should this be not so, an action must be brought on his bond against the surety who is answerable to the extent of the amount of the recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal, and of the appointment of a new receiver in his place. In ascertaining the liability of the surety the Court proceeds upon the principle that the surety is liable (to the extent of the amount of the penalty) for all sums of money which the receiver himself was properly liable to pay into Court or account for.(7)

A surety who has been compelled to pay money on account of his obligation is entitled to be reimbursed out of the balance in the receiver's hands, Lord Eldon saying: "As the receiver is an officer of the Court, and the surety is so in a sense, if there is anything due on account between them, justice requires that, upon the application of the surety, he shall be indemnified for what he has paid for the receiver out of the balance due him." (8) And a surety who pays the debt of his principal has the same right against his co-surety that he has against the principal, and will be permitted to put the bond in suit as against the co-surety.(9)

(1) See *Ex parte* Rani Mathusri Jyai Amba, 13 M. 390 (1890).

(2) Griffith *v.* Griffith, 2 Ves. 400; Kerr, 241; Woodroffe, 291.

(3) Hamilton *v.* Brewster, 2 Moll. 407; Kerr, 241.

(4) Swain *v.* Smith, Set. on Decr. 680.

(5) Woodroffe, 292.

(6) *Vide* ib., Appendix.

(7) Kerr, 242-244.

(8) Glossup *v.* Harrison, 3 V. & B. 134.

(9) *Re* Swan's Estate, Ir. R. 4 Eq. 209, cited in Kerr, 245.

Appeal.—It was held under sect. 588 of the last Code (now represented by O. XLIII.) that an order authorizing a receiver to remove any person in possession of the property was appealable, under that section, at the instance of the person dispossessed,(1) and it has also been held that under O. XLIII. r. 1, cl. (*s*) a final, but not an interlocutory order, appointing a receiver is appealable,(2) and also that directions given by a Court in passing a receiver's accounts are not appealable.(3)

(1) Rowland Hudson *v.* John Pierpont Morgan, 13 C. W. N. 654 (1909).

(2) Upendra *v.* Bhupendra, 13 C. L. J. 157 (1910).

(3) Mohini *v.* Ram Narain, 14 C. L. J. 445 (1911); Keshobati *v.* McGregor, 35 C. 568 (1908).

ORDER XLI.

Appeals from Original Decrees.

[s. 541.]

Form of appeal. What to accompany memorandum.

1. (*1*) *Every* appeal shall be *preferred* in the form of a memorandum *signed* by the appellant *or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum* shall be accompanied by a copy of the decree appealed *from* and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

Contents of memorandum.

(*2*) *The* memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed *from* without any argument or narrative; and such grounds shall be numbered consecutively.

Memorandum of appeal.—The Appellate Court must look at the memorandum of appeal itself and not at the stamp on it in order to see which part of a decree is the subject of appeal before it. The Court can no more deal with a part of a decree which is not challenged by a memorandum of appeal or by objections filed by the opposite party than it can pass an order reversing the decree of a first Court when that decree is not in appeal before it. The memorandum of appeal or objections when filed are what give the Judge on appeal jurisdiction to interfere with the decree below. He cannot of his own motion deal with a decree which is not the subject of appeal to him, or with a portion of a decree against which portion there has been no appeal and no objections filed. The Appellate Court has no jurisdiction to deal with that portion of the decree which is not the subject of appeal before it.(1) The Code does not make any provision as to how Courts should deal with memoranda of appeal containing scandalous matter; but Courts possess inherent power to stop such an abuse of its records.(2)

"**Presented.**"—In order to effect a valid presentation of an appeal it must be by the suitor in person or by a person duly qualified to present it,(3) and where an advocate or vakil is heard the grounds should have been duly

(1) Cheda Lal *v.* Badullah, 11 A. 35, 37, 38, 39, 40 (1888).

(2) Zamindar of Tuni *v.* Bennayya, 22 M. 155, 158 (1898).

(3) Shiam Karan *v.* Raghunandan, 22 A. 331 (1900) [presentation by person not suitor, advocate, attorney or vakil]; Wazir-un-nissa *v.* Ilahi Baksh, 24 A. 172, 173 (1901) [authorized agent of female pauper].

certified.(1) Though in the *vakalatnama* filed in the Court below the names of two vakils were entered, and though the *vakalatnama* was accepted only by one of them yet the presentation of the appeal by the pleader, who accepted the *vakalatnama*, was considered a sufficient presentation.(2) But where by an oversight the name of the *vakil* who had filed an appeal was omitted from the body of his *vakalatnama*, it was held, on objection taken by the respondents, that the document was invalid and the appeal had not been properly presented.(3) If an appeal, being in reality a first appeal from a decree, is erroneously described as "First appeal from order" in the memorandum of appeal, and it is shown that neither respondent was in any way prejudiced by such misdescription or an insufficient stamp was placed on the memorandum by reason thereof, the appeal should not be dismissed for such misdescription.(4) It has been held that there is no proper presentation when the court-fees due have not been paid; (5) but as regards subsequent affixing not having retrospective effect the first set of cases were decided before the enactment of sect. 582A of the last Code (see now sect. 149), which was intended to cover cases where the insufficiency of the stamp upon the memorandum of appeal was due to mistake.(6)

"Accompanied by a copy of the decree."—In appeals against decrees in suits or proceedings tantamount to a suit (*e.g.* contentious probate proceedings) it is necessary that the memorandum of appeal should be accompanied by a copy of the decree, and a copy of the decree is a necessary accompaniment for a valid appeal.(7) The Court has no power to exempt an appellant from production of a copy of the decree, but (if satisfied that the discretion vested in it under sect. 5 of the Limitation Act should be exercised) it may make an order that a certified copy of the decree may be received and allowed to be attached to the memorandum of appeal.(8) But in cases of appeals against orders under sect. 244 (now sect. 47) (which are decrees under sect. 2), it is sufficient to attach to the memorandum a copy of the order itself (which is the decree, and no other decree is necessary), and it is not necessary to attach a copy of the decree even if such a decree may have been drawn up.(9) The provisions of this rule, as extended to second appeals by sect. 108, do not require that any

(1) Kishen Chunder *v.* Hurish, 3 W. R. 216 (1865); Oliullah *v.* Bachulal, 15 C. 706 (1888); *In re* Noor Ahmed, 17 W. R. 338 (1872); but a vakil appellant cannot certify his own appeal; Thakoor Dass *v.* Ameer Mondal, 14 W. R. 168 (1870).

(2) Ayyanna *v.* Nagabhoosanam, 16 M. 285 (1892).

(3) Muhammad Ali Khan *v.* Jas Ram, 36 A. 47 (1913); Pokhpal Singh *v.* Dambar Singh, 6 A. L. J. 110 (1909).

(4) Sant Lal *v.* Sri Kishen, 14 A. 221 (1892).

(5) Balkaran *v.* Gobind, 12 A. 129, 142 (1890); see also Sheo Partap *v.* Sheo Gholam, 2 A. 875 (1880); Yakut-un-nissa *v.* Kishoree, 19 C. 747 (1891); Lakhi Narain *v.* Kirtibas Das, 18 C. L. J. 133 (1913); but see Dhondiram *v.* Taba Savadan, 27 B. 330 (1902).

(6) See Doorga Churn *v.* Dookhiram, 26 C. 925, 929, 930 (1899); Bai Ful *v.* Desai Manoobhai, 22 B. 849 (1897); Valambal Ammal *v.* Vythilinga, 24 M. 331, 332, 333 (1900); s. c., 25 M. 380.

(7) Chamela Kuar *v.* Amir Kahn, 16 A. 77 (1893); see also Bhawani *v.* Kallu, 17 A. 537, 553 (1895); Khirode Sundari *v.* Jnanendra, 6 C. W. N. 283, 284, 286 (1901).

(8) Prosonoo *v.* Ram Chandra, 17 C. L. J. 66 (1912); Hem *v.* Jadab, 16 C. L. J. 116 (1901); Binapani *v.* Sashi, 16 C. L. J. 133 (1912).

(9) Khirode *v.* Jnanendra, 6 C. W. N. 283, 284, 286 (1901).

other documents should be presented with the appeal than a copy of the decree against which the appeal is presented and the judgment on which it is founded. It is not necessary to file a copy of the first Court's decree. If an appellant relies on the original judgment, and decree in support of a second appeal, he may reasonably be called on by the Court to produce copies when applying for admission of second appeal. In other cases it is vexatious to insist on parties incurring useless expense and trouble.(1)

"And of the judgment."—Where the parties in two or more suits are the same, and the decision in one case governs all the cases, then, if the appellant file copies of the judgment and decree passed in the principal case this may be considered a sufficient compliance with the law; but if the parties in each case be different, it is not sufficient for the appellant to refer to a case with which he has nothing to do, and to say that the judgment of the Lower Court in that case governs his, and that it has been filed by another appellant with whom he has no privity.(2) In appeals under clause 10 of the Allahabad Letters Patent under the rules of that High Court, a copy of the judgment appealed from is required to be presented with the memorandum of appeal.(3)

2. The appellant shall not, *except by* leave of the Court, [s. 542.]

Grounds which may be taken in appeal.

urge or be heard in support of any ground of objection *not set forth in the memorandum of appeal; but* the *Appellate* Court, in deciding the appeal, shall not be confined to the grounds of *objection* set forth *in the memorandum of appeal or taken by leave of the Court under this rule:*

Provided that the Court shall not rest its decision on any *other* ground *unless the party who may be affected thereby* has had *a* sufficient opportunity *of* contesting the case on that ground.

Grounds of appeal.—The grounds which may be taken without leave under this rule are those only set out in the memorandum.(4) An objection which may be heard under sect. 105 (formerly sect. 591) must be one set forth in the memorandum of appeal,(5) and the Court has a discretion to grant or refuse leave,(6) which is not taken away even when the point sought to be raised is one of limitation.(7) Questions, however, may arise even as to those which

(1) Pirathi Sing *v.* Vencatramanayyan, 4 M. 419 (1881).

(2) Bhyrub Nath *v.* Huro Sundaree, W. R. Mis. 28 (1864); see also Mothoor Nath *v.* Kissen Mohun, W. R. Mis. 9 (1863, 1864).

(3) Fuzal Mahammad *v.* Phul Kuar, 2 A. 192 (1879).

(4) As to specifically raising the point, see Narayana *v.* Chingalamma, 10 M. 1, 8 (1885); and see Protap Chunder Borooah *v.* Collector of Goalpara, 22 W. R. 216, 219 (1874).

(5) Tilak Roy Singh *v.* Chakardhari Singh, 15 A. 119, 120 (1892); foll. in Bansi Lal *v.* Ramji Lal, 20 A. 370, 372 (1898).

(6) Ib. It has refused leave where the matter was one of Court fees: Ram Kishen Upadhia *v.* Dipa Upadhia, 13 A. 580 (1890); and will consider the conduct of a party: Thakuri *v.* Kundan, 17 A. 280, 281 (1895).

(7) Ahmed Ali *v.* Waris Husain, 15 A. 123 (1893); and see Dattu *v.* Kasai, 8 B. 535 (1884); *contra* Mukvana Saluji *v.* Raj Sangsi, 2 B. H. C. R. 169, 170, 173, 174. In Baloram *v.* Mangta Das, 11 C. W. N. 959 (1907); s. c., 34 C. 941, the majority of the Court considered that leave should be given.

are set out by reason of the fact that they raise a new case or points not the subject of determination in the lower Court. Generally speaking, in these cases pure points of law only are arguable which arise on the findings and require no further inquiry. This subject will be found discussed under the heading "Scope of the appeal" in the notes to sects. 100 and 101, *ante*. This rule is equally applicable to second as to first appeals.(1)

Grounds of appeal must be such as arise from out of the plaintiff's pleadings and documentary proofs and necessary to the decision of the appeal.(2) In drawing up grounds of appeal it should (it has been held) be remembered that no subsequent event or devolution of interest can effect the decision of a question as it stood at the time the decision was pronounced. To give effect to these, some supplementary proceeding and not an appeal is necessary.(3) Points not taken in the memorandum of appeal, if they raise questions of fact, upon which the findings arrived at by the Court of Appeal must be taken to be conclusive, will not be allowed to be taken in special appeal.(4)

If the appellant thinks that his grounds of appeal in the memorandum filed with the Judge are not sufficient, he may apply to the Judge to allow him to be heard upon the objections not mentioned in the memorandum of appeal; but if he does not do so, nor does he even make the objections upon which he relies before the High Courts previously to his appealing to that Court, he cannot ask the High Court to reverse the decision of the Judge of the Lower Appellate Court because he did not reverse the decision of the first Court on grounds which were never mentioned in appeal, or not brought to the notice of the Judge of the Lower Appellate Court.(5) The Court, however, itself is not limited by the grounds of objection. It is entirely within the competency of the Court to take into its consideration anything in the case which either affects the regularity of the proceedings of the Court below, or relates to the correctness of the decision upon the merits, and the Court is not confined to the grounds set forth in the memorandum of appeal.(6) This rule confers upon Courts power to decide appeals upon grounds other than those set forth by the appellant in the memorandum, and that power is to be exercised by the Court alone, and not to enable the appellant to take the respondent by surprise by urging matters of which he had no notice. Parties, however, complaining of judgments and decrees must mention all the grounds of complaint in the memorandum of appeal, and these provisions are not meant to relieve them of such necessity.(7) As a rule the High Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum of appeal, but where a decree comes before it which upon its very face is illegal—a decree which goes beyond the power of the Court which passed it—the High Court is bound to take up the point itself and rectify the mistake, and not to allow itself to become an

(1) Ahmed Ali *v.* Waris Husain, 15 A. 123 (1893).

(2) Nawab Sidhee Nuzur Ally Khan *v.* Ojoodhyaram, 10 M. I. A. 540, 553; s. c., 5 W. R. P. C. 83.

(3) Anund Moyee *v.* Sheeb Chunder, 2 W. R. P. C. 19 (1862).

(4) Nilratan *v.* Ram Rutton, 5 C. W. N. 627, 629 (1901).

(5) Mahomed Anjob *v.* Gouri Pershad, 6 W. R. 61, 64 (1866).

(6) Shama Churn *v.* Bindabun, B. L. R. F. B. 892, 900 (1868); and see Thakuri *v.* Kundan, 17 A. 280, 281 (1895).

(7) Bansidhar *v.* Sita Ram, 13 A. 381 (1891).

instrument for the commission of further mistakes.(1) An Appellate Court exceeds its authority in giving a plaintiff a relief for which he does not ask. Although the Court may decide an appeal before it upon grounds other than those stated in the memorandum of appeal, yet the rule does not entitle the Court to go beyond the subject-matter of appeal.(2)

Where a Lower Appellate Court allowed an appellant (one of the defendants interested in a small portion of the decree) to raise an objection verbally (and not taken in the memorandum of appeal) to the whole of the decree, and dismissed the suit on the ground of non-joinder of parties, it was held by the High Court that it was not open to the Judge upon the appeal of only one of the defendants as to a small portion of the decree to entertain the objection upon which he had thrown out the suit.(3) When a Lower Appellate Court dismissed a suit on a point on which no issue was raised although it had been taken in the written statement, and which was not made a ground of appeal; it was held by the High Court that the point must be considered to have been abandoned at the trial; it was therefore not open to the Lower Appellate Court to dismiss the suit on that ground.(4)

Rejection or amendment of memorandum.

3. (*1*) *Where* the memorandum of appeal *is* not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there. [s. 543.

(*2*) *Where* the Court rejects any memorandum, it shall record the reasons for such rejection.

(*3*) *Where* a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall *sign or initial* the amendment.

Rejection or amendment of memorandum.—The memorandum may be rejected under this rule if it is not drawn up in the manner prescribed; (5) as also on any of the grounds set out in O. VII. r. 11 (formerly sect. 54) read with sect. 107 (formerly 582),(6) but a judicial order should be passed, and the reasons for such rejection must be given.(7)

Memo. appeal insufficiently stamped.—When a memo. of appeal which is insufficiently stamped is returned in order that it may be sufficiently stamped, the Appellate Court should fix a time within which the deficiency is to be supplied.(8) In this rule there is no limitation as to the time when a memorandum

(1) Poran Sookh *v.* Parbutty, 3 C. 612, 615, 616 (1878); Lachman *v.* Bahadur Singh, 2 A. 884, 888 (1880); and cf. Bansidhar *v.* Sita Ram, 13 A. 381 (1891).

(2) Saroda Sundaree *v.* Gobind Monee, 24 W. R. 179 (1875).

(3) Nakur Chunder *v.* Judoo Nath, 25 W. R. 389 (1875).

(4) Govindrao Krishna *v.* Balu, 16 B. 586 (1891).

(5) Budy Prasad *v.* Baij Nath, 15 A. 367, 370 (1893).

(6) Ib.

(7) Ib.; Jugsib Sahay *v.* Kasee Nath, 1 Ind. Jur. 121 (1862).

(8) Sheo Partab *v.* Sheo Golam, 2 A. 875 (1880).

may be rejected or amended.(1) But the time for rejection is when the appeal is presented, and not after it has been once admitted.(2) The filing of an appeal out of time is another matter. The registration is a ministerial proceeding. And when registered out of time, the Court may, on discovery, reject it (3) where there is fraud, misrepresentation, suppression of fact, or mistake.(4) An order admitting an appeal after time, made *ex parte* by a single Judge of the High Court sitting to receive applications for the admission of appeals under a rule of the Court made under 24 & 25 Vict. c. 104, sect. 13, and sect. 27 of the Letters Patent of the Allahabad High Court, can be impugned and set aside, at the hearing by the Division Court before which it is brought for hearing, on the ground that the reasons assigned for admitting it were erroneous and inadequate.(5) The High Court in special appeals can look into the grounds which the Lower Appellate Court Judge has given for admitting the appeal in which the decision appealed against was passed after the lapse of the period of limitation; and the grounds upon which he acted in so admitting the appeal are impeachable in special appeal.(6) The discretion of the Lower Appellate Court in such cases is liable to review or appeal where such Court is acting through caprice or prejudice, or where the discretion is exercised without any proper legal material to support it. Where the exercise of discretion is perverse, the High Court in second appeal will interfere.(7)

One of several plaintiffs or defendants may obtain reversal of whole decree *where* it proceeds on ground common to all.

4. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed *from* proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal *from* the whole decree, and thereupon the Appellate Court may reverse or *vary* the decree in favour of all the plaintiffs or defendants, as the case may be.

Decree proceeding on common ground.—The ordinary rule is that upon an appeal of one of several parties, an Appellate Court cannot reverse the decree appealed from as against any other of the parties; (8) nor can the Appellate Court, on the appeal of one defendant, having only a part interest in a decree, reverse the entire decree.(9) It is not competent to certain defendants appealing

(1) Damoda *v.* Gokulchand, 7 A. 79, 85 (1884).

(2) Gopee Bullub *v.* Goluck, W. R. 135 (1864).

(3) Syud Jafir Hossein *v.* Sheikh Mahomed Amir, 4 B. L. R. App. 103, 104, 106 (1870) [and the respondent may apply to dismiss the appeal].

(4) Secretary of State *v.* Mutu Jawmy, 4 B. L. R. App. 84 (1870).

(5) Dubey Sahai *v.* Ganeshi Lal, I. A. 34 (1875).

(6) Mouri Bewa *v.* Surendra, 2 B. L. R. 184 (1869), Note; s. c., 10 W. R. 178. See also Surbhai *v.* Raghu-Nathji, 10 B. H. C. R. 397 (1873); Chunder Doss *v.* Boshoon Lal, 8 C. 251, 253 (1881).

(7) Ib.; Ranchodji *v.* Lallu, 6 B. 304, 306, 307 (1882); Parbati *v.* Ganpati, 23 B. 513 (1898).

(8) Koolada Pershad *v.* Gora Chand, 17 W. R. 353 (1872).

(9) Woomesh *v.* Matunginee, 2 W. R. 170 (1865).

and making a non-appealing defendant a respondent, between themselves, to open out that portion of the case which, as between the plaintiff and the non-appealing defendant, has not been appealed against, and when the ground on which the decision is given is not common to all the defendants this rule does not apply.(1) But when the decision of the first Court proceeds on grounds common to all the defendants, one of the defendants is justified in appealing on behalf of all.(2) Thus where, on the appeal of one of the several judgment-debtors, the bond on which the plaintiff sued was found to be false and not binding at all, all the other parties to the bond were released notwithstanding that they did not appeal.(3) It is incongruous that a claim should be dismissed as against one party and allowed against another on contradictory grounds, as say, in the first case, on the ground that a mortgage is satisfied, and in the second on the ground that the mortgage had not been discharged. It is to prevent such incongruities that power is conferred when an appeal is presented against the whole decree to interfere as well on behalf of parties who have not appealed as on behalf of those who have appealed.(4) No distinction is made between decrees *ex parte* and others.(5) Where there is a common ground amongst plaintiffs or defendants an appeal by one is virtually an appeal by all, though they may not be parties to the record.(6) It is not directed that the Appellate Court should pass a decree in favour of persons who are not before it in appeal, but the effect of the provision is to make a decree passed in favour of one out of the defendants or plaintiffs operate in favour of all the plaintiffs or defendants as the case may be.(7) The decree which may be the subject of such appeal is one affecting in the same manner all the plaintiffs and defendants—one incapable of division, and upon which it would be impossible for a Court to find in one sense for some of the plaintiffs or defendants, and in the opposite sense for the other plaintiffs or defendants; for instance, where the suit relates to property in which all the plaintiffs or all the defendants are co-sharers.(8) If one of the several defendants appeal not against the whole decree but only against that portion of it which affects him, and his defence in the Lower Court was not a defence common to other defendants, the Lower Court decree cannot be reversed in favour of those defendants who have not appealed.(9) In a recent case where a lambardar had appealed against a decree without joining his co-defendants (his tenants), it was held that under this rule it was open to him

(1) Khermukuree Dassee *v.* Nilambur, 2 W. R. 227, 231 (1865); Gudadhur *v.* Monmohinee, 7 W. R. 366 (1867); Deoputtee *v.* Dhumoo Lal, 11 W. R. 238, 240 (1869); Shaikh Mahomed *v.* Sheikh Anwar Ali, 21 W. R. 112 (1873).

(2) Sreestee *v.* Sreenath, 18 W. R. 331, 332 (1872); Sreemunjuree *v.* Poorusattum, 9 W. R. 499 (1868); Ram Lochun *v.* Nittya, 12 W. R. 211 (1869); Jadumoni *v.* Fudu Bibi, 7 B. L. R. 28 (1871); Mohunt Rung Lal *v.* Gouri Mundal, 10 W. R. 286 (1868).

(3) Sufur Ali *v.* Busuroolla, 6 W. R. 323 (1866).

(4) Seshadri *v.* Krishnan, 8 M. 192, 194 (1884); and see Kulai Kada *v.* Viswanatha Pillai, 28 M. 229, 234 (1904).

(5) Sreenath *v.* Grey, 13 W. R. 114, 116 (1870).

(6) Abdul Rahiman *v.* Maidin Saiba, 22 B. 500, 508 (1896); Sirdar Singh *v.* Krishna Mills Co., 63 P. R. (1914).

(7) Mulchand *v.* Ram Ratan, 20 A. 493, 496 (1898).

(8) Sreeram Ghuttuck *v.* Brojo Mohun, 11 W. R. 449 (1869); and see *per* Bayley, J., in Kharmukra *v.* Nilambur, 2 W. R. 227, 230 (1865).

(9) Ram Chunder *v.* Oomachurn, 18 W. R 26, 27 (1872).

to obtain a reversal of the decree in favour of all the defendants, but the plaintiffs were bound to join all the defendants as respondents in a second appeal.(1)

What is a common ground must be determined in each case upon the nature of the decree given, and the cases cited are given in illustration only of the general principle enacted.(2)

The Calcutta High Court has held,(3) dissenting in this from a Madras decision, subsequently overruled,(4) that the former section did not require that the decree appealed against should proceed *exclusively* on grounds common to all the defendants, but that it should proceed on any ground common to the defendants.

Under this rule, one of several persons who have stood on a common ground may appeal for all. They are not prevented from appealing severally if they wish to do so; but if they allow one of their number to represent them for pressing their appeal, they must accept his representative character as to the incidents also of the appeal, at least so far as the jural relation between the parties are concerned. The appeal opens up the whole case, though made by but one of the joint parties in the Court below. But the case being thus opened up, it is opened up for the respondent as well as for the appellant; and under the former sect. 561 (now O. XLI. r. 22) the respondent may press any objection against the decree which he could have urged in an independent appeal. Where a decree of the Court of the first instance is partly in favour of two joint plaintiffs, and one plaintiff appeals, the Appellate Court may reject the whole claim on the cross objection of the defendant,(5) the decree having been passed against the defendants, it was open to any one of them to appeal against it if the ground of appeal was common to all the defendants.(6) But where there are several respondents before the Court of first appeal, though one of them may represent his fellows in a further appeal, he cannot represent a person who was not his

(1) Dasarath *v.* Brojo Mohon, 18 C. L. J. 261 (1913).

(2) Joykisto *v.* Nittyanund, 3 C. 738 (1878); Doyal Chunder *v.* Nobin, 8 B. L. R. 180 (1871); Doorga Churn *v.* Shama Nund, 12 W. R. 376 (1869); Katyanee *v.* Madhub, 4 W. R. 68 (1865); Shaikh Mahomed *v.* Sheikh Anwar, 21 W. R. 112 (1873); Lall Soondar *v.* Hurry Kishen, Marsh, 113, 115 (1862); Ram Kamal Saha *v.* Ahmad Ali, 30 C. 429, 432 (1903); Boydonath *v.* Ojan Bibi, 11 W. R. 238, 240 (1869); Lukhy Kant *v.* Ram Doyal, Marsh, 281 (1863); Najamma *v.* Subba, 11 M. 197, 199 (1887); Appa Rau *v.* Ratnam, 13 M. 249, 251 (1889); Yenabalu *v.* Abdul Khader, 4 M. H. C. R. 26; Sumana Vekraman *v.* Razan, 16 M. 293 (1892); Annamalay Chettiar *v.* Pitchu Ayyar, 28 M. 122, 124 (1904); Vishwa Nath *v.* Vasudev, 28 B. 699, 702 (1901); Ram Chunder *v.* Ooma Churn, 18 W. R. 26, 27 (1872); Chunder Monee *v.* Modhoo Dey, 23 W. R. 166 (1875); Greesh Chunder *v.* Gour Mohun, 7 W. R. 49 (1867).

(3) Ram Kamal Saha *v.* Ahmad Ali, 30 C. 429, 432 (1903); foll. Annamalay *v.* Pitchu Ayyar, 28 M. 122, 124 (1904).

(4) Syed Hussein *v.* Madan Khan, 17 M. 265 (1894); overruled by Dhuttaloor Subbayya *v.* Pardigantam Subbayya, 30 M. 470, F. B. (1905); s. c., 17 M. L. J. 119.

(5) Babaji Dhondshet *v.* Collector of Salt Revenue, 11 B. 596, 597, 598 (1887).

(6) Chander Sang *v.* Khimabhai, 22 B. 718, 721 (1897); also Chintamon *v.* Gungabai, 27 B. 284 (1903); s. c., 5 Bom. L. R. 90; see also Chajju *v.* Umrao Singh, 22 A. 386, 392 (1900); Puran Mal *v.* Krant Singh, 20 A. 8 (1897); Ram Lochun *v.* Nittya, 12 W. R. 211 (1869); Ram Sewak *v.* Lambar Pande, 25 A. 27, 28 (1902); Doorga *v.* Balwant, 23 A. 478, 481 (1901); Abdul Ghani *v.* Muhammad, 28 A. 95, 97 (1905).

co-respondent and against whom therefore no decree could have been made on a point common to the two, or on any point at all.(1)

It was held that the former section applied only to appeals by parties arrayed on the same side of a litigation in the original Court and against whom judgment on a common ground had been passed, and only some of them appeal from such judgment on behalf of themselves and others who do not join in the appeal. It did not relate to cases in which a party (be he a plaintiff or a defendant in the original Court) who has been unsuccessful only to a certain extent of the subject-matter of the litigation in appeal from so much of the decree as has been passed against him, happens to value the appeal as if it related to the whole subject-matter of the litigation or to pay Court fees on such amount.(2) Where two suits brought by two different parties claiming different interests in a certain share to set aside the sale of that share, having been dismissed, one of the plaintiffs appealed and the sale was set aside; it was held that the decision must be considered as setting the sale aside as to the whole of that share, although the other parties did not appeal. If they both had joined in one suit, but only one had appealed, the decree of the Appellate Court would have been for the benefit of both, and the whole sale would have been set aside. Their bringing separate suits instead of joining in one suit ought not to make any difference in that respect.(3)

It was held that where a respondent failed to give the notice required by sect. 561 of the former Code (see r. 22 of this Order), it was not open to the Appellate Court to grant any relief to that respondent in a case where the granting of such relief was not necessarily incidental to the relief granted to the party who had appealed.(4) But see now in this connection r. 33 of this Order, which enacts part of O. 58, r. 4 of the English Rules.

Stay of proceedings and of execution.

5. (*1*) *An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor* shall execution of a decree be stayed by reason only of an appeal having been preferred *from* the decree; but the Appellate Court may for sufficient cause order stay of execution *of such decree.*

Stay by Appellate Court.

(*2*) *Where* an application *is* made for stay of execution of an appealable decree before the expir*ation* of the time allowed for appealing therefrom, the Court which passed the decree may *on* sufficient cause *being shown* order the execution to be stayed.

Stay by Court which passed the decree.

(1) Deo Gopal Savant *v.* Vasudev Vithal Savant, 12 B. 371 (1887).

(2) *Per* Mahmood, J., in Cheda Lal *v.* Badullah, 11 A. 35, 40 (1888).

(3) Sheikh Nagor *v.* Shuriutoolah, 20 W. R. 77 (1873).

(4) Kulai Kada Pillai *v.* Viswanatha Pillai, 28 M. 229, 232 (1904); as to suits for contribution, see Rup Jan *v.* Abdul Kadir, 8 C. W. N. 496; 31 C. 643 (1904); Asundi *v.* Bareddi, 34 M. 249 (1910).

(*3*) No order *for stay of execution* shall be made under *sub-rule* (*1*) *or sub-rule* (*2*) unless the Court making it is satisfied—

(*a*) that substantial loss may result to the party applying for stay of execution unless the order is made;

(*b*) that the application has been made without unreasonable delay; and

(*c*) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(*4*) *Notwithstanding anything contained in sub-rule* (*3*), *the Court may make an ex parte order for stay of execution pending the hearing of the application.*

"**Stay of execution.**"—This rule, which refers to applications by parties only,(1) assumes that there is something to stay and therefore does not apply where the decree has been in fact executed.(2) To execute a judgment or order is to carry it into effect or enforce it. When there still remains something substantial to be done under a decree, before it can become thoroughly effectual that decree has to be "executed" within the meaning of this rule.(3) So a decree directing the issue of a grant of probate to the propounder of a will is one that is capable of execution, and stay of execution of such decree can be granted under it.(4) It was held that sect. 283 of the former Code did not constitute an exception to the procedure laid down by sect. 545, now replaced by this rule.(5)

The principle upon which all stay is granted for the preservation of property pending litigation is that the successful party in the litigation—that is, the ultimately successful party—is to reap the fruits of that litigation and not to obtain merely a barren success.(6) In cases where a stay of execution or an injunction is granted on an *ex parte* application, liberty to apply to the Judge to vary or set aside the order must be implied if not expressed.(7) And a Court which has jurisdiction to pass an order has equally jurisdiction to pass any subsequent order in any matter flowing from and naturally and necessarily arising out of the first order.(8) The ruling that if property is sold before an order staying execution is communicated, the sale is in such case not void (9)

(1) See Khiluck Chunder *v.* Prosunnomoyee, Marsh, 478 (1864).

(2) Dharam Singh *v.* Kishen Singh, 12 C. L. R. 532 (1883).

(3) Mt. Brij Coomaree *v.* Ramrick Dass, 5 C. W. N. 781 (1901). As to orders directing criminal proceedings to be taken against parties or witnesses, see Ram Churn, S. D. N. W. P. 363 (1863).

(4) Mt. Brij Coomaree *v.* Ramrick Dass, *supra.*

(5) Syed Fathula *v.* Munyappa, 6 M. 98 (1882).

(6) Mt. Brij Coomaree *v.* Ramrick Dass, 5 C. W. N. 781 (1901).

(7) Amir Hasan *v.* Ahmad Ali, 9 A. 36 (1886).

(8) Moonshee Ameer Ali *v.* Kassim Ali Khan, 13 W. R. 403 (1870).

(9) Bisesswari Chowdhurany *v.* Hurro Sundar, 1 C. W. N. 226 (1892).

has been dissented from,(1) the order of stay taking effect when it is made and not when it is communicated. It has been said that an applicant who has asked for stay of execution should on the ground of its being an indulgence be made to pay costs even if successful.(2) But this has been dissented from,(3) and there is certainly strong support in reason for the view that when the law allows an appeal and allows an appellant upon proper cause being shown to ask for and obtain an order for stay, it cannot be said that what is asked for is merely an indulgence.

By Court of first instance.—The rule assumes that the decree is appealable and not final.(4) If an appeal lies, but has not been filed, the first Court but no other (5) may stay execution upon an application made before the expiry of the period of appeal, though as the rule states the successful party is not prohibited from executing his decree simply on the ground that the period for appealing has not expired.(6) The Court which dismisses a suit becomes *functus officio*, save that it may stay execution of its own decree or order for costs.(7) After appeal is filed the Appellate Court, as the Court which has seizin of the suit, may stay execution.(8) A Civil Court cannot stay execution in cases in which an appeal has been made to the Privy Council against a decree of the High Court.(9)

"**Sufficient cause.**"—The application should be supported by an affidavit verifying the facts alleged, and these facts should show sufficient cause for a stay.(10) What constitutes sufficient cause must depend upon the facts of the particular case (11) In this connection the proviso to the rule must be referred to. The Court is given a discretion in the matter, and may refuse the application where there has been such delay as disentitles the party to any consideration from the Court.(12) And see *post*. The provisions of this rule as regards the exhibition of sufficient cause apply equally to decrees for immoveable as for moveable property.(13)

"**Substantial loss.**"—As appears from the use of the word "*shall*" this

(1) Hukum Chand Boid *v.* Kamalanand Singh, 33 C. 927 (1906); and see also Meah Jan *v.* Man Singh, 2 A. 686 (1880).

(2) Chuni Lal *v.* Anantram, 25 C. 893 (1898), *per* Maclean, C.J., and Jenkins, J.

(3) Ib., *per* Bannerjee, J.

(4) Amir Hasan *v.* Ahmad Ali, 9 A. 36 (1886).

(5) See Barlow *v.* Abdool Haye, 17 W. R. 341 (1872).

(6) Deputy Collector, Sonthal Pergunnahs *v.* Binode Ram Sein, 5 W. R. Misc. 53 (1866).

(7) Yamin-ud-Dowlah *v.* Ahmed Ali Khan, 21 C. 561 (1894); see this case discussed in Woodroffe's Injunctions, 3rd ed. pp. 56 *et seq.*

(8) See Chuni Lal *v.* Anantram, 25 C. 893, 894 (1898), *per* Bannerjee, J.; Satya Shankar *v.* Maharaj Narain, 35 A. 119 (1912).

(9) Muttealaummal *v.* Chellayamal, 5 M. H. C. R. 98 (1869).

(10) Multan Chand Shivram *v.* Khan Saheb Kharsedji, 15 B. 536 (1890). As to the duty of a pleader to verify statements made to him, see *Re* Sreenath Roy, 17 W. R. 405 (1872); Ram Nath *v.* Kamleshwar, 15 C. W. N. 432 (1911). (The High Court may also deal with the order under s. 115 and direct stay in terms of r. 6 of this Order.)

(11) See Mahomed Hossein *v.* Lootf Ali Khan, 20 W. R. 393 (1873); in *Re* Ahmed Reza, 13 W. R. 281 (1870), sufficient cause was held not shown.

(12) *In re* Leslie, 17 W. R. 160 (1872).

(13) *In re* Ismail Kooer, 9 W. R. 448 (1868).

must be shown.(1) So the Court granted the stay of that part of a decree which directed the completion of certain works, but refused it as regards another part ordering payment of money, as it was not satisfied that substantial loss would result.(2)

"**Delay.**"—*Vide ante.*

Notice.—Though there was no express provision as to notice under the last Code it was the practice to give notice to the decree-holder before disposing finally of an application for stay of execution.(3) And this will probably be so in the generality of cases now, though not statutorily required, unless the case falls within the fourth clause.

Security.—The taking of security is compulsory.(4) The nature and extent of the liability depends on the words of the security-bond given to the Court.(5) The rule refers to the ultimate order; and, therefore, the obligation extends to the final decree passed after remand by the High Court in second appeal.(6) The amount, of course, is determinable by the special circumstances. When proceedings are ordered to be stayed on giving security, the judgment-debtor must be allowed reasonable opportunity to show that the security offered is sufficient.(7) This clause does not contemplate a decree or order in a separate proceeding to be instituted in the future.(8) The relationship between a decree-holder and judgment-debtor who has executed a security-bond mortgaging property is not such as to be governed by sect. 67 of the Transfer of Property Act, and a suit is not necessary.(9) In the case of third parties, the Bombay High Court has held (10) that payment by a surety may be enforced by summary process in execution. The Calcutta High Court has considered a suit necessary.(11) The former view has now been adopted in sect. 145, *ante*. In the under-mentioned case the Court directed that execution should be first taken against the judgment-debtor and then the surety.(12) When property is deposited in Court in lieu of security for the purpose of staying a sale, and the order directing the sale is confirmed on appeal, neither the depositor nor judgment-debtor can claim to have the deposit restored which is then held for the decree-holder.(13) As to appeal see next paragraph. The Court may, on the bond ceasing to have

(1) See Nazar Ali Khan *v.* Ojoodhyaram, 1 Ind. Jur., N. S. 185 (1866).

(2) H. H. Gaikwar Sirkar *v.* Ghandi, 25 B. 243 (1899); s. c., 3 Bom. L. R. 367.

(3) Multan Chand Shivram *v.* Khan Saheb Kharsedji, 15 B. 536 (1890).

(4) Cf. Wise *v.* Rajkrishna Roy, B. L. R. F. B. 541, 550 (1866); Sagore Chunder *v.* Sheobourne, Bourke, 103 (1865).

(5) Cf. Shivlal Khubchand *v.* Apaji Bhivrav, 2 B. 654 (1878); 3 B. 204 (1879) [cf. Shek Suleman *v.* Shivram Bhikaji, 12 B. 71 (1887)]; Moonshee Ameer Ali *v.* Kassim Ali, 13 W. R. 403 (1870).

(6) Shivlal Khubchand *v.* Apaji Bhivrav, *supra.*

(7) Mt. Bahooria *v.* Lalla Jumahar Lall, 20 W. R. 52 (1873).

(8) Saminatha Pathan *v.* Sorhatha Ammal, 22 M. L. J. 190 (1911).

(9) Shyam Sundar Lal *v.* Bajpai Jainarayan, 30 C. 1060 (1903); s. c., 7 C. W. N. 914.

(10) Jamsedji *v.* Bawabhai, 25 B. 409 (1900); s. c., 3 Bom. L. R. 35.

(11) Surjoo Das *v.* Balmakund Das, 23 C. 212 (1895); Tokhan Singh *v.* Roop Narain Singh, 22 C. 25 (1894).

(12) Gopal Nana Shet *v.* Goharmal, 10 B. 578 (1894).

(13) Sheo Gholam Sahoo *v.* Rahut Hossein, 4 C. 6 (1878).

effect, direct that it be cancelled and returned. For the power to take security involves the other.(1) But a Subordinate Court has no jurisdiction to release a security taken under the directions of the High Court.(2) Where by order of an Appellate Court a security-bond was executed by the judgment-debtor for stay of execution of a decree pending the decision of an appeal under sect. 545 of the last Code (now represented by this rule) and after the disposal of the appeal the decree-holder applied for sale of the property under the subsisting attachment, it was held that the sale could be carried out in execution-proceedings consequent on the attachment.(3) A security-bond under this rule pledging immoveable property exceeding Rs.100 in value requires registration.(4)

Stay by Appellate Court.—An appeal must be pending. A Court has no power after the passing of a final unappealable decree, and before the granting of an application for review of judgment, to order a stay of execution of the decree.(5) In the decision cited,(6) it was held that where an incidental decree under sect. 244 (now 47) is under appeal, the Court may stay execution of the substantive or original decree in the suit pending the hearing of the appeal, though such original decree is itself not under appeal. See now r. 8, *post*. The manner in which an Appellate Court effects a stay is either on appeal from an order of the Court of first instance refusing a stay; for such an order when made by a High Court is a "judgment" under the Letters Patent,(7) and when made by other Courts is one falling within sect. 244 (now sect. 47). *ante*,(8) provided that the Court against which the appeal is made is the Court executing the decree within the meaning of that section; (9) or after an appeal has been filed an original application may be made direct to the Appellate Court.(10) But the Appellate Court must have acquired seizin either of the original suit or of the execution-proceedings. It was therefore held that the High Court was not competent to stay proceedings in execution of a decree of a Subordinate Court merely by reason of an appeal having been preferred against an order of refusal to set aside the decree under sect. 108 of the former Code, corresponding with O. IX. r. 13 of this Code.(11) A Superior Court has no power to direct a Subordinate Court to stay execution in a case which is not before it.(12) When an Appellate Court reverses a decree

(1) Moonshee Ameer Ali *v.* Kassim Ali, 13 W. R. 403, 409 (1870).

(2) Abedoonissa Khatoon *v.* Ameeroonissa Khatoon, 17 W. R. 464 (1872).

(3) Baij Nath *v.* Mohant Sia Ram, 17 C. L. J. 267 (1913).

(4) Nagaruru *v.* Tangatur, 31 M. 330 (1908).

(5) Ameer Hasan *v.* Ahmad Ali, 9 A. 36 (1886).

(6) Pasupati Nath Bose *v.* Nanda Lal Bose, 28 C. 734 (1901).

(7) Mt. Brij Coomaree *v.* Ramrick Dass, 5 C. W. N. 781 (1901).

(8) Ghazidin *v.* Fakir Buksh, 7 A. 73 (1884); Udeyadita Deb *v.* Gregson, 12 C. 624 (1886); Musaji *v.* Damodardas, 12 B. 279 (1888); Mahant Ishwargar *v.* Chudasama, 12 B. 30 (1887).

(9) Ramchandra *v.* Balmukund, 6 Bom. L. R. 780 (1904); and see ib., and Mt. Brij Coomaree *v.* Ramrick Dass, *supra*, as to interfering in appeal with an exercise of discretion.

(10) Chuni Lal *v.* Anantram, 25 C. 893, 894 (1898). In Mt. Brij Coomaree *v.* Ramrick Dass, *supra*, there was both an appeal from an order of the original Court followed by a separate application to the Appellate Court.

(11) Bhagwat Rajkoer *v.* Sheo Gclam Sahu, 31 C. 1081 (1904).

(12) Barlow *v.* Abdool Haji, 17 W. R. 341 (1872).

in favour of a plaintiff, it should not stay execution of its own decree, for in such case a plaintiff having lost his decree is in no better position until his special appeal is decided than a plaintiff before judgment.(1) When an Appellate Court refuses an application for stay, this does not prevent an application under sect. 546 (now r. 6), should an order for execution be obtained.(2)

The Court has inherent powers of stay beyond those given by statute. There is an inherent power in the Court to stay under proper circumstances the drawing up of its own order or to suspend their operation, if the necessities of justice so require,(3) or to stay proceedings in the Lower Court—such power being auxiliary to that of the Appellate Court to reverse the order of the Inferior Court.(4) And when an appeal is pending against a preliminary order directing an account, the Court having seizin of the appeal can, apart from the question whether the case falls within the Code, make an order staying the carrying out of such order pending the hearing of the appeal.(5)

Appeal.—An order refusing stay of execution made by a Court which is not executing the decree is not appealable.(6)

Security in case of order for execution of decree appealed *from.*

6. (*1*) *Where* an order is made for the execution of a decree *from* which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be *taken* for the restitution of any property which may be *or has been* taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(*2*) *Where* an order has been *made* for the sale of immoveable property in execution of a decree, and an appeal is pending *from* such decree, the sale shall, on the application of the judgment-debtor *to the Court which made the order*, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

(1) Kavasji Bhimji *v.* Dhondiraj, 10 B. H. C. R. 411 (1873).

(2) H. H. the Gaikwar Sirkar *v.* Ghande, 25 B. 243, 244 (1900). The decision in Janardan *v.* Nilkanth, 25 B. 583 (1901), is not understood; the application was under s. 545, and the Court said no order could be made under s. 546; Srinibash *v.* Kesho Prasad, 38 C. 754 (1911); 15 C. W. N. 475.

(3) Mt. Brij Coomaree *v.* Ramrick Dass, 5 C. W. N. 781, at p. 796 (1901).

(4) Panchanan Singha Roy *v.* Dwarka Nath Roy, 3 C. L. J. 29 (1905); and see remarks in Hukum Chand Baid *v.* Kamalanand Singh, 3 C. L. J. 67 (1905); and see Nanda Kishore Singh *v.* Ram Golam Sahu, 40 C. 955 (1912). For essential prerequisite to a stay of execution by an Appellate Court, see Srinibash *v.* Kesho Prasad, 38 C. 754 (1911); 15 C. W. N. 475.

(5) Balkishen Sahu *v.* Khugnu, 31 C. 722, F. B. (1904); 8 C. W. N. 572.

(6) Ramchandra Kasturchand *v.* Balmukund Chaturbhuj, 29 B. 71 (1904).

Security for restitution.—No action can be taken unless an appeal is pending.(1) Under sect. 36, Act XXIII. of 1861, the Court was given a discretion.(2) Under the present rule, as under the last Code, the Court must demand security on sufficient cause being shown by the appellant. In the case of money decrees the party appealing may obtain stay of execution of the decree, so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed, in which case stay should not be granted.(3) Where the application is made before execution has been taken out, sufficient cause must be shown—that is, probable cause—of the judgment-debtor's inability to recover the property if the decree be reversed.(4) The former section spoke of property which "may be taken in execution," and a question therefore arose whether security may be taken, where the decree has been already executed at the date of the application. See cases cited.(5) The case has now been met by the introduction of the words "*or has been.*" The security bond should be made applicable to the ultimate decision which may be passed in the suit.(6) An order requiring security is appealable.(7) As regards the enforcement of the security if it be personal to the parties to the suit, there is no difficulty in proceeding to realize any amount that may be due in execution of the decree to which they were parties. A difficulty, however, has arisen where the security is given by a third party for either the appellant or respondent.(8) The Calcutta High Court has held that a bond given by a third party must be enforced by separate suit, and not in execution of the decree for the due performance of which it was given.(9) The Bombay High Court has held that summary process in execution is available.(10) See, however, now sect. 145.

Stay of sale.—The former section referred to execution of a decree "for money," and a decree for arrears of rent was held to be such.(11) These words have now been omitted. The former section did not expressly state to what Court the application should be made. It was a point of doubt whether the Appellate Court had jurisdiction.(12) The amendment makes it

(1) See *In re* Bhugwan Chunder Ghose, 6 W. R. Misc. 15 (1866).

(2) See Wise *v.* Rajkrishna Roy, B. L. R. F. B. 541, 550 (1866), which also held that the corresponding section under that Act did not apply to cases on appeal from the High Court to the Privy Council.

(3) Dhunjibhoy Cowasji *v.* Lisboa, 13 B. 241 (1888).

(4) See Sukhee Monee *v.* Brojoraj Mookerjee, 17 W. R. 69 (1871).

(5) Hukum Chand Baid *v.* Kamalanand Singh, 33 C. 927; s. c., 3 C. L. J. 67 (1905), where the earlier decisions are collected.

(6) Cf. Narayan Deo *v.* Gajanan Dikshit, 10 B. H. C. R. 1 (1873), in which it was held that the bond was not confined in its operation to the first Appellate Court, but included whatever order might be passed in appeal whether first or special: Shivlal Khubchand *v.* Apaji Bhivisav, 2 B. 654 (1878).

(7) Lutchmeeput Singh *v.* Sita Nath Doss, 8 C. 477 (1882).

(8) Surjoo Das *v.* Balmakund Das, 23 C. 212 at p. 215 (1895); but see at p. 216.

(9) Ib.; and see Arunachellam *v.* Arunachellam, 15 M. 203, at p. 210 (1891).

(10) Jamsedji *v.* Banabhai, 25 B. 409 (1900); and see Janki Kuar *v.* Sarup Rani, 17 A. 99 (1895).

(11) Banku Behary Sanyal *v.* Syama Churn Bhuttacharjee, 25 C. 322 (1897).

(12) Kunj Lal Marwari *v.* Bahitram Marwari, 8 C. W. N. 381 (1904); *In re* Murad-un-nissa, 15 A. 196 (1893); Tribeni Sahu *v.* Bhugwat Bux Rai, 11 C. W. N. 1030 (1907); s. c., 34 C. 1037.

clear that the application is to be made to the Court which passed the order.(1)

[s. 547.] **7.** No such security as is mentioned in *rules 5 and 6* shall be required from the Secretary of State for India in Council or, *where* the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

No security to be required from the Government or a public officer *in certain cases.*

8. *The powers conferred by rules 5 and 6 shall be exerciseable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.*

Exercise of powers in appeal from order made in execution of decree.

Appeal from orders in execution.—This rule, which is new, has been added to meet particularly the case where the litigant does not quarrel with the decree but appeals from an order passed in execution of that decree. It adopts, as regards stay of execution, the decision noted,(2) in which it was held that an Appellate Court had power to stay execution when an appeal from an order in execution proceedings was pending before that Court. See note to r. 5, *ante*, "Stay by Appellate Court."

Procedure on admission of appeal.

[s. 548.] **9.** (*1*) *Where* a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal.

(*2*) Such book shall be called the Register of Appeals.

Register of Appeals.

Registration.—The registration of an appeal is a proceeding of a purely ministerial character.(3) An appellant has no right to withdraw an appeal which has been regularly registered without the permission of the Court, and the leave of the Court is in every case necessary after an appeal has been regularly registered. As a general rule of practice, the respondent should be served with due notice of the application for leave when it is made after the notice of the day fixed for hearing has been issued. In every instance the appellant will be liable to pay to the respondent his costs occasioned by the appeal.(4) When

(1) As to meaning of expression "Court which passed the decree," see Ghazidin *v.* Fakir Baksh, 7 A. 73, 76 (1884).

(2) Pasupati Nath Bose *v.* Nanda Lal Bose, 28 C. 734 (1901).

(3) Syed Jaffer *v.* Sheikh Mahomed (1870), 4 B. L. R. Ap. 103, 104; s. c., 13 W. R. 351.

(4) Kareem Bee *v.* Beegam Bee and others (1869), 3 Mad. H. C. R. 368.

the Lower Appeal Court rejects an appeal—holding that no appeal lies, on the ground that the first Court's judgment was final under sect. 153 of the Bengal Tenancy Act—the High Court, on second appeal, when *primâ facie* the suit is not one under sect. 153 of the Tenancy Act, can direct that the appeal in the Court below be duly registered under this rule.(1)

10. (*1*) The Appellate Court may *in* its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both : [s. 549, paras. one to three.]

Appellate Court may require appellant to *furnish* security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India *other than* the property (if any) to which the appeal relates.

Where appellant resides out of British India.

(*2*) *Where* such security *is* not furnished within such time as the Court orders, the Court shall reject the appeal.

Object of rule.—This rule was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance.(2) Its object is to secure the respondent in an appeal from the risk of having to incur further costs which he might never succeed in recovering from the appellant.(3) The fourth paragraph of the former section, which was one of procedure only,(4) and dealt with summary proceedings in execution against the surety, has been omitted. The matter is covered by section 145, *ante*.(5)

"**The Appellate Court.**"—This rule applies, it has been held, only to appeals preferred to the High Court from subordinate Courts subject to its appellate jurisdiction, and not to appeals preferred to the High Court under clause 15 of the Letters Patent from the judgment of one of its own Judges,(6) and does not apply to appeals from the orders of a Judge sitting as a commissioner of the Insolvent Court,(7) the right of appeal in such cases being given by sect. 73 of the Insolvent Act (11 & 12 Vict. c. 21). It is applicable to an appeal from an order under sect. 244 (now sect. 47).(8)

(1) Mathura Mohun *v.* Amiruddi (1903), 8 C. W. N. 64, 66.

(2) Lakhmi Chand *v.* Gatto Bai, 7 A. 542, 546 (1885).

(3) Lekha *v.* Bhauna, 18 A. 101, 103, 104 (1895).

(4) Added to the Code of 1882 by sect. 46 of Act VII. of 1888.

(5) Abdul Wahed *v.* Farcedoonnissa, 16 C. 323, 326 (1889).

(6) Sisha Ayyar *v.* Nagarathua (1903), 27 M. 121, 123; as to orders by single Judges sitting on the original side, see Monohur Doss *v.* Khodrum (1865), Bourke 110; Cazee Mazhur *v.* Denobundo (1865), Bourke 119; Bama Sundari *v.* Ramnarayan (1875), 7 B. L. R. App. 59; Nawab Behram *v.* Haji Sultanali, 14 Bom. L. R. 1106 (1912).

(7) In the matter of Ramsebak Misser, 5 B. L. R. 179 (1870).

(8) Dagdu *v.* Chandravan, 1 Bom. L. R. 837; 24 B. 314 (1899).

"**In its discretion.**"—Under the first paragraph the Court has absolute discretion in all cases not coming under the second paragraph in making or refusing an order for security for costs. Under the second paragraph, which is the proviso to the first, the Court is given no discretion in the matter. In cases falling within that proviso the Court has to follow the mandate of the statute and make an order for security for costs. An order for security for costs having been made under either the first paragraph or the second, it is by the third paragraph of the rule enacted that if such security be not furnished within such time as the Court orders the Court shall reject the appeal. There again the Court is given no discretion in the matter.(1) But the Bombay High Court has recently held that under sect. 129 it is not bound to demand such security under the second paragraph, since the provisions of the Bombay High Court Rules are inconsistent with this.(2) In this as in other cases the discretion must be properly exercised. And this is not so when no opportunity has been given to show cause against the order.(3) The rule is somewhat general in its terms, and it is very desirable that in applying it, the Court should proceed in the exercise of its discretion on some definite general principles; otherwise litigants will be encouraged to make applications, in the great majority of cases.(4) Mere poverty is no ground for requiring an appellant to give security for the costs of the appeal.(5) But where something more than mere poverty is alleged, as where it has been found that the suit is a mere speculation, security may be called for.(6) If the appellant is unable to pay the costs ordered, there is nothing vexatious in his not obeying the order; it is his misfortune and not his fault; but where the conduct of the party complained of, in not paying the costs ordered to be paid, is vexatious—that is, such as indicates a wilful determination on his part not to obey the order of the Court and there is a vexatious determination not to pay costs ordered to be paid—there is good ground for applying for security for costs.(7) Where the parties have agreed that there should be security for costs, security should be demanded.(8) The Madras High Court has held that the former section was applicable to appeals *in formâ*

(1) Lekha *v.* Bhauna, 18 A. 101, 103, 104 (1895).

(2) Behram Jung Nawab *v.* Haji Sultan Ali Shustry, 37 B. 572 (1912). For Bombay High Court Rules, see Appendix.

(3) Siraj-ul-Haq *v.* Khadim Husain, 5 A. 380 (1883). In Balwant Singh *v.* Doulat Singh, 18 I. A. 57; s. c., 8 A. 315 (1886), where there was no proper notice, the appeal was restored.

(4) Ahmed bin Shaik Essa *v.* Shaik Essa (1888), 13 B. 458, 461, in which also the Bombay practice as to amount of security is referred to.

(5) Maneckji Limji *v.* Goolbai (1878), 3 B. 241; Lakhmichand *v.* Gatto Bai (1885), 7 A. 542; Jiwan Ali *v.* Basa Mal (1886), 8 A. 203; Khajah Assenoollajoo *v.* Solomon (1887), 14 C. 533 [it is otherwise if he is not the real litigant, but a puppet in the hands of others]; Hewitson *v.* Deas, 21 C. 526 (1894); *Quære* therefore as to Jogendra Deb Roykut *v.* Funindro Roykut, 18 W. R. 102 (1872). As to pauperism, see Hanken *v.* Turnor, 10 Ch. D. 372, 376 (1878), and insolvency, Rhodes *v.* Dawson, 16 Q. B. D. 548; Havelock *v.* Ashberry, 19 Ch. D. 84; Cook *v.* Whitlook, 24 Q. B. D. 658; Blackett *v.* Blackett, C. A. (1902), W. N. 91, pp. 170, 175.

(6) Ram Sing *v.* Balubai (1903), 5 Bom. L. R. 661, in which it was also held that the Court in exercising its discretion might well be guided by the provisions of sect. 380 (now O. XXV. r. 1) of the Code.

(7) Ahmed bin Shaik Essa *v.* Shaik Essa, 13 B. 458, 462 (1888).

(8) Elias *v.* Chuckerbutty, 1 Ind. Jur. N. S. 223.

pauperis, though very special grounds must be shown for taking security.(1) The Calcutta High Court has held otherwise.(2)

"**On the application.**"—Such an application must be made promptly. The rule has always been that applications for security for costs must be made promptly, not only on the ground that the respondent should apply for security for costs before he incurs them, but on the ground that it is unreasonable that security should not be applied for till the applicant has incurred the costs of the appeal, whether they have been paid by himself or by his solicitors.(3) Thus when an application for security for costs already incurred and for estimated costs was made by the respondent, when the appellant had already incurred all the costs of preparing the paper book and the appeal was actually on the board, the application was dismissed with costs.(4) It is a wholesome rule of practice that no order affecting a party should be made without notice to him calling upon him to show cause why the order should not be made.(5) The practice is that the respondent obtains a *rule nisi* on an affidavit, then the appellant shows cause and then the respondent replies.(6)

"**Of the respondent.**"—The Appellate Court has no power of its own motion to dismiss an appeal for not furnishing security (when no application has been made for security for costs by the respondent) because the appellant is guilty of no default, not having been called upon by the respondent or the Court to furnish security for costs or of laches, in not voluntarily offering security.(7)

"**From the appellant.**"—An application that the respondent should give security was of course refused.(8)

"**Or of the original suit.**"—This expression must refer primarily to the original suit in which the decree was passed, in execution of which the order appealed against was passed. It may also refer to the costs recited in the order in the execution proceedings, which are proceedings in the suit. Thus the Court has power to require an appellant from an order under sect. 244 (now sect. 47), to give security for the costs of the appeal and of the original suit.(9) As regards the costs of original hearing, the applicant must make out either that the appellants are residing out of the jurisdiction, or that the conduct

(1) Sishayyangar *v.* Jainulavadin, 3 M. 66 (1880).

(2) Nussurooddeen *v.* Ujjal Biswas, 17 W. R. 68 (1871).

(3) Pooley's Trustees *v.* Whitham, 33 Ch. D. 76 (1886); Jogendra *v.* Janindra, 18 W. R. 102 (1872).

(4) Bhobonath *v.* Radhaprasad, 5 C. W. N. 119 (1900).

(5) Siraj-ul-Haq *v.* Khadim Husain, 5 A. 380 (1883). It was held in this case that an order rejecting an appeal, for not furnishing security, was a "decree," but on this point the case has been overruled by Lokha *v.* Bhauna (1895), 18 A. 101.

(6) Bama Sundari *v.* Samnarayan (1877), 7 B. L. R. Ap. 59.

(7) Wise *v.* Jugbundoo, 7 M. I. A. 431 (1859).

(8) Bhugobutty *v.* Issur Chander, 16 W. R. 311 (1871); and see Fleming *v.* Shearman, 4 B. L. R., O. C. J. 92 (1870), where defendant was held not entitled to an order detaining in Court, pending appeal, money paid into Court by the plaintiff, who was subsequently successful.

(9) Dagdu *v.* Chandrabhan, 1 Bom. L. R. 837 (1899); s. c., 24 B. 314. As to the Code of 1859, see Bama Sundari *v.* Ramnarayan Mitter, 7 B. L. R. App. 59 (1871).

of the party complained of, in not paying the costs ordered to be paid, is vexatious.(1)

Form of order.—An order for security for costs should follow the words of the rule, and should not specify the particular amount in rupees for which security should be given. It would be a good order under the rule if it directed the appellant to furnish the security within a time to be stated "for the costs of the appeal" or "for the costs of the original suit" or "for the costs of the appeal and of the original suit." To hold that the order must specify the amount in rupees of costs for which security should be given would either be to frustrate the intention of the Legislature in framing the section, or to make the order a purely speculative order. The object of the rule is that the respondent at the earliest moment which suits him should take the advantage of the rule, and at that time it would be impossible for the respondent, the appellant, or the Court to say what might be the costs of the appeal. The last paragraph of the former section was said to point to the security being for an indefinite and not for a definite amount. An order specifying the amount would not be a bad order, but the better practice is that the amount should not be specified in the order.(2)

"Within such time."—The application to the Court to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that it should do so. If ultimately the order is not complied with, and the security is not furnished, the appeal may be rejected.(3) It cannot be laid down as a hard-and-fast rule that the Court can in no case, after the time for giving security is passed, allow the appellant further time for giving security.(4) This principle has now been adopted in sect. 148, *ante*. Though the Court may extend the time for furnishing the security demanded, after the time allowed by the order has elapsed it will not do so unless on good grounds.(5)

"Shall reject."—The Code empowers the Appellate Court to demand security, and directs that Court to reject the appeal if the security is not furnished within the time the Court orders. To justify the rejection of the appeal there must have been a demand on the part of the Court. The issue of a preliminary notice to show cause is not tantamount to a demand. It simply informs the appellant that the Court proposes to consider the propriety of demanding security from him, and offers him the opportunity of showing cause to the contrary. A Court is not bound by the Code to issue such a notice, though in practice it would generally be improper to make an order for security without affording

(1) Ahmed bin Shaik Essa *v.* Shaik Essa, 13 B. 458, 462 (1888).

(2) Lekha *v.* Bhauna (1895), 18 A. 101, 105, overruling Thakur Dass *v.* Kishori Lal (1884), 9 A. 164; see also Ahmed bin Shaik Essa *v.* Shaik Essa, 13 B. 458 (1888).

(3) Budri Narain *v.* Sheo Koer (1889), 17 I. A. 1, 3, 4; s. c., 17 C. 512, 514 [overruling Haidri Bai *v.* E. I. Ry. Coy. (1878), 1 A. 687, 688: followed in Shirajudin *v.* Krishna, 11 M. 190 (1887); see Bhugwan Das Bogla *v.* Haji Ahmed, 16 B. 263, 266 (1891)]; Chunni Lal *v.* Ajudhia Prasad, 19 A. 240, 243 (1896).

(4) Jumna Bai *v.* Vissandas (1897), 21 B. 576, 579.

(5) Madhusudan *v.* Adhikari Prapanna (1889), 17 I. A. 9; s. c., 17 C. 516; Rajab Ali *v.* Amir Hossein (1889), 17 C. 1 (p. c.).

the appellant the opportunity of contesting it. Where such notice is given the appellant is not bound to appear. He may allow the application to be decided in his absence. If he does not appear and the order is not made in his presence, he must have due notice of it to constitute a demand. The order directing the appellant to furnish security must be served either on him or on his vakil. It would be unreasonable to hold that he was in contempt or disobedience of an order which had not been communicated to him.(1) Conflicting opinions have been expressed upon the question whether when the appellant has not given security for costs, the respondent should apply specially to have the appeal rejected or whether it is sufficient for him to object at the hearing of the appeal for non-compliance with the order.(2) An appeal, though rejected, may, on sufficient grounds, be restored.(3) No appeal is given from an order for security for costs. It has been held, therefore, that it could not have been intended that the order for security which was unappealable might be questioned by an appeal from the act of the Court compulsorily done under the rule on security not being given as ordered. An order, therefore, rejecting an appeal under this rule is not a decree and is not appealable as such,(4) nor as an order.(5)

Power to dismiss appeal without sending notice to Lower Court.

11. (1) The Appellate Court, *after sending for the record* if it thinks fit *so to do, and* after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court *from* whose decree the appeal is *preferred* and without serving notice on the respondent or his pleader. [s. 551.]

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not *appear when the appeal is called on for hearing*, the *Court may make an order that the* appeal be dismissed.

(3) The dismissal of an appeal under this *rule* shall be notified to the Court *from* whose decree the appeal is *preferred.*

Summary dismissal.—This rule applies to appeals admitted and registered.(6) A proceeding under this rule is to all intents and purposes a trial,(7)

(1) Timmu *v.* Deva Rai, 5 M. 265, 266 (1882).

(2) Muhammadbhai *v.* Bhauji Topan, 3 Bom. H. C. R. 64 (1866), *contra* Thakur Das *v.* Keshori Lal, 9 A. 164, 166 (1886) [overruled on another point by Lekha *v.* Bhauna (1895), 18 A. 101, 105]. It is to be noted that in the first case another rule of Court had also been disregarded.

(3) Balwant Singh *v.* Doulat Singh, 8 A. 315 (1886); see Jamnabai *v.* Vissondas, 21 B. 576, 579 (1897).

(4) Lekha *v.* Bhauna, 18 A. 101, 103, 104 F. B., overruling Siraj-ul-Haq *v.* Khadim Husain, 5 A. 380 (1883); Firozi Begam *v.* Abdul Latif, 30 A. 143 (1908).

(5) O. XLIII.

(6) Rudr Prasad *v.* Baijnath, 15 A. 367 (1893), in which Edge, C.J., also held that there was a power to summarily reject a memorandum of appeal before admission, if none of the grounds mentioned in sect. 584 (now 100) existed.

(7) Thakur of Masada *v.* Widow of Thakur of Nandwasa, 2 A. 819, 823 (1880).

and a judgment and decree should be drawn up in the usual manner. It has been held that in dismissing an appeal under this rule a District Judge is not relieved from the necessity of writing a judgment, however short, showing the points raised, the decision thereon, and the reasons therefor.(1) But it is not the practice of the Calcutta High Court to draw up decrees under this rule.(2) And the Allahabad High Court has held that it is not obligatory upon the lower Appellate Court to write a judgment in such cases.(3) But a Full Bench of the Bombay High Court has recently held that a lower Appellate Court must write its judgment (as provided by Bombay Civil Circular 51), when it dismisses an appeal under this rule.(4) The order of dismissal under this rule is a decree and not merely a refusal to entertain the appeal, and so far as it is a final adjudication there is no distinction between an appeal which is dismissed under this rule and an appeal dismissed after full hearing.(5) Where an appeal is dismissed under this rule, the effect of the dismissal is to affirm the decree appealed against, which becomes merged in the decree of dismissal of the Appellate Court. When, therefore, an appeal has been dismissed under this rule, the Court which made the decree appealed against has no jurisdiction to review its judgment or decree.(6)

[s. 552.] **Day for hearing appeal.**

12. (*1*) Unless the Appellate Court dismisses the appeal under *rule 11*, it shall fix a day for hearing the appeal.

(*2*) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

It is not competent to a Court of Appeal to restrict the ground or grounds upon which the appeal heard under this rule is to be admitted finally.(7)

[s. 550.] **Appellate Court to give notice to Court whose decree appealed** *from*.

13. (*1*) *Where* the appeal is *not dismissed under rule 11*, the Appellate Court shall send notice of the appeal to the Court *from* whose decree the appeal is *preferred*.

(1) Puttappa *v.* Yellappa, 5 Bom. L. R. 233 (1903); Rami Deka *v.* Brojo Nath Saikia, 25 C. 97 (1897); Royal Reddi *v.* Linga Reddi, 3 M. 1 (1881); Rakhal Chunder Tewari *v.* Satindra Deb Rai, 5 C. L. J. 348 (1906); Pachi Dassi *v.* Bala Das, 13 C. W. N. 1031 (1909).

(2) Uma Sundari Devi *v.* Bindu Bashini, 24 C. 759.

(3) Samin Hasan *v.* Perin, 30 A. 319 (1908); Tanaji Dagdo *v.* Shankar, 36 B. 116 (1911).

(4) Hanmant *v.* Annaji Hanmanta, 37 B. 611 F. B. (1913), overruling Tanaji Dagdo *v.* Shankar, 36 B. 116 (1911).

(5) Uma Sundari Devi *v.* Bindu Bashini Chowdhrani, 24 C. 759 (1897); but see Bapu *v.* Vajir, 21 B. 548 (1896), which, as well as the former case, deal with the question of amendment of the decree. This latter case has been dissented from in Asma Bibi *v.* Ahmad Hussein, 30 A. 290 (1908).

(6) Peary Mohan Mukherjee *v.* Mohendra Nath Manna, 4 C. L. J. 566 (1906); and see Ramappa *v.* Bharma, 30 B. 625 (1906).

(7) Lukhi *v.* Sri Ram, 15 C. W. N. 921 (1911); 14 C. L. J. 146.

(2) *Where* the appeal *is* from *the decree of* a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Transmission of papers to Appellate Court.

(3) Either party may apply in writing to the Court *from* whose decree the appeal is *preferred*, specifying any of *the* papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, *and given to*, the applicant.

Copies of exhibits in Court whose decree appealed *from.*

Records.—If there is any part of the record not sent up which the appellant wishes to bring before the Appellate Court, it is his duty to ask the Court to send for it before the day of trial.(1)

14. (1) Notice of the day fixed *under rule 13* shall be *affixed* in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court *from* whose decree the appeal is *preferred*, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all *the provisions* applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice. [s. 553.]

Publication and service of notice of day for hearing appeal.

(2) Instead of sending the notice to the Court *from* whose decree the appeal is *preferred*, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the *provisions* above referred to.

Appellate Court may itself cause notice to be served.

15. The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*. [s. 554.]

Contents of notice.

Procedure on hearing.

16. (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal. [s. 555.]

Right to begin.

(1) Buksh Ali Sowdagir *v.* Joyanut Khan, 11 W. R. 248 (1869).

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

Hearing.—The rule says "on the day fixed," but the hearing of the appeal before the day fixed, if the pleaders of both parties are present and argue the case, is not such a defect in procedure as renders interference in special appeal necessary.(1) If it appears that the rules of Court relating to appeals have not been complied with, and no adequate excuse is offered, the appeal may be dismissed.(2)

[s. 556.]

Dismissal of appeal for appellant's default.

17. (1) *Where* on the day fixed, or *on* any other day to which the hearing may be adjourned, the appellant does not *appear when the appeal is called on for hearing, the Court may make an order that* the appeal be dismissed.

Hearing appeal *ex parte.*

(2) *Where* the appellant *appears* and the respondent does not *appear*, the appeal shall be heard *ex parte.*

"Where on the day fixed," etc.—A party seeking to put in motion the stringent provisions of this rule is bound to show very distinctly that the procedure under it has been strictly complied with, and that the appellant did not make his appearance on the day to which the case was adjourned. When he is unable to show that, or that the appellant below had any notice that his appeal was to have been heard on the day on which the Judge disposed of it, the appeal cannot be dismissed under this rule.(3) Where a Lower Appellate Court, after eleven months' delay and without fixing any time for disposing of an appeal, dismissed it for default, the High Court set aside the order and remanded the case.(4) If an appeal is called on without any day having been fixed for hearing and the appellant is absent, his absence is not a default which renders his appeal liable to be dismissed.(5) It should appear on the record that a day had been fixed for the hearing of the appeal, and that thereupon the default had followed.(6) But if an appeal is taken up before the appointed day and is allowed to proceed to a hearing in the presence of the pleaders of the parties and is argued by them, there is no defect in the procedure.(7)

"Appear."—The former section (556) ran "*does not attend in person or by his pleader.*" But the word "attend" was held to be practically synonymous with "appear." (8) The present wording therefore effects no alteration in the

(1) Hukumunnissa *v.* Bibee Muckdoomun, 1 W. R. 246 (1864).

(2) Bhungi Girdhar *v.* Morgan, 3 B. H. C. R. O. C. J. 63 (1866).

(3) Shib Chunder *v.* Allad Monee (1866), 5 W. R. Mis. 22.

(4) Soodhamonee *v.* Gooroopersaud (1864), W. R. 176.

(5) Huro Chunder *v.* Ram Coomar (1865), 2 W. R. 254.

(6) Ib.

(7) Hukumunnissa *v.* Bibee Muckdoomun (1864), 1 W. R. 246.

(8) Satish *v.* Ahara Prasad, 34 C. 403, 408, 417, F. B.; s. c., 11 C. W. N. 329.

sense. Where there has been no "appearance" the rule applies. But when there has been an "appearance" it does not.(1) The question, however, has arisen as to what constitutes an appearance within the meaning of the rule. "Appearance" has several meanings, and these must be understood in reference to the particular subject to which it relates, and the purpose or end to be answered by the appearance has an important bearing in determining what is sufficient to constitute an appearance in a particular case. A Full Bench of the Calcutta High Court (2) has recently ruled that an application by counsel or pleader who is instructed only to apply for an adjournment, which is refused, is not an "appearance;" and that when in such circumstance an appeal is dismissed, the dismissal is one for default under this rule entitling the appellant to apply for re-admission under r. 19. The decisions are not altogether uniform, but the balance of authority in the Bombay (3) and Allahabad (4) High Courts is in favour of the same view, which has also been taken by the Punjab Chief Court.(5) Where, however, a pleader for the appellant appeared and asked for an adjournment but did not withdraw from the case, merely urging that the records were in possession of his leader who was absent, and that he could not argue the appeal, but the application for adjournment was not granted, it was held by the Madras High Court that it was open to the Court to refuse the adjournment, but that if it did so it was bound to write a judgment and dispose of the appeal, and could not dismiss it for default.(6) But the Madras High Court has recently held that where the pleader was instructed only to apply for an adjournment and was not duly instructed and able to answer all material questions relating to the suit, nor accompanied by any one able to answer such questions, there was no appearance by the defendant.(7) When the appellant and his pleaders were present when the appeal was called on for hearing, and one of the pleaders addressed the Court, but soon after the commencement of his argument, went to another Court and did not return, and the other pleader refused to address the Court, the appeal, it was held, should be dismissed, but not for default.(8) If the appellant, in a case remanded to the Lower Appellate Court, does not put in an appearance and takes no steps to produce evidence, the Lower Appellate Court may dismiss the appeal for default.(9) Where there were two appeals

(1) Patinhare Tarkatt *v.* Vellur Krishnan, 26 M. 267 (1902) [pleader appeared—asked for adjournment but did not withdraw]; Chiranji Lal *v.* Kundan Lal, 20 A. 294 (1898) [pleader stated that brief had come into his hands too late but did not withdraw].

(2) Satish Chandra Mukerjee *v.* Ahara Prasad Mukerjee, 34 C. 403 (1907), where the earlier cases will be found collected.

(3) Bhimacharya *v* Fakirappa, 4 B. H. C. R. 206 (1867); Soonder Lal *v.* Goor Prasad, 23 B. 414 (1898); *contra* Ram Chandra *v.* Madhay, 16 B. 23 (1891).

(4) Lalta Prasad *v.* Nand Kishore, 22 A. 66 (1899); Hira Dai *v.* Hira Lal, 7 A. 538 (1885); Ramtahal *v.* Rameshar, 8 A. 140 (1886); Shankar Dat *v.* Radha Krishna, 20 A. 195 (1897) [affirmed by P. C. in 23 A. 220 (1900)]; Baldeo Prasad *v.* Kunwar Bahadur, 35 A. 105 (1912).

(5) Gurdat Singh *v.* Sohan Singh, 6 P. L. R. 595 (1904).

(6) Patinhare Tarkatt *v.* Vellur Krishnan (1902), 26 M. 267; Chiranji Lal *v.* Kundan Lal (1898), 20 A. 294; see also Satish *v.* Ahara (1907), 34 C. 403, 414.

(7) Venkatarama *v.* Nataraja, 24 M. L. J 235 (1912).

(8) Jawahir *v.* Debi Singh (1895), 18 A. 119.

(9) Triloke Chunder *v.* Aukhu Chunder (1873), 21 W. R. 65.

by the same appellant before the Court and he was summoned to give evidence in one of them, but failed to attend, judgment, it was held, could not be given against him for default in the other appeal.(1)

"**Be dismissed.**"—The Court, in the absence of the appellant on the day fixed for hearing, should dismiss the appeal and not reverse the judgment of the lower Court.(2) If a Judge, instead of dismissing the appeal for non-appearance of the appellant in person or by pleader, goes into the merits of the case and gives judgment against the appellant, the appeal must be considered as dismissed for default of the appellant in appearing; and an application for re-admission and re-hearing of the appeal cannot be treated as one for review. It is improper to consider or decide upon the merits of a case when the Judge has no opportunity of hearing what the appellant has to say in support of it.(3) It is illegal to try an appeal on the merits in such a case, and the judgment given in this way is a nullity and must be cancelled, and its existence is no bar to the re-admission of the appeal.(4) The amended rule now says the Court may make an order of dismissal. The former section ran "shall be dismissed." (5)

Appeal.—An order dismissing an appeal from a decree for default,(6) or dismissing objections to the execution of a decree for default,(7) was formerly held to be a decree within the meaning of sect. 2 of the last Code and thus appealable. But that section now excludes orders of dismissal for default from the category of a decree.(8) A party may apply for re-admission under r. 19, and from this there is an appeal under O. XLIII., *post*.

Delivery of paper books.—In appeals to the High Court from its original jurisdiction, if the appellant does not deliver the prescribed number of paper books within the prescribed time, the respondent or his attorney may, with the leave of the Court, or a Judge, prepare and deliver such paper book, or he may apply on notice to the appellant, to have the appeal dismissed for want of prosecution, or for such other order as he may be advised. If no application

(1) Arunachella *v.* Venkatachella (1870), 5 M. H. C. R. 269.

(2) Munickaram *v.* Roop Narain (1862), Marsh, 5. But see Dakshinamoorthy *v.* Municipal Council of Trinchinopoly, 31 M. 157 (1907).

(3) Mohesh Chunder *v.* Thakoor Dass (1873), 20 W. R. 425, 426 [approved in Satish Chandra Mukerjee *v.* Ahara Prasad 34 C. 403, 414 (1907)]; Buldeo Misser *v.* Syud Ahmed (1871), 15 W. R. 143; Kanahai Lal *v.* Naubat Rai (1881), 3 A. 519.

(4) Zainab Begam *v.* Manawar Husain (1886), 8 A. 277, 278.

(5) Muruga Chetty *v.* Rajasami, 22 M. L. J. 284 (1912).

(6) Radha Nath *v.* Chandi Charan (1903), 30 C. 660 (F. B.), Prinsep, J., dissenting, overruling Jagarnath *v.* Budhan (1895), 22 C. 115; Anwar Ali *v.* Jaffer Ali (1896), 23 C. 827; see also Ram Chandra *v.* Madhav (1891), 16 B. 23; Mansingji *v.* Mehta Hariharram (1894), 19 B. 307. In Mansab Ali *v.* Nihal Chand (1893), 15 A. 359, the Allahabad High Court has held that such an order is not a decree and so not appealable as such; see also Nand Ram *v.* Muhammad Bakhsh (1880), 2 A. 616; Kanahai Lal *v.* Nanbat Lal (1881), 3 A. 519; Lal Singh *v.* Kunjan (1882), 4 A. 387; Gilkinson *v.* Subramania (1898), 22 M. 221; see also the cases cited in Radhanath *v* Chandi Charan, *supra*.

(7) Lal Narain *v.* Mahomed Rafiuddin (1900), 28 C. 81.

(8) Rukminimayi *v.* Paran Chandra, 39 C. 341 (1910); 15 C. L. J. 334; followed in Parbati *v.* Tulsi Koeri, 18 C. L. J. 128 (1913).

be made, the case will be set down in the next peremptory lists of appeals from the original side, and be disposed of by the Court as it may think fit.(1)

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

18. *Where* on the day fixed, or *on* any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of *serving* the notice, the Court may *make an* order that the appeal be dismissed : [s. 557.]

Provided that no such order shall be *made* although the notice has not been served upon the respondent, if on *any such* day the respondent appears *when the appeal is called on for hearing.*

Deposit.—A period must be fixed by the Court for the deposit; unless a time has been fixed the suit cannot be dismissed on the ground of failure to deposit.(2) A party has been held not excused for omission to deposit by the fact of the duty having been committed to an ignorant *kurpurdaz* who failed to perform it.(3) An appeal should not be dismissed for default merely because the appellant has failed to explain satisfactorily why the *talabana* was not deposited within the period fixed by the Court, without ascertaining whether there was ample time after the deposit to serve the notices upon the respondents.(4) If the fees for the service of the notice of appeal on the respondent are deposited, but the notice to be served as required by the Circular Order of the High Court is not filed, the appeal cannot be dismissed under this rule.(5)

Re-admission of appeal dismissed for default.

19. *Where* an appeal *is* dismissed under *rule* 11, sub-*rule* (*2*), *or rule 17 or rule 18*, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, *where* it *is* proved that he was prevented by any sufficient cause from *appearing* when the appeal was called on for hearing or from depositing the sum so required, the Court *shall* re-admit the appeal on such terms as to costs or otherwise as *it* thinks fit. [s. 558.]

"**The appellant.**"—This rule provides that an appellant, whose appeal has been dismissed for want of prosecution under the circumstances mentioned, may apply for the re-admission of the appeal, but nothing is said in it as to re-hearing the case upon the application of the respondent against whom an *ex parte* decree has been passed, and a respondent against whom such a decree

(1) Belchamber's Rules and Orders; Appellate Side Rules, Pt. II., Ch. VII., r. viii., p. 29.

(2) See Purshadee Lall *v.* Umbika Pershad, 11 W. R. 290 (1869).

(3) Pran Chunder Roy *v.* Jaggessar Mookerjee, 11 W. R. 417 (1869).

(4) Chandra *v.* Kaliprasanna, 35 C. 535 (1908).

(5) Gol Mahomed *v.* Abdul Jubbar, 16 C. W. N. 498 (1912); 15 C. L. J. 683.

has been passed cannot apply for re-hearing under this rule.(1) In such cases the remedy lies under r. 21.

"**To the Appellate Court.**"—The application must be made to the Court dismissing the appeal.(2) If an appeal is referred by a District Judge to an assistant Judge for trial, under sect. 17 of the Bombay Civil Courts Act (Act XIV. of 1869), and the Assistant Judge dismisses the appeal for default, the application for re-admission of the appeal should be made to him and not to the District Judge, and his order refusing to re-admit the appeal is not subject to reversal or review by the District Judge.(3) As to limitation in case of such an application, see case cited.(4)

"**Prevented.**"—This and the kindred provision in O. IX. r. 13 mean that the application may be based upon any ground which would be a just and proper one for granting the application, and not that the application can be based upon one ground only, viz. that the applicant was prevented by sufficient cause from appearing. The affirmative provisions of the Code that a plaintiff or appellant may prove that he was "prevented by sufficient cause" from appearing or attending when his suit or appeal was called on and dismissed, do not imply the negative, namely, that an application for restoration cannot be granted unless "sufficient cause (in this sense) is shown." (5) It has been recently held that a Court has power to restore an appeal dismissed for default even where the appellant is not able to prove that he was prevented by a sufficient cause from appearing, and that the Court is not bound to restore an appeal in every case where the non-appearance is due to the pleader's negligence, but may in its discretion leave him to his remedy against the pleader by an action for damages.(6) The Court is bound to see whether the reasons set forth in the application for the re-admission of the appeal are satisfactory or not. Thus, where the Lower Appellate Court refused an application for re-admission merely because the appellant had not conformed to a rule which he had passed that two pleaders should be engaged in every appeal, the High Court sent back the case to the Judge to consider whether a good ground had been shown for the re-admission of the appeal.(7) The reasons for rejecting the application should be stated.(8) When an appeal was transferred from the file of one Court to another, no notice of the transfer having been given to the appellant by the pleaders in the case, and the appeal was dismissed in his absence, held that sufficient ground for his absence had been made out.(9) What, however, is "sufficient cause" must be decided in each case according to its own peculiar circumstances.

"**From appearing.**"—Whether the application is made for restoration under this rule or O. IX. r. 13, the same principle will apply. In both cases

(1) Tara Chand *v.* Anund Chunder (1868), 10 W. R. 450.

(2) Kisto Persad *v.* Cowie (1864), W. R. 315.

(3) Sakharam Lakshman *v.* Govind Joti, 15 B. 107 (1890).

(4) Hinga Bibee *v.* Munna Bibee, 31 C. 150 (1903).

(5) Somayya *v.* Subbamma (1903), 26 M. 599, 602.

(6) Muruga Chetty *v.* Rajasami, 22 M. L. J. 284 (1912).

(7) Shomaed Ali *v.* Eusoof Khan, 15 W. R. 80 (1871); Huro Chunder *v.* Ram Coomar, 2 W. R. 254 (1865).

(8) Huro Chunder *v.* Ram Coomar, *supra*.

(9) Narain Singh *v.* Bheurab Churn Panda, 8 C. L. R. 360 (1881).

the question is whether an appearance by a counsel or pleader instructed to apply only for an adjournment is an "appearance" within the meaning of the Code, and whether in such a case the suit or appeal can be dismissed for default. The first question has been answered in the negative and the second in the affirmative.(1) When an appeal is dismissed under such circumstances, the order of dismissal is for default, and the appellant is entitled to apply for re-admission of the appeal under this rule.(2) Where an appeal is dismissed by a Divisional Bench of the High Court, for default in depositing the estimated costs of preparation of the paper book, such a dismissal can be set aside by review. Such a case is not one in which default was made in appearing at the hearing of the case, if the record shows that the pleaders on both sides were in attendance and heard. Under the Code there are only two methods known to the law by which a judgment and decree of a Divisional Bench of the High Court can be set aside in India. These two methods are described in these provisions and those relating to review. Where it appears from the record that pleaders on both sides were in attendance and heard, there has been no default in appearing at the hearing of the case, and therefore this rule will not apply.(3)

Appeal.—The Code allows an appeal from an order refusing to grant an application under this rule for the restoration of an appeal. But it does not provide for an appeal from an order granting such an application.(4) When, however, the order dismissing an appeal is not one which can properly be made under r. 17, there is no appeal from an order refusing to re-admit the appeal under this rule, and the remedy, in such a case, is by revision. Thus, in a case when the appeal came on for hearing, the appellant himself and two pleaders on his behalf were present in the Lower Appellate Court; one of the pleaders opened the case, but in a short time was called away to attend to a case before another Court, and the Lower Appellate Court, waiting some little time for the pleader to return, called upon the other pleader and the appellant to support the appeal, and when each of them declared his inability to do so, dismissed the appeal "for the default of prosecution." The then appellant applied for the restoration of the appeal, which was refused, on the ground that no sufficient cause was shown for the restoration. The appellant appealed to the High Court under this rule. It was dismissed on the ground that the appeal in the Lower Appellate Court was not dismissed for default, but the appellant was allowed to file an application for revision.(5) When an application for restoration

(1) Satish *v.* Ahara Prasad (1907), 34 C. 403, 417 (F. B.); s. c., 11 C. W. N. 329; 5 C. L. J. 247; Cooke *v.* Equitable Coal Co. (1904), 8 C. W. N. 621; see also the cases cited in notes to r. 17.

(2) Satish *v.* Ahara Prasad, *supra*; overruling Watson & Co. *v.* Ambica Dasi (1899), 4 C. W. N. 237; s. c., 27 C. 529.

(3) Fatimunnissa *v.* Deoki Pershad (1896), 24 C. 350, 354 (F. B.); s. c., 1 C. W. N. 21; Ramhari *v.* Madan Mohan (1895), 23 C. 339, so far as it decided the contrary, overruled.

(4) O. XLIII.; Gulab Kunwar *v.* Thakur Das (1902), 24 A. 464; Huro Chunder *v.* Ram Coomar (1865), 2 W. R. 254; Shaikh Mittoo *v.* Ruhman Khan (1867), 8 W. R. 361; cf. Ramessur Dutt *v.* Lootfunnissa (1866), 6 W. R. Mis. 130; Kalee Kistoo *v.* Hureehur (1868), 10 W. R. 160.

(5) Jawahir Sing *v.* Debi Sing (1895), 18 A. 119; for meaning of the word "default," see Satish *v.* Ahara Prasad, 34 C. 903, and notes to r. 17; but see Buldeo Misser *v.* Syed Ahmed, 15 W. R. 143 (1871); Shibendra *v* Konoo Ram, 12 C. 605 (1886).

is made the applicant must produce all his evidence in support of it before the Court to which it is made. If he does not do so and the application is refused, he cannot, on appeal from the order dismissing his application, supplement his evidence.(1)

Power to adjourn hearing and direct persons appearing interested to be made respondents.

20. *Where* it appears to the Court at the hearing that any person who was a party to the suit in the Court *from* whose decree the appeal is *preferred*, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

Adding respondent.—The power of the Court to act under this rule is only limited in two respects, first, the person whom the Court may add must have been a party to the suit, and secondly, he must be a person interested in the result of the appeal. There is no period of limitation specified in the Limitation Act, for the action of the Court in that matter.(2) The party added must be interested in the result of the appeal. Whether this be so must be determined in each case on its facts.(3) In a suit for contribution the first Court gave a decree against one of the defendants and dismissed it against the other. On appeal by the defendant against whom the decree was passed, the lower appeal Court having, at the hearing of the appeal, found that the defendants, against whom the suit was dismissed, were not made parties to the appeal, though interested in the result of the appeal, directed that they should be made parties; and they entered appearance in accordance with the order made. Held that there was nothing wrong in the lower appeal Courts making them respondents and passing a decree against them.(4) An Appellate Court is competent to make a person a respondent who in the original suit was arrayed on the same side with the appellant.(5) In a suit for contribution, where there was a decree against defendants Nos. 1 and 3 separately, and the suit was dismissed against defendant No. 2: on appeal by defendant No. 1, there being no appeal by the plaintiff,

(1) Muzaffar Ali *v.* Kedarnath, 20 A. 266 (1898).

(2) Bindeshri *v.* Ganga Saran (1892), 14 A. 154; Girish Chunder Lahiri *v.* Sasi, 33 C. 329, 337 (1905).

(3) See *e.g.* Bishun Churn *v.* Jagendranath, (1898); 26 C. 114, 121; Amlook Chand *v.* Sarat, 16 C. W. N. 49 (1911); 38 C. 913.

(4) Upendra Lal Mukerjee *v.* Girindra (1898), 25 C. 565, 568; s. c., 2 C. W. N. 425; Rup Jan Bibee *v.* Abdul Kader (1904), 8 C. W. N. 496, 500 (F. B.), diss. from Anna Ram *v.* Balkishen (1883), 5 A. 266, where it was held that inasmuch as s. 559 did not empower an Appellate Court virtually to make an appeal for an appellant, who had refrained from availing himself of his privileges under law, by introducing for him other respondents than those included in the memorandum of appeal, defendants against whom the suit was dismissed could not be made respondents. See also Soiru Padmanabh *v.* Narayan Rao (1893), 18 B. 250; Husdon *v.* Basdeo Bajpye (1898), 26 C. 109, 113; s. c., 3 C. W. N. 76; Subramanian *v.* Veerabadran, 31 M. 442 (1908).

(5) Sohna *v.* Khalak Singh (1889), 13 A. 78, 86; Konagappa *v.* Sokkalinga (1892), 15 M. 362.

defendant No. 2 might, it was held, be made a respondent.(1) The Allahabad High Court has held that the provisions of the former section did not apply to second appeals, and that a second Appellate Court could not add a party as a respondent unless that party was a party to the appeal below, and this notwithstanding that he was a party to the suit in the Court of first instance; (2) but the opposite view has been held by the Madras High Court, and according to the ruling of that High Court, it is competent for the second Appellate Court to add parties who were defendants in the Court of first instance, though not joined as respondents in the Lower Appellate Court.(3) This rule applies only to cases where at the hearing of the appeal the Court is satisfied that a person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal.(4)

Re-hearing on application of respondent against whom *ex parte* decree made.

21. *Where* an appeal is heard *ex parte* and judgment is *pronounced* against *the respondent*, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from *appearing* when the appeal was called on for hearing, the Court *shall* re-hear the appeal on such terms as to costs or otherwise as *it* thinks fit to impose upon him. [s. 560.]

Rehearing of appeal.—After an appeal is filed the power to set aside the original decree on an application under sect. 108 (now O. IX. r. 13) is vested in the Appellate Court. This power is distinct from the power to set aside an *ex parte* appellate decree conferred by the present rule, which only enables the Court to direct the appeal from the original decree to be reheard, thus temporarily restoring the original decree.(5) No appeal lies to the High Court under sect. 153 of the Bengal Tenancy Act from an order refusing to hear an application under this rule to have an appeal from a decree in a rent suit, valued less than Rs.100, reheard in the presence of the respondent.(6) An application to rehear the appeal is an application in the suit.(7)

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

22. (*1*) Any respondent, though he may not have appealed *from* any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any *cross*-objection to the decree which [s. 561.]

(1) Rup Jan Bibee *v.* Abdul Kadir (1904), 8 C. W. N. 496, 500.

(2) Chunni *v.* Lala Ram (1893), 15 A. 5, 8.

(3) Paya Matathil *v.* Kovamel Amina (1895), 19 M. 151, 153.

(4) Bhima Rout *v.* Dasarathi, 40 C. 323 1912).

(5) Sankara Bhatta *v.* Subraya Bhatta, 30 M. 535 (1907); s. c., 17 M. L. J. 436.

(6) Samed Sheikh *v.* Naba Nepal Ghose, 19 C. L. J. 310 (1914).

(7) Ib.; and see Accha Mian *v.* Durga Churn, 25 C. 146; 2 C. W. N 137 (1897).

he could have taken by way of appeal, provided he has filed *such* objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Form of *objection* and provisions applicable thereto.

(*2*) Such *cross*-objection shall be in the form of a memorandum, and the provisions of *rule 1*, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(*3*) Unless the respondent files with the objection a written acknowledgment from the *party who may be affected by such objection* or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on *such party* or his pleader at the expense of the respondent.

(*4*) *Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.*

(*5*) The provisions *relating to pauper appeals* shall, so far as they can be made applicable, apply to an objection under this *rule*.

Scope of rule.—In this rule two classes of cases have been referred to: under it a respondent may, firstly, *support* the decree of the Court of first instance upon grounds which may have been decided against him by that Court; and if a part of the decree is adverse to him he has the right to *object* at the hearing of the appeal to that part of the decree without filing a separate appeal. These two classes of cases are not of an analogous character. Cross-objections are in the nature of an appeal, a remedy which a respondent has against a decree which is partly unfavourable to him.(1) A respondent, when the decree is against him, cannot (unless he has filed a cross-appeal) be heard except to support the decree, and can only alter it by means of a cross-appeal.(2) A party may be satisfied with the decree of the Lower Court, and may be willing to allow it to stand unimpeached if his opponent does not think it necessary to appeal; but he may not be willing to have the decree modified or altered upon appeal in favour of his opponent, without having the whole decree set right. Again, suppose a defendant sets up two defences to a claim brought against him, and the Lower Court determines in his favour as to one of them and against him as

(1) Kalyan Singh *v.* Rahmu, 23 A. 130, 134 (1901); see also Ramjiwan Mal *v.* Chand Mal, 10 A. 587, 601, 602 (1888); Jamaitunnissa *v.* Lutfunnissa (1885), 7 A. 606, 621; Thakoor Dass *v.* Gopee Kristo (1871), 5 W. R. 18; and as to appeal and cross-objections under the City of Bombay Improvement Act, see Raghunath Das *v.* Secretary of State, 29 B. 514 (1905); and see Rangam Lal *v.* Jandhu (1911), 34 A. 32.

(2) Casperz *v.* Kishori Lal Roy Chowdhury (1896), 23 C. 922, 929; s. c., 1 C. W. N. 12.

to the other; the plaintiff's claim would be dismissed. The Lower Court might be wrong as to both defences, and ought to have decided in the defendant's favour the defence which was decided against him, and *vice versâ*. If the plaintiff were to appeal and to reverse the decision of the Lower Court upon the defence decreed in the defendant's favour, it would be unjust not to allow the defendant, if he could, to show that the Lower Court was wrong in point of law in determining the other defence against him, for he might thereby be able to show that the Lower Court was substantially right in dismissing the plaintiff's suit, though wrong as to the defence which barred it.(1) He may support the decree on the ground decided against him. This reason applies to special appeals with as much force as it does to regular appeals.(2) It was held that the order of a Lower Appellate Court disallowing the objections filed by the respondent in that Court under sect. 561, was appealable, because it was a decree passed in appeal within the meaning of sect. 584 of the last Code, whether it dealt with the grounds of appeal urged by the appellant or the objections taken by the respondent under sect. 561.(3) It was also held that sect. 647 of the last Code made applicable to revision petitions under sect. 25 of the Provincial Small Cause Court Act, the procedure relating to appeals, and consequently a memorandum of objections would lie in such revision petitions.(4)

Decree entirely in favour of respondent.—Where a decree is entirely in favour of a respondent it is not necessary for him to file a notice of objection to the decision on any issue found against him. He can *support* the decree on the ground that that issue ought to have been decided in his favour. The Appellate Court ought to decide that issue or show in its judgment a reason for not doing so.(5) And see *ante*.

"Decided against him."—If a point has not been decided in favour of the respondent, it must for the purposes of the rule be taken to have been decided against him within its meaning. It is not necessary to entitle a respondent to support a decree upon a particular ground that that ground should have been in express terms decided against him.(6) Where a claim to set off was asserted in the respondent's (defendant's) written statement, but no issue on the point was raised, and no pronouncement on it was made by the first Court; and it was not made the subject of any cross-objection, nor was it urged before the Appellate Court in argument; the former section was *held* to be no bar to the Appellate

(1) Issur Ghose *v.* Hills (1862), 1 Ind. Jur. 25, 29; s. c., Marsh, 151, 153; 1 Hay. 350 W. R. Sp. n. 49; and as to Code of 1859, see *In re* Mirza Himmat, B. L. R., F. B. 429, 431 (1866).

(2) Ib.; Narayan Ayyar *v.* Lakshmi Ammal, 3 M. H. C. R. 216, 291 (1866).

(3) Ganapati *v.* Sitharama (1887), 10 M. 292, 294.

(4) Krishna Aiyangar *v.* Appanaiyangar, 17 M. L. J. 62 (1906).

(5) Lala Gouri Sunkar *v.* Janki Pershad (1889), 17 I. A. 57, 61; s. c., 17 C. 809; Bhagoji *v.* Bapuji (1888), 13 B. 75, 77.

(6) Shrish Chunder Ray *v.* Mungri Bewa, 9 C. W. N. 14, 18 (1904). In Balek *v.* Kansil, 4 A. 491 (1882), it was held on the facts that the matter was not decided against the respondent; in Ganga Prasad *v.* Gudadhar Prasad, 2 A. 651, 654 (1880), the appellant to the High Court lost his appeal in the Lower Court, and there was no objection which respondents could have taken by way of appeal to this Court against the decree of the Lower Appellate Court. See as to this case, Kamat *v.* Kamat, 8 B. 368, 370 (1884).

Court's jurisdiction to deal with the point, because the first Court did not decide the point adversely to the respondent. It did not deal with it, and so the case was held to fall within the operation of sect. 566 of the former Code.(1)

Decree unfavourable to respondent.—This rule gives the respondent the power of taking any objection to the decree at the hearing of an appeal which he could have taken by way of appeal,(2) provided he has filed a notice of his objection within the prescribed period. Where there is, as a matter of fact, an appeal to be heard (and the question whether the appeal would, in law, lie or not does not affect the respondent's right in such cases), at such hearing the respondent is entitled to have his objections to the decree heard or determined.(3) The law gives a defendant the right to file a cross-objection. Of this right he cannot be deprived merely because only one of two plaintiffs appealed instead of both.(4) But the right of taking objections exists only in those cases in which the party proposing to file them might have appealed and did not. Thus where, immediately upon the dismissal of his appeal, the plaintiff filed objections in the defendant's appeal setting up the very grounds upon which in his own appeal he had asked for relief and been refused, it was held that such objections could not be entertained.(5) Where a decree is in favour of the respondent, the Appellate Court should not accept the facts found by the first Court as incontestably proved, merely because no objection to the decree was filed by the respondent under this rule. The Appellate Court should deal with the evidence in the case and find on it whether the facts found by the first Court were proved or not.(6) The consequence of the grant of a certificate under sect. 48 of the City of Bombay Improvement Act (Bom. Act. IV. of 1898) is that there shall be an appeal to the High Court from the award or any part of the award of the Special Collector under the Land Acquisition Act (I. of 1894), and this must mean that there shall be a right of appeal, or to use the language of the Code, that an appeal will lie to the High Court, and it follows that the respondent will be entitled to object in manner provided by this rule.(7) It has been held that where a respondent to an appeal failed to give the notice required, it was not open to the Appellate Court to grant any relief to that respondent in a case where the granting of such relief was not necessarily incidental

(1) The Ahmedabad, etc., Spinning and Weaving Co. *v.* Lakshmi Shankar (1904), 30 B. 173, 189.

(2) See Ganga Prasad *v.* Gajadhar Prasad, 2 A. 651, 654 (1880), and notes to s. 96, "Who can appeal."

(3) Kamat *v.* Kamat (1884), 8 B. 368, 370. The Judges did not express any opinion as to the soundness of the decision in Ganga Prasad *v.* Gajadhar Prasad (1880), 2 A. 651, 654, as it had no bearing on this case. In the case in 2 A. 651 both parties appealed from the decree of the first Court, and both the appeals were dismissed by the Lower Appellate Court. The plaintiff then appealed to the High Court, whereupon the defendant wanted to file objections to the decree of the Lower Appellate Court dismissing his appeal, and it was held that such objection could not be entertained (at p. 654).

(4) Babaji Dhondshet *v.* Collector of Salt Revenue, 11 B. 596, 598 (1887).

(5) Ramji Das *v.* Ajudhia Prasad (1903), 25 A. 628. In Kulaikada Pillai *v.* Viswanatha Pillai, 28 M. 229, 231 (1904), the opinion was expressed that the section applied only where a party had a right of appeal, but who until forced or invited into Court did not think fit to exercise it.

(6) Bahgoji *v.* Bapuji (1888), 13 B. 75, 77.

(7) Raghunath Das *v.* Secretary of State (1905), 29 B. 514, 527.

to the relief granted to a party who had appealed ; (1) but that the rule in no way prevented an Appellate Court from upholding the decree of the Lower Court on any ground which in law warranted such upholding, even though that ground may not have been referred to, or disallowed, in the Lower Court.(2) The Appellate Court ought not, it was held, to reverse the decision of the Lower Court where the respondent has made no objection to it. Thus a plaintiff claimed a certain sum and was awarded a less sum by the first Court. He then appealed on the ground that he should have been awarded the full amount, but the defendant did not object to the decree awarding the lesser amount. The Appellate Court could not, it was held, reverse the first Court's decree and dismiss altogether plaintiff's suit.(3) When the defendant respondent does not appeal against or object to the amount awarded by the first Court to the plaintiff, it was held not open to the Appellate Court to reduce it.(4) The extended powers which have been now given to Appellate Courts by the new r. 33 of this Order are, however, to be noted in connection with these and similar cases.

"**To the decree.**"—The decree alone is appealable, there is no appeal from the judgment. If a party desires to have formal effect given to findings in a judgment by the decree so as to allow of his filing objections under this rule he should apply to have the decree brought into conformity with the judgment.(5)

Against whom cross-objections may be filed.—The question whether the right of a respondent to prefer cross-objections is limited to urging them against the appellant or whether one respondent can prefer cross-objections against another respondent, has given rise to some discussion. On the one hand, it may be said that the right of urging cross-objections on the part of the respondent ought to be limited to urging them as against those of his adversaries in the Court below, who are dissatisfied with the decree of that Court, and who have preferred an appeal against the same, and that other parties who have not preferred any appeal against the decree of the Court below, and against whom no appeal has been preferred, ought to be left unaffected by the appeal, except so far as it may benefit them under the provisions of O. XLI. r. 4. On the other hand, it may be urged that cases may arise in which the appeal of some only of the defendants or of the plaintiffs may open up matters which render it necessary for the ends of justice that the whole case should be gone into and some of the respondents should be allowed the opportunity of urging cross-objections against their co-respondents. When this question came up

(1) Kulaikada Pillai *v.* Viswanatha Pillai (1904), 28 M. 229, 233. In Rup Jaun *v.* Abdul Kadir (1904), 31 C. 643, the question whether an Appellate Court can give relief to a respondent who has not given notice was not considered, and the judgment of the Full Bench in that case was expressly limited to the case of a suit for contribution. In the first case White, C.J., observed that sect. 561 only applied where a party had a right of appeal but until forced or "invited" into Court did not think fit to exercise it.

(2) Receiver of Nidadavole Estate *v.* Vegasena, 28 M. 427, 435 (1904).

(3) Hem Chunder *v.* Ahmed Reza (1863), Marsh, 332.

(4) Nyan Chandra *v.* Narayan (1880), 4 B. 293.

(5) Jamaitunnissa *v.* Lutfunissa, 7 A. 606, 610 (1885), Mahmood, J., however, being of opinion that the expression "objection to the decree" referred not only to matters existing on the face of the decree, but also to those which should have existed but did not exist there.

before the Calcutta High Court (1) it was decided that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellants; and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents.(2) Thus where the Court of first instance decided a suit upon a ground common to all the defendants, it was held it was competent for the Appellate Court, on the appeal of only one of the defendants, to modify or set aside in favour of all the defendants the decree of the Lower Court, and the whole case was opened out in appeal, not only as between the plaintiff and the defendant who had appealed, but also as between the plaintiff and other defendants, who had been made respondents apparently because they had not joined in the appeal. It was held that the Appellate Court could not do complete justice between all the parties without opening up the whole case, and such an instance was one of the exceptional cases in which a respondent should be allowed to prefer objections as against his co-respondents.(3) It was also held by the Madras High Court that one respondent can file a memorandum of objections against another respondent.(4)

Court fees on cross-objections.—The objections under this rule have to be made by means of a document which has to be filed within one month after service of notice of the appeal, that is, on a date which is generally long prior to the date of hearing. Is that document chargeable with court-fees at the time it is filed? Under sect. 4, Court Fees Act, it is not so chargeable unless it is a document of any of the kinds specified in the first or second Schedule annexed to the Act. A memorandum of objections is not a document so specified in those schedules. Such being the case, no fee is leviable on a memorandum of objections until the time of hearing, and it is leviable under the special provision in sect. 16 of the Court Fees Act.(5) The Court cannot remit the stamp-duty in such cases; (6) the proper order is to dismiss the memorandum (with or without costs, at the discretion of the Court).(7)

(1) Bishun Churn Roy Chowdhury *v.* Jogendranath Roy (1898), 26 C. 114; followed in Shabiuddin *v.* Deomoorat, 30 C. 655 (1903).

(2) Bishun Churn Roy *v.* Jogendranath, 26 C. 114, 121 (1898); and see Abdul Ghani *v.* Muhammad Fasih, 28 A. 95 (1905); Upendendra Lall Mukherjee *v.* Girindranath Mukherjee, 25 C. 565 (1898); Shabiruddin *v.* Deomoorat (1903), 30 C. 655, 657, 658; Jadu Nandan *v.* Deo Narain, 16 C. W. N. 612 (1911); 15 C. L. J. 61; Nursey Virji *v.* Harrison, 37 B. 511 (1913).

(3) Abdul Ghani *v.* Mahammad Fasih (1905), 28 A. 95, 97, 98; dist. Kallu *v.* Manu (1900), 23 A. 93; and pointing out that the reasoning in Timmoyya *v.* Lakshmana, 7 M. 215 (1883), was based upon the provisions of Act XII. of 1899, the language of which materially differed from the Code of 1882.

(4) *Per* Benson and Boddam, JJ. (1903), 14 Mad. L. J. 34, S. N.

(5) Reference under Court Fees Act, 25 M. 24, 26 (1901); Narayan *v.* Krishna (1884), 8 M. 214, 217; Babaji Hari *v.* Rajaram Ballal (1895), 1 B. 75, 79; Sharada Soonduree *v.* Gobind Monee (1875), 24 W. R. 179.

(6) Brojeshwari *v.* Gureo Churn (1885), 11 C. 735 [pauper respondent].

(7) Kumarasamia *v.* Udayar Nadan, 32 M. 170 (1908); for cross objections *in formâ pauperis*, see Govind *v.* Radha, 15 C. W. N. 205 (1910).

"**Within one month.**"—This rule allows a respondent to file a memorandum of objections within one month from the date on which notice has been served on him or on his pleader. The right so conferred is an absolute right, and the hearing of the appeal cannot be advanced so as to defeat this provision. An appeal cannot be definitely posted until the Court has ascertained that notice of the appeal has been served on the respondent, and a date should then be fixed not less than one month from the date of service.(1) The Court may grant further time. Whether it will do so will depend on the particular facts proved.(2) Under this rule the Court has power to receive a memorandum of cross-objections at any time.(3)

Withdrawal of appeal (sub-rule (4)).—Cross-objections are in the nature of an appeal, a remedy which a respondent has against a decree partly unfavourable to him, but they were considered to so far differ from a cross-appeal that they depended on the hearing of the appeal, and could not be heard if the appeal was not heard. Upon this view a number of questions arose as to the effect of the withdrawal of an appeal before and after the commencement of the hearing, and what constituted a hearing upon the right to have cross-objections heard and determined.(4) The general result of these decisions may be stated to be that they involved a discussion of the meaning of the term "hearing," that if the appeal was withdrawn before the "hearing" the respondent could not be heard upon his cross-objections dependent as they were on the appeal; but that if the hearing had begun and the Court had thus become seized of the cross-objections, the respondent could not be deprived of his remedy because the appellant choose to abandon his. (5) The matter need not now be further considered. An appellant may of course withdraw his appeal at any time up to its actual decision.(6) But now under sub-rule (4) in all cases of withdrawal the Court may proceed to determine the cross-objections. Where, however, the decree is wholly in favour of the respondent his right to contest any of the conclusions in the first Court judgment is only for the purpose of supporting the decree, and if the appeal is withdrawn that purpose is fully secured because the decree is left standing and the right to dispute the conclusions in the judgment is no longer of any use to him. To withdraw the appeal in such a case cannot, as in the case of cross-objections, deprive the respondent of

(1) Sundaram *v.* Annangar, 13 M. 492, 493 (1890).

(2) In Sulleman *v.* Joosub Jan, 14 B. 111 (1890), the Court refused an extension.

(3) Govind *v.* Radha, 15 C. W. N. 205 (1910).

(4) See Kalyan Singh *v.* Rahmu, 23 A 130, 134 (1901); Jafar Hasain *v.* Ranjit Singh, 17 A. 518; Ramjuvan *v.* Chandmal, 10 A. 587, 602 (1888) [dismissal of appeal as barred by limitation]; Kombi Achen *v.* Koshanni, 21 M. 352 (1897) [dismissal for failure to join parties]; Baroda Kant *v.* Pearce Mohun, 23 W. R. 37 (1874) [dismissal for default]; and see also Paresh Narain *v.* Watson & Co., 23 W. R. 229 (1874); Bahadoor Singh *v.* Bhugwan Dass, 1 Agra H. C. R. 23; Shama Charan *v.* Radha Kristo, 14 W. R. 210 (1870); Sarbhai Doyalji *v.* Raghunathji, 10 B. H. C. R. 397 (1873); Dhondi Jagannath *v.* Collector of Salt Revenue, 9 B. 28, 30 (1884); Maktab Beg *v.* Hasan Ali, 8 A. 551 (1886); Venkataramanaya *v.* Koppi, 3 M. H. C. R. 302 (1867); Ram Pershad *v.* Bhurosa, 9 W. R. 328 (1868).

(5) See Shankar Lal *v.* Sarup, 34 A. 40 (1911).

(6) Kalyan Singh *v.* Rahmu, 23 A. 130, 134 (1901).

any remedy whatever.(1) Sub-rule (4) is therefore limited to cross-objections. A question also arose as to whether, when an appeal was abandoned, and the respondent could not proceed with his objections to the decree, he could file an appeal, after the expiry of time allowed for appeal by the Limitation Act, under sect. 5 of that Act. It was held that the mere fact that an appeal has been withdrawn did not amount to "sufficient cause" within that section. But each case had to be decided upon its own special circumstances. If the Court was satisfied in any case that there had been "sufficient cause for not presenting the appeal within the prescribed time," then it would allow the appeal to be admitted.(2) For the reason given such a case is not likely to recur, as there is no necessity to file an appeal if the appeal covers only the ground of the cross-objections which can now be determined when the appeal is abandoned.

Remand of case by Appellate Court.

23. *Where* the Court *from* whose decree an appeal is *preferred* has disposed of the suit upon a preliminary point *and* the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in *the* case so remanded, *and shall send* a copy of *its judgment and* order to the Court *from* whose decree the appeal is *preferred*, with directions to re-admit the suit under its original number in the register *of civil suits*, and proceed to determine the suit; *and the evidence* (*if any*) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

Remand.—Where the Lower Court has taken evidence sufficiently to enable the Appellate Court in its view of the case to pronounce judgment, then the latter Court must determine the case whether the Lower Court has or has not fixed the proper issues. In such case it has all the materials necessary to the exercise of its judgment, and if the proper issues have not been fixed, it may resettle the issues under r. 24. Cases may, however, occur where the Court has not such material.

The first case is where there has been no complete determination of the suit by reason of the Court's erroneous disposal of the case on a "preliminary point." Such an order of remand implies a reversal of the first judgment,(3) and re-opens the whole case,(4) and involves a second decision by the Lower Court, that is, the Court which first disposed of the suit and no other.(5) This

(1) Kalyan Singh *v.* Rahmu, 23 A. 130, 134 (1901).

(2) Hurgovindas *v.* Jadavahoo (1899), 23 B. 692, 695.

(3) See Kebul Kishen *v.* Mt. Ambala, 7 W. R. 326 (1867), and Madhub Chunder *v.* Ram Dyal, 8 W. R. 303 (1867), where it was pointed out that an Appellate Court could not affirm a decision regarding one part of the claim when it had remanded the substantive part for the trial of the merits which the first Court had refused. As to informal orders in this respect, see Lalli Ram Saran *v.* Nem Narain Singh, 6 C. W. N. 326 (1902).

(4) Tarinee Kant Lahiree *v.* Kunj Beharee Awustee, 12 W. R. 112 (1869); Gudadhur Dutt *v.* Shushee Monee, 21 W. R. 7 (1873).

(5) Bai Shri Majirajba *v.* Maganlál Bhai shankar, 19 B. 303 (1894).

is a complete remand. As already stated a complete remand involves a reversal of the first judgment. Where the first Court disposes of the suit on two grounds only, *res judicata* and limitation; and on appeal its decision was upheld only on the first ground and the question of limitation was not gone into; in second appeal the High Court reversed the decision and remanded the case to the Lower Appellate Court to decide it on the merits. This was held to leave the whole case open to that Court, and before it could reverse the first Court's decree and remand the case for a first decision, it was bound to determine whether the fresh Court's decision on the question of limitation was right or wrong.(1) It has been held that it is not a good ground for passing an order of remand under this rule to say that the preliminary issue has been decided by the Court of first instance on a wrong view of the burden of proof, unless the Appellate Court finds that such decision was wrong.(2)

The next case is when the Lower Court has omitted to try an issue or to determine a question of fact essential to the right decision of the case set up in the first Court, and in consequence the evidence is insufficient (rr. 25, 26). In such a case the decree is not set aside.(3) The case is retained undisposed of on the file of the Appellate Court. The Lower Court is directed to take the additional evidence and to try on such evidence the issues remitted. When it has done this it returns the additional evidence with its finding thereon to the Appellate Court, which then being placed in a position to determine the appeal, passes judgment.(4) In this case there is what has been called a partial remand. Where the Court of first instance has considered the whole of the evidence before it and completely disposed of the suit on the merits, the Appellate Court must itself finally determine the appeal and cannot remand; (5) but if it thinks that the determination of any particular question unnecessary, it may make an order under r. 25, *post*.(6)

The third case (which is not, properly speaking, a remand) exists where the Lower Court has determined the whole case and has not omitted to frame or determine any issues, but has decided the case on insufficient evidence (rr. 27–29). In this case the Appellate Court itself takes the evidence or directs the Lower Court to do so, and when such evidence is returned passes judgment in the appeal which, as in the former case, has meanwhile remained on its file.

An improper order of remand is not necessarily void, but only illegal or irregular.(7) Under the last Code an order under sect. 562 was

(1) Raisingji *v.* Balvantrao, 11 B. 663 (1887).

(2) Habib-ul-lah *v.* Lalta Prasad, 34 A. 612 (1912).

(3) See Mokund Lall *v.* Hurbullabh Narain, 12 C. L. R. 136, 138 (1882).

(4) See Lalla Chuni Lall *v.* Mohiji Singh, 1 C. W. N. 340 (1895).

(5) Narain Pal *v.* Kali Kishore, 1 C. W. N. xxix. (1896); Mallikarjuna *v.* Pathareni, 19 M. 479 (1896); Parvatisankar *v.* Bai Naval, 17 B. 733 (1891); Ram Das Mondal *v.* Indromoni Dasi, 3 C. W. N. 325 (1898); and see Arumugam Chetti *v.* Jagavsera Rama, 28 M. 444 (1905).

(6) Ambica Churn Das *v.* Kala Chandra Das, 10 C. W. N. 422 (1905).

(7) Mirza Jiwad Ali *v.* Hossein Bibee, 8 W. R. 207 (1867); Mohesh Chandra Dass *v.* Jamiruddin Mollah, 28 C. 324 (1900); *contra* Cheda Lal *v.* Badullah, 11 A. 35 (1888); Rameshur Singh *v.* Sheodin Singh, 12 A. 510 (1889); Trailokya Mohini Dasi *v.* Kali Prosanna Ghose, 11 C. W. N. 380 (1907); and as to proceedings subsequent to an illegal order of remand, see Jatinga Tea Co. *v.* Chera Tea Co., 12 C. 45 (1885); Durga Kinkar *v.* Konchai Ronza, 5 C. L. J. 71 (1906).

appealable,(1) and a party might impeach the order of remand on appeal from the final decree.(2) Under sect. 578 (now s. 99), however, no decision should be reversed unless it has affected the merits of the case or the jurisdiction of the Court. But jurisdiction in this section is used in its strict sense, and does not mean the legal authority of a Court to do a certain thing, viz. to order a remand, and therefore in each case it had to be determined whether the merits had been prejudicially affected.(3) Under the present Code, however, an appeal is given from an order under this rule (O. XLIII.), and under sect. 105, if an appeal lies and the party does not appeal, he cannot afterwards dispute the correctness of the order of remand.

When a case is remanded the Lower Court should fix a reasonable date for the parties to appear and carry on the suit,(4) and if they do not appear the case should be dismissed.(5) If they appear no fresh *vakalutnama* is necessary.(6) When a case is remanded to a District Judge he should not transfer it to another officer.(7) Costs of the Appellate Court can be recovered only when the order of remand provides for them.(8) If on the return of the case it appears that the remand order has not been carried out, the Court, in remanding it a second time, should point out the manner in which the carrying out of the previous order seemed defective.(9) If a party who is offered a remand elects to go on with the case as it stands, he is estopped from impugning the decision on that point.(10) Where a case was remanded to be tried on the merits, the Court remanding considering it not barred, the Lower Court was held wrong in entering again into the question of limitation.(11) For the Court cannot

(1) S. 588, cl. 28, and the appeal was not restricted by the sect. 586. Mahadev *v.* Ragho, 7 B. 292 (1883); Gulam Husen *v.* Sayad Musa, 8 B. 260, 261 (1884); Kirti Mohaldar *v.* Ramjan, 10 C. 523 (1884); Collector of Bijnor *v.* Jafar Ali, 3 A. 18 (1890). As to appeals, see Loki Mahto *v.* Aghoree Ajail, 5 C. 142 (1879); Gauri Shankar *v.* Karima Bibi, 15 A. 413 (1893); Abrahim Khan *v.* Taizunnessa, 17 C. 168 (1889); Bhau Bala *v.* Bapaji Bapuji, 14 B. 14 (1889); Deokishen *v.* Bansi, 8 A. 172 (1886); Sohan Lal *v.* Azizunnissa, 7 A. 136 (1884); Jhanday Lal *v.* Sarman Lal, 21 A. 291 (1899); Partap Singh *v.* Narain Das, 16 A. 375 (1894); Ram Prosad *v.* Sachi Dassi, 6 C. W. N. 585 (1902); Mathura Nath Ghose *v.* Nobin Chandra, 24 C. 774 (1897) [no appeal from order under cl. 16, sect. 588]; Hasan Ali *v.* Siraj Husain, 10 A. 252 (1894).

(2) Savitri *v.* Ramji, 14 B. 232 (1889); Rameshur Singh *v.* Sheodin Singh, 12 A. 510 (1889); Cheda Lal *v.* Badullah, 11 A. 35 (1888); Badam *v.* Imrat, 2 A. 675 (1881), and next case.

(3) Mohesh Chandra Das *v.* Jamiruddin Mollah, 28 C. 324 (1900); s. c., 5 C. W. N. 509, and cases there cited; Nawcourie Mundal *v.* Mookta Bibee, 2 W. R. 181 (1865); Nasurooddeen *v.* Lall Mahomed, 10 W. R. 234 (1870); Gunga Monee *v.* Issur Chunder, 17 W. R. 405 (1872).

(4) Haradhun Chuckerbutty *v.* Protap Narain Chowdhury, 14 W. R. 401 (1870); Watson & Co. *v.* Kunhiji Bahadoor, 9 W. R. 294 (1868).

(5) *In re* Kalee Mohun Dass, 17 W. R. 70 (1872).

(6) Sm. Nobin Monee Dassee *v.* Joy Gopal Gossain, 1 W. R. 275 (1864).

(7) Sita Ram *v.* Nauni Dulauja, 21 A. 230 (1899); Chowdhry Hamedoollah *v.* Mutecoonnissa Bibee, 15 W. R. 574 (1871).

(8) Digambar Chatterjee *v.* Ram Roodro, 13 W. R. 39 (1870).

(9) Radhabullub Surma *v.* Anundmoyee Dabia, 1864, W. R. 39, Misc.

(10) Nobo Lall Khan *v.* Oodheeranee, 3 W. R. 5 (1865).

(11) Mt. Judoobunsee *v.* Mt. Asman Kooer, 14 W. R. 371 (1870).

re-open a matter already adjudicated upon between the parties.(1) It has been held that when a case is sent back for trial on the merits the order of remand shuts out preliminary objections such as limitation or *res adjudicata* (2) or jurisdiction.(3) On the other hand, it has been held that the remand of a case for trial on the merits does not prevent adjudication upon any other issue arising in the case, *e.g.* limitation, provided that such issue has not been adjudicated upon by the Court making the remand.(4) The question whether sect. 25 of the last Code, now sect. 24, had application to a case remanded was considered in the case cited.(5) It has been held that where the decision of the Court of first instance is not based on any preliminary ground and where the whole of the evidence has been taken and the conclusion of the Court relates to the merits of the case, the Appellate Court cannot set aside the decree under this rule.(6)

"**Preliminary point.**"—Prior to the amendment of the Code of 1882 by Act VII. of 1888, sect. 562 contained the words: "*So as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties,*" and the word "*investigate*" was used instead of the word "*determine*" at the end of the section. The condition therefore necessary to justify a remand consisted prior to Act VII. of 1888 in the exclusion of evidence of a material fact or in the omission to investigate the merits as the consequence of the decision on a preliminary question which the Appellate Court could not uphold.(7)

The condition necessary to a remand after 1888 was the omission to determine the merits. Therefore it was held competent for an Appellate Court to remand a case where the Court of first instance recorded evidence on all the issues and at the final hearing determined the suit erroneously on some particular point without expressing any opinion on the other issues.(8) But there could be no remand where, though the Court held that the suit was barred by limitation, it at the same time came to a definite decision on each of the other issues.(9)

(1) Saheb Tewaree *v.* Kishoree Sahoy, 24 W. R. 330 (1875); Ram Kuvarbhai *v.* Damodhar, 6 B. H. C. R. 146 (1869).

(2) Sheo Sahoy Tewaree *v.* Ram Pershad Narain, 24 W. R. 333 (1875); and see Moru bin Patlaji *v.* Gopal bin Sahu, 2 B. 120 (1877); Dattu *v.* Kasai, 8 B. 535 (1884); where the objections seem to have been taken in the final appeal after the remand order had been carried out.

(3) Temulji Rustamji *v.* Fardunji Kavasji, 5 B. H. C. R. 137 (1868).

(4) Rajah Tej Kishen *v.* Shib Chunder Bose, 3 W. R. Act X. 158 (1865).

(5) Gurdeo Singh *v.* Chandrikah Singh, 5 C. L. J. 611 (1907); followed in Protab Chandra Roy *v.* Judisthir Das, 19 C. L. J. 408 (1914).

(6) Rani Dassi *v.* Ashutosh, 15 C. L. J. 310 (1910).

(7) Ramachandra Joishi *v.* Hazi Kassim, 16 M. 207, at p. 209 (1892); see Muniappa Naidu *v.* Iyasamy Mudely, 5 M. H. C. R. 313 (1870); Syud Hussun Ali *v.* Manoowar Ali, 21 W. R. 413 (1874); Durga *v.* Haidar Ali, 7 A. 167 (1884); Lingammal *v.* Venkatammal, 6 M. 239, 242 (1882); Mt. Rama Kooer *v.* Lalla Bhagwan Lall, 22 W. R. 224 (1874); Amma *v.* Kunhunni, 9 M. 355 (1886).

(8) Ramachandra Joishi *v.* Hazi Kassim, 16 M. 207, 209, 210 (1892); Venganayyan *v.* Ramasami Ayyan, 19 M. 422, 423 (1895); Krishnan Chetti *v.* Muthu Palandi, 22 M. 172 (1898); Matadin *v.* Jamna Das, 27 A. 691 (1905); and see Muhammad Allahdad Khan *v.* Muhammad Ismail Khan, 10 A. 289 (1888); Kelumutachen *v.* Chondu, 19 M. 157 159 (1895).

(9) Hafiz Abdul Rahim *v.* Hari Raj Singh, 22 A. 405 (1900); Paramchand *v.* Nirvani, 1 Bom. L. R. 72 (1899).

It was held that the expression "*preliminary point*" was used in sect. 562 of the last Code, not in the sense of some point collateral to the merits, *e.g.* limitation, *res judicata*, and the like, but of some point preliminary to a general investigation of the merits. The words referred thus to some point either collateral to the merits which precluded their determination altogether or some particular question which, though relating to the merits, precluded their general determination.(1) The term is somewhat ambiguous. The meaning would appear to be that the Appellate Court may remand where the Lower Court has disposed of a suit upon a point or issue, the determination of which has precluded the necessity for determining other points or issues in the suit, and such other points or issues have been left undetermined.

Sect. 562 was held to authorize a remand only where the entire suit and not merely a portion of it had been disposed of by the Court upon a preliminary point.(2) In an appeal from an order refusing to set aside a decree (sect. 108 or O. IX. r. 13 of this Code), the only case which can be remanded to be tried on its merits is the application under sect. 108, and not the original case the decree in which is sought to be set aside.(3) When, in contravention of the provisions of sect. 202 of the Agra Tenancy Act, 1901, a Civil Court heard and determined a suit in which a question of tenant right was raised, and on appeal the Lower Appellate Court remanded the suit, it was held that that Court ought not to have done so, but should have passed the order required by sect. 202 of the Act.(4)

It not infrequently, however, happens that a remand is necessary in consequence of an error, omission, or irregularity by reason of which there has not been a proper trial or an effectual and complete adjudication of the suit. The former Code not providing for the case, difficulty was felt,(5) and recourse was had to an inherent jurisdiction (6) (the only powers of remand being those contained in sects. 562 and 566 of that Code) (7) or a jurisdiction implied in the terms of other sections of the Code.(8) So a case has been remanded where the suit was decided without the plaintiff being given a fair opportunity of

(1) Ramachandra Joishi *v.* Hazi Kassim, 16 M. 207, 210 (1892); Kanakammal *v.* Rangachariar, 20 M. 25, 27 (1896) [where the Court held that there was no cause of action]; Mata Din *v.* Jamna Das, 27 A. 691 (1905). In Mana Vikrama *v.* Gopalan Nari, 30 M. 203 (1906), the point was held not preliminary but an integral part of the merits; Meghan Dabe *v.* Pran Singh, 30 A. 13 (1907).

(2) Banwari Lal *v.* Samman Lal, 11 A. 488 (1889).

(3) Rai Radha Kissen *v.* Collector of Jaunpore, 5 C. W. N. 153 (1900).

(4) Jagan Nath *v.* Bhawani, 27 A. 167 (1904).

(5) See Mohesh Chandra Dass *v.* Jamiruddin Mollah, 28 C. 324, at p. 334; ["we may add that cases may arise . . . in which although a complete remand under sect. 562 may not be warranted, still nothing short of a retrial of all the issues rendered necessary by the previous imperfect trial of them would satisfy the requirements of justice,"] followed in Nabin Chandra Tripati *v.* Prankrishna De, 41 C. 108 (1913).

(6) Perumbra Nayar *v.* Subrahmanian Pattar, 23 M. 445 (1899); Durga Dihal Das *v.* Anoraji, 17 A. 29 (1894); Zohra Bibi *v.* Zobeda Khatun, 12 C. L. J. 368 (1910). But this case has been dissented from in Nabin Chandra Tripati *v.* Prankrishna De, 41 C. 108; 18 C. L. J. 613 (1913) (no inherent power of remand).

(7) Habib Baksh *v.* Buldeo Prasad, 23 A. 167, 171 (1901).

(8) Ib., at p. 173.

knowing the line of defence he had to meet; (1) where the decision was given without taking the defendant's evidence; (2) or where an Appellate Court made an order under sects. 27, 32, or 53 of the former Code; (3) or where the Court mistook the nature of the case (4) and had not properly tried an issue; (5) where the parties were or might have been misled by the act of the Court; (6) where an appeal was held wrongly to have abated,(7) or a suit was wrongly decided *ex parte*.(8) A remand under sect. 562 was, however, under the last Code held to be bad where the Lower Court acted irregularly in issuing a commission,(9) and on the ground of defect of parties; (10) and where the deposition of the witnesses did not bear the usual certificate.(11) It was proposed to specially legislate for cases where the Lower Court had committed any error, omission, or irregularity by reason of which, in the opinion of the Appellate Court, there had not been a proper trial or an effectual and complete adjudication of the suit as contemplated by law, and the party complaining of such error, omission or irregularity had been materially prejudiced thereby. The Special Committee, however, reported that they thought it safer not to give legislative sanction to the views enunciated by the Allahabad High Court in Habib Baksh *v.* Baldeo Prasad,(12) considering that the power of reversal and remand was liable to be abused, while the procedure under r. 25 was free from this liability, and at the same time furnished (as it considered) an effectual remedy. As to this, it is to be observed that under that rule a remand is not made for a further trial and decision by the first Court on the whole case, but only for findings on specified issues to enable the Appellate Court itself to pass a proper decision. Cases may occur where an Appellate Court has power to make an order under some section or rule of the Code, and in order to give effect to the provisions of the section or rule applicable, it is necessary that it should in certain cases for the ends of justice send back the case to the Court of first instance. In the present Code the absolute prohibition of sect. 564, which created a difficulty against the adoption of this course, has been removed (that section being now omitted), and under sect. 151 the Court may make such order as is necessary for the ends of justice. Probably under the circumstances it is a correct conclusion to draw

(1) Shib Pershad Pattuck *v.* Nubo Kishen Mookerjee, 17 W. R. 445 (1872).

(2) Perumbra Nayar *v.* Subrahmanian Pattar, 23 M. 445 (1899).

(3) Habib Baksh *v.* Baldeo Prasad, 23 A. 167 (1901); Lingammal *v.* Chinna Venkatammal, 6 M. 239, 244, 245 (1882); but see as to amendment and joinder of parties, Farzand Ali *v.* Yusuf Ali, 2 A. 669 (1880); Ganesh Bhikaji *v.* Bhikaji Krishna, 10 M. 398 (1886); Kelu Mulacheri *v.* Chendu, 19 M. 157 (1895); Keshav Mohadev *v.* Pandurang Waman, 1 Bom. L. R. 29 (1899); Krishnaya *v.* Panchu, 17 M. 187 (1893).

(4) Juggur Nath *v.* Rajah Chutter Narain, 17 W. R. 410 (1871).

(5) Ram Chand Mookerjee *v.* Kameenee Debia, 10 W. R. 236 (1868); see Umbika Churn *v.* Ramdhun Mohurrur, 11 W. R. 35 (1869).

(6) Mahammad Allahdad *v.* Mahammad Ismail Khan, 10 A. 290 (1888).

(7) Bai Full *v.* Adesang, 3 Bom. L. R. 736 (1901).

(8) Krishna Ayyar *v.* Kuppan Ayyangar, 30 M. 54 (1906).

(9) Dhondo *v.* Panha Lall, 1 Bom. L. R. 110 (1899).

(10) Bando Daji *v.* Bhasker Mahadeo, 1 Bom. L. R. 369 (1899).

(11) Ram Gopal Dey *v.* Raghu Nath Ghoshal, 2 C. L. J. 496 (1904).

(12) 23 A. 167; followed in Jadub *v.* Gobinda, 37 C. 171 (1909); and see Narottam *v.* Mohanlal, 14 Bom. L. R. 1154 (1912); 37 B. 289.

that though the Legislature has expressly omitted to lay down as a positive rule that a remand may be granted in the cases referred to in the proposed, but rejected, amendment, for fear that a power expressed in such wide terms might be liable to abuse, the Court may, where that course is absolutely necessary for the ends of justice, exercise the power of remand in cases not falling within the precise terms of this rule or of *r.* 25, *post.* Further, if an order of remand is erroneous, a party who has consented to it may be estopped from contesting it,(1) and in no case are subsequent proceedings void merely because of such error.(2) It has, however, been recently held that an Appellate Court has no inherent power to remand when the Lower Court has committed errors materially prejudicing the complainant, and that its only power of remand is under sect. 107 (1) (*b*) as limited by this rule and is no wider than it was under the last Code.(3) In the under-mentioned cases it has been held that an order of remand may be made even when the disposal has not been on a strictly preliminary point, *e.g.* where there has been no regular hearing of the matter and the evidence on which the disposal was made has not been placed on record.(4) Where a judgment had been partly based on evidence not on the record it was held on second appeal that if such evidence was excepted it would be impossible to decide whether the remainder was sufficient to support the judgment and the case was remanded.(5) In this case the lower Court had relied on a statement made by a pleader, and it was held that such a statement must be regularly proved and permission to admit additional evidence was given.

"**And the evidence.**"—It was reported that the practice in various provinces differed on the question whether evidence recorded in the proceedings leading up to the decree set aside under sect. 562 was in itself available as evidence during the retrial, or whether it could only be made admissible in the case of witnesses attending at the hearing by examining them upon their previous depositions as statements recorded in a different proceeding. The Legislature has shown itself to be of the opinion that, subject to all just exceptions, such depositions should of their own force be available as evidence. Evidence may be received from parties who did not appear at the former trial.(6) Where the Judge in a remand observed that evidence was unnecessary, the declaration was held to sufficiently justify the plaintiff in making no further application for a summons on their witnesses.(7) Where a review had been granted for the purpose of seeing whether a *chittah* ought not to be used, and the case was remanded for a rehearing, the party was held to be concluded from objecting that the *chittah* was improperly made use of upon the rehearing.(8) It has been

(1) Baikunta Nath Dey *v.* Nawab Salimulla, 6 C. L. J. 547 (1907).

(2) Durga Kinkar *v.* Konchai Ronza, 5 C. L. J. 71 (1906).

(3) Nabin Chandra Tripati *v.* Pran Krishna De, 41 C. 108 (1913); dissenting from Zohra Bibi *v.* Zobeda Khatun, 12 C. L. J. 368 (1910).

(4) Vemula Jambalayya *v.* Rajamma, 24 M. L. J. 572 (1912); Kuppalan *v.* Kunjuvalli, 9 M. L. T. 373 (1911).

(5) Moni Lal *v.* Uma Charan, 19 C. L. J. 541 (1913).

(6) Koonj Biharee Awustee *v.* Tarinee Kant Lahiree, 8 W. R. 285 (1867).

(7) Ram Jewan Singh *v.* Radha Pershad Singh, 16 W. R. 109 (1871).

(8) Makhun Koeer *v.* Tincowree Dutt, 14 W. R. 22 (1870).

held that a case in which there was no proper hearing by the first Court, and no record of the evidence, was a fit one for remand.(1)

Appeal.—An appeal lies under O. XLIII. But the right of appeal from interlocutory orders ceases with the disposal of the suit,(2) and under the provisions of sect. 105, *ante*, a party who does not appeal from the order is thereafter precluded from disputing its correctness. It has been held that no appeal lay in a suit or proceeding under the Agra Tenancy Act, 1901,(3) and that O. XLIII. gives no appeal against an order of remand not passed under this rule,(4) or against an order setting aside a dismissal of a suit under O. IX. r. 4.(5)

24. *Where* the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the *suit*, notwithstanding that the judgment of the Court *from* whose decree the appeal is *preferred* has proceeded wholly upon some ground other than that on which the Appellate Court proceeds. [s. 565.]

Where evidence on record sufficient, Appellate Court may determine case finally.

"Determine the suit."—See notes to r. 23, *ante*. The word "*may*" before "*after resettling the issues*" (6) was substituted for "*shall*" in the last Code by sect. 51, Act VII. of 1888. Where a Court of first instance after taking evidence dismisses a suit upon a preliminary objection without giving a decision upon the merits of the case and the decree is reversed on appeal, the Court of Appeal, if it considers the evidence on the record sufficient, may decide the case, and is not bound to remand it for trial under sect. 562 (now r. 23).(7) If the evidence is insufficient the Court should proceed under the next rule or r. 27. This rule does not enable an Appellate Court to declare a right in favour of one of the parties where no issue has been fixed on the point, and the right has not been set up in the Lower Court.(8) But if all the points in dispute are covered by the issues and there is evidence to decide them, there cannot be a remand.(9) Where a Court of first appeal omits to determine a material issue of fact, the High Court, as a Court of second appeal, was held not competent under this rule

(1) Kuppalan *v.* Kunjuvalli, 9 M. L. T. 373 (1911).

(2) Madhu Sudan Sen *v.* Kamini Kanta Sen, 32 C. 1023 (1905), foll. Salig Ram *v.* Brij Bilas, 29 A. 659 (which case has since been overruled in Uman Kunwari *v.* Jarbandhan, 30 A. 479 (F. B.) (1908); and not followed in Lakshmi *v.* Maru Devi, 37 M. 29 (1914);) and see Baikunta Nath Dey *v.* Nawab Salimulla, 6 C. L. J. 547 (1907); Gulzari Mal *v.* Kabir-un-nissa, 30 A. 191 (1908).

(3) Vilayat Husen *v.* Mahendra Chandra Nandy, 28 A. 88 (1905).

(4) Vijayaraghava *v.* Komarappa, 22 M. L. J. 409 (1912).

(5) Wahid-un-nissa *v.* Kundan Lal, 35 A. 427 (1913).

(6) See Shaikh Futteh-Oollah *v.* Oomdanissa Bibee, 14 W. R. 69, 70 (1870), where the duty as to resettlement of issues was pointed out.

(7) Bandi Subbayya *v.* Madalapatti, 3 M. 96 (1880).

(8) Official Trustee *v.* Krishna Chandra, 12 C. 239; s. c., 12 I. A. 166 (1885).

(9) Radha Prasad Singh *v.* Lal Sahab Rai, 13 A. 53; s. c., 17 I. A. 150, 156 (1890).

to determine such issue itself, but should refer it for determination to the Court of first appeal.(1) But see now sect. 103, *ante*.

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed *from*.

25. *Where* the Court *from* whose decree the appeal is *preferred* has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court *from* whose decree the appeal is *preferred*, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its finding thereon *and the reasons therefor*.

Omission to frame or try issue.—See notes to r. 23. Prior to sect. 52 of Act VII. of 1888, sect. 566, which this rule replaces, contained in place of the words "*if necessary*" the words "*and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question.*" The rule, it has been said, is intended to provide for cases where some point has come to light in the Appellate Court which has not been raised or the importance of which has not occurred to the parties or to the Judge in the Court below.(2) Where, however, though no specific issue has been framed on a particular question, yet the matter has been tried and determined without any objection on the part of the plaintiff who has not been taken by surprise, but was fully informed by the defendant's list of documents and from cross-examination of his witnesses that the defence would be taken, it is undesirable in general that the case should be sent back to be retried on a special issue framed as to that particular question.(3) The expression "*determine any question of fact*" means in a legal manner.(4) The Court may (5) frame issues (6) provided that there has been an omission (7) on the part of the Lower Court. The Appellate Court should frame the issues which are essential and send them to the Lower Court for trial, but should not remand and direct the Lower Court to frame the issues.(8)

(1) Sheo Ratan *v.* Lappu Kuar, 5 A. 14 (1882); Sohawan *v.* Babu Nand, 9 A. 26, 30 (1886); Girdhari Lall *v.* Crawford, 9 A. 147 (1886).

(2) Anundo Lall Dass *v.* Boycaunt Ram Roy, 5 C. 283 (1879).

(3) Chundra Kunwar *v.* Chaudhri Narpat, 29 A. 184 (1906).

(4) Nivath Singh *v.* Bhikki Singh, 7 A. 649, 655 (1885).

(5) Mitna *v.* Fuzl Rub, 13 M. I. A. 573 (1870); Sreenath Biswas *v.* Luckhee Narain Aich, 24 W. R. 268.

(6) Chandi Din *v.* Narain, 14 A. 366 (1892); Ahmedabad Municipality *v.* Manilal Udenath, 19 B. 212, 216 (1894); Shaikh Umer Ali *v.* Ramzan Ali, 23 W. R. 347 (1875); Hurpershad *v.* Sheo Dyal, 3 I. A. 259, 279 (1876); Goluck Chunder Sen *v.* Paresh Mahomed, 25 W. R. 284 (1876); Ganga Prasad *v.* Lal Bahadoor Singh, 17 A. 117 (1894); Bungo Chunder Banerjee *v.* Chunder Nath Chuckorbutty, 25 W. R. 47 (1875).

(7) Runpal Singh *v.* Joy Mungul, 11 W. R. 106 (1869); Tiluck Chunder *v.* Brojo Soondur, 24 W. R. 121 (1875).

(8) Chunder Nath Sarma *v.* Ramanauth, 1 W. R. 69 (1864).

The issues should be specifically stated by the Appellate Court. It is not sufficient to direct the case to be decided in accordance with the observations in the judgment.(1) It is always dangerous to allow parties to make a new case in a Mofussil Appellate Court, and the Courts as a general rule should not allow a point not appearing in the pleadings or raised in any other way in the first Court to be framed into an issue.(2) A party cannot change the nature of the case after remand.(3) Where a Judge proceeds under this rule he should not reverse the decree of the Lower Court and remand the suit; but should frame the necessary issues and send them down for trial; and keep the suit pending until the return of the first Court's finding on the issues with the record of the trial.(4) The effect of such an order is not a re-hearing, and save as to the issues sent down the first Court has no power to deal with the case.(5) The Court is to direct additional evidence to be taken, and the parties are entitled to have the opportunity of giving evidence upon the fresh issue, even though the order of remand contains no express direction to that effect.(6) The parties should have the fullest opportunity to produce their evidence.(7) When a case is remanded by one Judge and subsequently comes before another of equal jurisdiction (8) or the Judge's successor,(9) the latter officer cannot set aside the order of remand. So where a Judge remanded a case to be tried on a certain issue and directed the Munsiff to give plaintiff a decree according to the decision at which he would arrive, and the case went back in appeal before another Judge, it was held that the Appellate Court was limited to seeing whether the issue was a proper issue or not; and could not go behind the order.(10) A Court to which a case is remanded for retrial, on a particular issue amongst others, cannot on remand allow that issue to be abandoned and proceed to try the case upon the other issues raised; (11) nor can the Court refer the case to an arbitrator; (12) and when the case is remanded to the Lower Appellate Court for findings on certain issues,

(1) Grish Chunder Lahiri *v.* Soshi Shikhareshwar Roy, 4 C. W. N. 631 (1900).

(2) Hurpurshad *v.* Sheo Dyal, 3 A. 259, 279 (1876); Sreenath Biswas *v.* Luckee Narain Aich, 24 W. R. 268 (1875); Ram Narain Roy *v.* Nilmonee Adhikaree, 23 W. R. 169 (1875); Pran Kishen Deb *v.* Mahomed Ameer, 21 W. R. 338 (1874); Ustoorun *v.* Mohun Lal, 21 W. R. 333 (1874); Brojo Soondur *v.* Futick Chunder, 17 W. R. 407 (1872); Illikka Pakramar *v.* Kutti Kunhamed, 17 M. 69 (1893).

(3) Radha Kishore *v.* Mahtab Chund, 3 W. R. Misc. 5 (1865); Norendro Coomar Dutt *v.* French, 3 W. R. 198 (1865).

(4) Boncharee Ghose *v.* Ainooddeen Biswas, 24 W. R. 137 (1875); see Umbika Churn Mundle *v.* Ramdhan, 11 W. R. 35 at p. 36 (1869); Wise *v.* Ishan Chunder Banerjee, 14 W. R. 380 (1870). In Ganga Monee *v.* Issur Chunder, 17 W. R. 405 (1872), it was held that the irregularity in procedure did not affect the merits of the case; Abdul *v.* Fayaz, 15 C. W. N. 575 (1911).

(5) Gossain Dowlut Geer *v.* Bissessur Geer, 22 W. R. 207 (1874).

(6) Kisto Churn Chuckerbutty *v.* Muggun Chuckerbutty, 10 W. R. 491 (1865); and see as to evidence additional to that on the record, Ram Sunkur *v.* Nilkant Biswas, 9 W. R 392 (1868).

(7) Laloo Mundal *v.* Bhooban Mohun Chatterjee, 17 W. R. 361 (1872).

(8) Birjo Soondur *v.* Juggut Chunder, 21 W. R. 199 (1874); Kharag Prasad *v.* Durdhari, 14 A. 348 (1892).

(9) Luleet Panday *v.* Brijnath Singh, 14 W. R. 285 (1870); Wise *v.* Ishan Chunder Banerjee, 14 W. R. 380 (1870).

(10) Bodun Burooah *v.* Abdul Gunny, 19 W. R. 281 (1873). See also Suraj Din *v.* Chattar, 3 A. 755 (1881).

(11) Shib Chund Lahiri *v.* Joymala Dasi, 7 C. L. R. 103 (1880).

(12) Nand Ram *v.* Fakir Chand, 7 A. 523 *526 (1885).

it is not competent to that Court to delegate the decision of those issues to a Court subordinate thereto; (1) for when issues are remitted under this rule, such issues are triable only by the Court which was originally seized of the case.(2) There is no appeal under the Letters Patent from an order referring to issues for trial.(3)

"**Return.**"—Where an Appellate Court has made an order under this rule the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal elsewhere.(4) Where a Judge has heard the argument on some of the issues and expressed his decision upon them, he is not bound to hear the whole case on the return made to another issue framed under these sections.(5) The findings upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in first appeals, but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined.(6) In certifying to the High Court the findings on issues sent back on remand and found by the Court of first instance, the Lower Appellate Court is, in the absence of any admission by the party against whom the issues have been found, bound to form its own opinion on the evidence and record its findings with the reasons for them.(7) Where a party is dissatisfied with a decision, and appeals and re-opens the whole case, he must acquiesce in the result finally arrived at by the Court below in accordance with the instructions of the High Court in his special appeal.(8)

Finding and evidence to be put on record. Objections to finding.

26. (1) Such evidence and findings shall *form* part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to *any* finding.

Determination of appeal.

(2) After the expiration of the period *so* fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

Objections.—The Appellate Court on the return of the finding and evidence should fix a reasonable time (9) for the parties to file their objections. If no objection is raised by either party within the period allowed, neither has a right to be heard, though the Court has a discretion to allow objections afterwards, and if no objection be raised then or at the hearing, the Appellate Court is not bound to amend the finding, but apart from any objection by the parties, it

(1) Sabri *v.* Ganeshi, 14 A. 23 (1891).

(2) Ali Sher Khan *v.* Ahmad Ullah, 29 A. 360 (1907).

(3) Kali Kristo Pal Chowdhry *v.* Ram Chunder Nag, 9 C. L. R. 461 (1881).

(4) Udit Narain Singh *v.* Jhanda, 15 A. 315 (1893).

(5) Lachman *v.* Jamna, 10 A. 162 (1885).

(6) Balkishen *v.* Jasoda Kuar, 7 A. 765 (1885).

(7) Ramchandra Govind Manik *v.* Sono Sarkhhot, 19 B. 551 (1894); and see Bhagvan *v.* Kesur Kuverji, 17 B. 428 (1892).

(8) Gungaram Dutt *v.* Chowdhry Junmajoy, 1 C. L. R. 144 (1877).

(9) See Bukhtouree *v.* Meheen Lall, 3

should examine and test them to see whether or not they ought to be accepted.(1) Objections which might have been but were not made under this rule in a Lower Appellate Court to the findings on remand of the Court of first instance cannot be raised for the first time as grounds of second appeal from the Lower Appellate Court's decree.(2) In case of an unnecessary remand under the last rule, it is competent to the Judge before whom the appeal subsequently comes to disregard the finding on the order of remand.(3) The Court is in any case bound to consider the findings of the Lower Court on the merits.(4)

27. (*1*) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if— [s. 568.]

Production of additional evidence in Appellate Court.

(*a*) the Court *from* whose decree the appeal is *preferred has* refused to admit evidence which ought to have been admitted, or

(*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(*2*) *Wherever* additional evidence is *allowed to be produced* by an Appellate Court, the Court shall record the reason for *its* admission.

"**Additional evidence.**"—There ought not to be a remand for the purpose of enabling a party to make out a fresh case. If cases were remanded for the purpose of allowing parties to improve their respective cases by calling further witnesses there would be no end of litigation.(5) It is always dangerous to allow parties to make a new case and call fresh evidence upon an issue on which they have failed upon the evidence originally adduced in support of it, and more expressly so in the Mofussil Courts.(6) The power given by this rule should be exercised sparingly except at the instance of the parties,(7) and then with caution. An appellant, who has had ample opportunity of giving evidence in the Court below and elected not to do so, but to rest his case on the evidence as it stood, ought not to be allowed at the stage of appeal to give evidence which

(1) Damodar Das *v.* Gopal Chand, 7 A. 79, 91 (1884); Ratan Singh *v.* Wazir, 1 A. 165 (1876); Mumtaz Begam *v.* Fateh Husain, 6 A. 391 (1884); Akbari Begam *v.* Wilayat Ali, 2 A. 908 (1880).

(2) Muhammad Abdul Hai *v.* Sheo Bishal Rai, 10 A. 28 (1887).

(3) Mubarak Husain *v.* Bihari, 16 A. 306 (1894); Ganendra *v.* Surya Kant, 17 C. W. N. 462 (1912).

(4) Umed Ali *v.* Salima Bibi, 6 A. 383 (1884); Woomesh Chunder Roy *v.* Jonardun Hajrah, 15 W. R. 235 (1871).

(5) Ram Pershad Sookul *v.* Rajunder Sahoy, 6 W. R 262, 265 (1866).

(6) Hurpurshad *v.* Sheo Dyal, 31 A. 259, 279 (1876).

(7) Sreeman Chunder Dey *v.* Gopaul Chunder Chuckerbutty, 11 M. I. A. 28, 48, 49 (1866).

he could have given below.(1) Ordinarily speaking it is only when a Court sees that from some inadvertence, mistake, or surprise a party has not adduced evidence which he was capable of adducing, and that he is likely to be prejudiced by the omission, that the Court should allow further evidence to be taken.(2) The test as to whether additional evidence should be received depends on the question whether or not the Appellate Court requires the evidence "to enable it to pronounce judgment" or for any other substantial cause, and as to this the Appellate Court is to be the sole judge.(3) The word "requires" means needs or finds needful. The legitimate occasion for this rule is when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence, and the application is made to import it. That is the subject of review of judgment.(4) An application to admit fresh documents the genuineness of which can be tested with certainty, stands on a much more favourable footing than an application to admit fresh parol evidence after the pinch and pressure of the case has been sustained; (5) but they should not be admitted if the appellant cannot show sufficient cause; (6) or generally if having had an opportunity of tendering them in the Court below he omitted to do so; (7) or resisted their production; (8) or if they do not bear on the issues tried by the Court of first instance.(9) Where the Appellate Court, with the assent of both sides, examines witnesses and also admits documentary evidence, and there is nothing to show that such admission was objected to, it is not open to any party on appeal to the Privy Council to take exception to the regularity of this procedure.(10) As each case must depend on its own circumstances it is not profitable to deal in detail with the cases in which additional evidence has been allowed or refused.(11) A local inquiry may be ordered under this rule.(12) The improper reception of evidence under this rule is not sufficient to reverse a decision if, independently of that

(1) Ram Das Chakarbati *v.* Official Liquidator, 9 A. 366 (1887).

(2) Gowhur Ali Khan *v.* Sakheena Khanum, 15 W. R. 507 (1871).

(3) In the goods of Prem Chand Moonshee, 21 C. 484 (1894); Aadiappa Pillai *v.* Muthu kumara Thevan, 36 M. 477 (1912); and Juba Naidu *v.* Ethirajammal, 22 M. L. J. 15 (1911) (meaning of "substantial cause").

(4) Kessowji Issur *v.* G. I. P. Railway Co., 31 B. 381 (1907); Midnapur Zamindary Co., Ltd. *v.* Muktakashi, 17 C. W. N. 615 (1912); Krishnama *v.* Narasimha, 31 M. 114 (1908); Jagrani Kunwar *v.* Durga Prasad, 36 A. 93; 19 C. L. J. 165 (1913), P. C.

(5) *In re* Wiltshire Iron Co., 3 Ch. App. 449.

(6) Nadiar Chand *v.* Chunder Sikhur, 15 C. 765 (1888); Durga *v.* Jai Narain, 33 A. 379 (1911).

(7) Bibee Zahrah *v.* Bhugwan Dass, 16 W. R. 211 (1871).

(8) Manohar Ganesh *v* Lakhmiram Govindram, 12 B. 247 (1887).

(9) Leslie *v.* Allender, 17 W. R. 390 (1872).

(10) Jagarnath Pershad *v.* Hanuman Pershad, 36 C. 833; 13 C. W. N. 830 (1909).

(11) See Abelakh Roy *v.* Guggun Bhuggut, 22 W. R. 268 (1874); Shaikh Komarooddeen *v.* Monye Mundal, 16 W. R. 220 (1871); Appa *v.* Vithoba, 6 B. H. C. R., H. C. J. 88 (1869) [section applies not merely to case where Lower Court has refused to take evidence, but also where there is substantial cause for taking further evidence]; Mohesh Chunder Doss *v.* Madhub Chunder Sirdar, 13 W. R. 85 (1870); Khuda Baksh *v.* Imam Ali Shah, 9 A. 339 (1886); Srinivasa Chariar *v.* Rangammal, 18 M. 94 (1894); Arjun *v.* Shankar, 22 B. 253 (1896); Jadu Nath Mookerjee *v.* Hari Pada Mookerjee, 1 C. W. N. lxxx. (1897) [omission to summon and rejection of documents]; Dhondo Gobind *v.* Panha Lal, 1 Bom. L. R. 110 (1899); Seshan Pattar *v.* Seshan Pattar, 23 M. 447 (1899).

(12) Roy Sooltan *v.* Laloo Kooer, 17 W. R. 300 (1872).

evidence, there is sufficient evidence on the record.(1) It has been held that on an appeal against an order made under O. XVII. r. 3, when the plaintiff was present, but his witnesses were not, and no application for adjournment or to enforce the attendance of the witnesses was made, the Appellate Court should proceed under this rule to direct the admission of fresh evidence, and under r. 25 of this Order to refer the issues (which in fact had never been tried) for trial to the Court of first instance, directing that Court to return findings.(2)

The power can be exercised even after the case has been remanded on special appeal.(3) It is not necessary that the party before applying to the Appellate Court should have sought for a review of the original Court's judgment and asked it to receive the evidence.(4) After a review has been admitted fresh evidence may be taken under this rule.(5)

An appeal does not lie from an order admitting or refusing to admit additional evidence ; (6) but both may be considered in an appeal from the final decree unless the appellant has taken advantage of the order and so cannot subsequently impugn it in appeal.(7) Where the Subordinate Judge in appeal took evidence and the case was heard in second appeal, it was held that the fact of the Lower Appellate Court taking additional evidence did not make the special appeal liable to be heard as if it were a regular appeal.(8) The rejection of an appeal under this rule gives no right of appeal to the Privy Council.(9) This and the next rule are not, it has been held, applicable to proceedings before Civil Courts under sect. 195 of the Criminal Procedure Code.(10)

Record of reasons for admission.—These are strictly required,(11) and should be stated in open Court in the presence of the parties.(12) It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation, and the statement of the reasons may inspire confidence and disarm objection.(13) But such record of reasons is not a condition precedent to the reception of the evidence ; so that the omission to do so would not render the evidence inadmissible.(14)

(1) Maharajah Jagadindra Banwari *v.* Bhabatarini Dasi, 5 B. L. R. App. 54 (1870).

(2) Ram Narain *v.* Jagdeo, 33 A. 690 (1911).

(3) Kali Kristo Tagore *v.* Judoo Lall Mullick, 24 W. R. 20 (1875).

(4) Ram Lall *v.* Rung Lall, 17 W. R. 47 (1872).

(5) Beharee Lall Nundee *v.* Troyluckho Moyee Burmonee, 12 W. R. 223 (1869) ; and see Gunesh Ram Surmah *v.* Rohinee Dassee, 14 W. R. 236 (1870).

(6) Kulpo Singh *v.* Thakoor Singh, 15 W. R. 429 (1871) ; Golam Mukdoom *v.* Hafeezoonissa, 7 W. R. 489 (1867) ; Mohesh Chunder Shah *v.* Shoshee Mookhee, 6 W. R. 196 (1866) ; though the refusal to exercise discretion would be an error in procedure : Ram Peari *v.* Kallu, 23 A. 121 (1900).

(7) Mohunt Damoodur *v.* Ritoo Singh, 24 W. R. 325 (1875).

(8) Mahomed Kamil *v.* Abdool Luteef, 23 W. R. 57 (1875).

(9) In the goods of Prem Chand Moonshee, 21 C. 484 (1894).

(10) Rama Iyer *v.* Venkatachela Padayachi, 17 M. L. J. 123 (1906).

(11) See Sreeman Chunder Dey *v.* Gopaul Chunder Chuckerbutty, 11 M. I. A. 28, 48 (1866) ; Hurparshad *v.* Sheo Dyal, 3 I. A. 259 (1876) ; Gunga Gobind Mundal *v.* Collector of 24-Purgunnahs, 11 M. I. A. 345, 368 (1867).

(12) See Gunput Roy *v.* Ram Deen Roy, 21 W. R. 416 (1874).

(13) Gunga Gobind Mundal *v.* Collector of 24-Purgunnahs, 11 M. I. A. 345, 368 (1867).

(14) Ib. ; Bhugwan Chunder *v.* Raj Coomar, 13 W. R. 303 (1870) ; Gopal Singh *v.* Jhakri Rai, 12 C. 37 (1885) ; Hafiz Abdul Kurim *v.* Sri Kissen Rai, 11 C. 139 (1884).

Mode of taking additional evidence.

28. *Wherever* additional evidence is allowed to be *produced*, the Appellate Court may either take such evidence, or direct the Court *from* whose decree the appeal is *preferred*, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

"**Or direct the Court.**"—If the order is for the taking of particular evidence the Lower Court cannot go beyond it and take other evidence; (1) though in a case where A. was directed to be examined and was ill, his agent was allowed to be examined in his stead.(2) It has been held that the lower Court taking evidence acts in a ministerial capacity (*sed quære*), and that the parties may object to the admissibility of the evidence recorded before it without objection, when it is submitted for the consideration of the Appellate Court.(3)

Points to be defined and recorded.

29. Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

Judgment in appeal.

Judgment when and where pronounced.

30. The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court *from* whose decree the appeal is *preferred*, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders.

"**After hearing.**"—It is the duty of the Appellate Court to allow the parties or their pleaders to submit the evidence to it at the hearing in open Court, and to make upon the evidence so submitted every comment, and found upon it every argument they may think necessary. To succeed in an appeal on the ground that the Judge had neglected or misconceived his duty on this point, the affidavits containing facts proving such an allegation ought to be perfectly clear and exhaustive, and should leave no doubt upon the subject, excluding the possibility of the Judge having done that which it was his duty to do. The judgment may be given at once. But there are cases, especially complicated cases, in which it is desirable that the Judge should have an opportunity of considering the evidence at leisure before giving judgment.(4) This rule only

(1) Bolakee Lall *v.* Radha Sing, 1 W. R. 357 (1864).

(2) Rajah Syud Ahmed *v.* Enaet Hossein, 1 W. R. 330 (1864).

(3) Ram Joy Surmah *v.* Prankishen Singh, 2 W. R. 80 (1865).

(4) Juggessur Sahoy *v.* Gopal Lall, 15 W. R. 54, 55 (1871).

authorizes the Court to pronounce judgment *after hearing* the parties. and judgment pronounced without hearing them is unauthorized by the Code. Thus where the appellant died before the hearing of the appeal, but his pleader did not know of his death until after the appeal had been decided, and an application of his son to the District Judge to have his name placed on the record, and the appeal reargued, was rejected ; held by the High Court that as the representative of the plaintiff appellant applied within the prescribed time to have his name entered on the record, the Court was bound to enter his name, and in not doing so the Court failed to exercise a jurisdiction vested in it by law. As the judgment was pronounced without hearing him, it was unauthorized by the Code.(1) It has been held that the senior pleader who is present before the Court has the entire control of a case in the High Court, and that it is not open to the junior pleader to take any ground of appeal which his senior has not thought fit to argue, except only when the senior has obtained the permission of the Court that that course should be taken.(2)

31. The judgment of the Appellate Court shall *be in* [s. 574.] *writing and shall* state—

Contents, date and signature of judgment.

(*a*) the points for determination ;

(*b*) the decision thereon ;

(*c*) the reasons for the decision ; and

(*d*) *where* the decree appealed *from* is reversed or varied, the relief to which the appellant is entitled ;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Judgment of Appeal Court.—The duty of the Appellate Court is not to interfere with the judgment of the first Court until it is perfectly satisfied in its own mind that the conclusion arrived at by the first Court is erroneous. If there is any doubt in the case, the benefit of that doubt ought to be given to the respondent and not to the appellant, for it must be presumed in law that the judgment of the Lower Court is right until the contrary is shown. No doubt the Appellate Court may make further inquiries ; but such inquiries ought to be made with discretion, and only in those cases where the Appellate Court finds it unable to do justice to the parties on the evidence and material as they stand upon the record.(3) The judgment, therefore, of the first Court, if not shown to be erroneous, ought to be affirmed, and it is for the appellant to show manifest (4) errors in the decree appealed from.(5) The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the Judge who tried the cause and saw the witnesses and their demeanour. That gives him considerable advantages over those who only draw this information from

(1) Jonardhan *v.* Ram Chandra, 26 B. 317, 319 (1901) ; s. c., 4 Bom. L. R. 23.

(2) Sreenoebash *v.* Umbika, 12 W. R. 375 (1869).

(3) Taliboonissa *v.* Sham Kishore, 15 W. R. 228, 229 (1871).

(4) Shetabdee Biswas *v.* Molamdee, 25 W. R. 30 (1875).

(5) Wise *v.* Sunduloonissa, 11 M. I. A. 177, 181 (1867).

perusing the notes. But still, though the Court of Appeal ought not lightly to find against the opinion of the Judge who tried the cause, that Court, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way.(1) The parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.(2) "If we are to accept," says James, L.J., "as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened. But then, that would be in truth to do away with the right of appeal in all cases of nuisance, for there is never one brought into Court in which there is not contradictory evidence, and there have been, I am satisfied, a larger percentage of appeals in those cases than in any other."(3) And therefore the Judge of an Appellate Court ought to explain his own views instead of merely saying that he adopts those of the first Court.(4) It has been said as regards the rule of the Privy Council not to disturb a judgment of a Court in India upon a question of the credibility of witnesses, unless it is manifestly clear from the probabilities attached to certain circumstances in the case that the Court below was wrong in the conclusion drawn from such evidence, that however necessary as regards a Court of Appeal far removed from India, it need not be extended as one equally necessary and applicable with the same strictness, to a Court of Appeal in India, which has the opportunity of calling witnesses and has all the advantages to be derived from a personal acquaintance with the prople, their feelings, habits, and character as well as other local advantages.(5)

The dismissal of an appeal under sect. 551 (now r. 11) by a Court whose decision may be the subject of an appeal, does not relieve the Court from the necessity of writing a judgment which, according to the provisions of this rule, should show the points raised, the decision upon those points, and the reasons for deciding them. Thus, where an Appellate Court's judgment was simply "Appeal rejected under sect. 551 of the Code of Civil Procedure;" held that

(1) Smith *v.* Chadwick, L. R. 9 A. C. 187, 194 (1884), *per* Lord Blackburn.

(2) The Glannibanta, 1 P. D. 283, 287 (1876).

(3) Bigsby *v.* Dickinson, 4 Ch. D. 24, 29 (1876); see also Akbari Begum *v.* Wilayat Ali, 2 A. 908 (1880); Mumtaz Begum *v.* Fateh Hussain, 6 A. 391 (1884); compare Nobin *v.* Rungochunder, 25 W. R. 363 (1876); Hoymobutty *v.* Sreekissen, 14 W. R. 58 (1870); Anund *v.* Rutnessur, 25 W. R. 50 (1875), where it was held that the Appellate Court should not disbelieve the witnesses believed by the first Court without good reasons for doing so, and that it is not justified in believing a witness whose demeanour was declared, by the first Court, to be unsatisfactory; Gopee Nath *v.* Boodhumunt, 25 W. R. 26 (1875).

(4) Rohimoni *v.* Zamiruddin, 8 C. L. R. 597 (1881).

(5) Sarodasoondery *v.* Tincowry Nundy, 1 Hyde, 223, 252 (1862), in which it was also held that a Court of Appeal cannot refer to evidence in another case. But see Heera Loll *v.* Mohesh Chunder, 1 Hyde, 105 (1862), where it was held that the High Court sitting in appeal on questions of fact, is guided by the same rules as those of the Privy Council when they sat upon motions for a rule for new trials from the Old Supreme Court.

the judgment was not in conformity with law, and the case was remanded for disposing of the appeal according to law.(1)

A Court of second appeal cannot enter into the merits of the appeal, in order to ascertain the weight of the evidence produced in support or the allegations of the parties. So it will insist upon having before it findings recorded in a judgment which strictly conforms to the imperative rule laid down in this rule. The rule here laid down cannot be too strictly enforced. A judgment which falls short of complying with the clear provisions of this section is, as such, worthless for the purposes contemplated by the law. Its imperative provisions apply alike to cases remanded by the first Appellate Court for trial of issues and to those in which no such remand has taken place.(2) As the High Court in second appeal is bound to accept the findings of fact arrived at by the Lower Court, it should insist upon a due obedience by those Courts of the mandate contained in this rule.(3)

Under clause (42) of the Letters Patent the Judges of the High Court are bound to record the reasons for their decisions, and these reasons should, on appeal to England, be transmitted with the record for information, at the hearing by the Judicial Committee.(4) These reasons should be stated publicly at the hearing, and not reserved to influence the Court of Appeal.(5) But it has been held to be doubtful whether the former section applied to cases where the High Court, having heard the judgment of the Court below and argument upon that judgment, came to the conclusion that it was right, and agreed with the reasons which it gave.(6)

It was held that on remand under sect. 566 of the last Code that sect. 567 required the lower Court of Appeal to proceed to determine the appeal. Sect. 571 required it to pronounce judgment, and sect. 574 (this rule) was imperative as to what the judgment was to contain. The Appellate Court was required to give its own decision, and the reasons for it, upon the issues remanded to the original Court under sect. 566.(7) These provisions apply alike to cases remanded by the first Appellate Court for the trial of issues and to those in which no such remand has taken place.(8) A Judge having remanded a case for further evidence to be taken and a fresh finding recorded on a question of fact, is bound, though there is no memorandum of objection, to examine into the correctness of the finding and come to a conclusion whether he accepts it or not, unless its correctness has been admitted by the party to whom it is

(1) Rami Deka *v.* Brojo, 25 C. 97 (1897); this case was dissented from in Samin Hasa *v.* Piran, 30 A. 319 (1908), but followed in Saravana Pillai *v.* Sesha Reddi, 31 M. 469 (1908).

(2) Ahmed Ali *v.* Salima Bibi, 6 A. 383 (1884); Mumtaz Begum *v.* Fateh Hussain, 6 A. 391 (1884); Sohawan *v.* Babu Nand, 9 A. 26 (1886); Bhagvan *v.* Kesur Kuverji, 17 B. 428, 430 (1892); Ramchandra Govind *v.* Sono Sadashiv, 19 B. 551 (1894); and as to judgment on remand for further evidence, see Kunhi Marakkar *v.* Kuth Umma, 20 M. 496 (1897).

(3) Sohawan *v.* Babu Nand, 9 A. 26, 31 (1886); Moni Lal *v.* Uma Charan, 19 C. L. J. 541 (1913).

(4) Katchekabyana Rungappa *v.* Kachivijaya Rungappa, 12 M. I. A. 495, 502 (1869).

(5) Richer *v.* Voyer, L. R. 5 P. C. 461, 481 (1874).

(6) Sundav Bibi *v.* Bisheshar, 9 A. 93, 95 (1886).

(7) Bhagvan *v.* Kesur Kuverji, 17 B. 428, 430 (1892).

(8) Umed Ali *v.* Salima Bibi, 6 A. 383 (1884); Mumtaz Begum *v.* Fateh Hussain, 6 A. 391 (1884).

adverse.(1) An appellant is fairly entitled to an expression of opinion of the Appellate Court on the grounds taken in the memorandum of appeal.(2) If, however, the Appellate Court is not asked to express any opinion on any particular ground of appeal stated in the memorandum of appeal, the Court is not at fault if no decision is passed upon it. If, having had his attention called to it, a Judge fails to decide such point, the proper course for the parties aggrieved is to ask him to review his judgment. In order to satisfy the High Court that a point which the Judge omitted to notice was actually taken in the oral pleadings, a party may put in either an affidavit of some person who heard the point raised or a copy of the petition to the Judge drawing attention to the omission with his order.(3) Where this rule has not been complied with and action is required, the Court may either reverse the decree and remand the case for a fresh decision,(4) and this is generally done; or the Court may (it has been said), without reversing the decree, retain the case on appeal, but return the proceedings in order that the Lower Court may state its reasons.(5) But though a decision may not be as clear as it might have been, if there are words to be found which substantially dispose of the case set up, the Court may consider it unnecessary to remand for a clearer finding.(6) It is, however, no objection that a judgment is short if it sufficiently appears that the evidence has been considered and the Court has given its opinion thereon.(7) As to whether a Lower Court's omission to comply (8) with the terms of this rule can be considered a ground for second appeal, see notes to sect. 100, *ante*.

Clause (*a*).—The necessity for this clause is obvious, it being the foundation of those which follow. The point or points on which the appeal has to be decided should be set down distinctly.(9) And it is a convenient practice which keeps the decision on each point and the reasons therefor separate from the rest.

Clause (*b*).—The judgment should clearly and fully dispose of all the points in issue between the parties by a distinct finding on each of them.(10)

(1) Kunhi Marakkar Haji *v.* Kutti Umma, 20 M. 496 (1891); Subbayya *v.* Rami Reddi, 22 M. 344 (1899).

(2) Muhammad Ahmad *v.* Zubaida Jan, 16 I. A. 205, 211 (1889); s. c., 11 A. 460, 470; Tayammaul *v.* Saschachalla Naiker, 10 M. I. A. 429, 436 (1865).

(3) Yusoof Ali *v.* Fyzoonissa, 15 W. R. 296 (1871).

(4) Haimabati Dasi *v.* Govinda Chandra, 2 C. W. N. 695, 697 (1898); Kristo Chunder *v.* Ram Brohmo, 20 W. R. 403 (1873), and numerous cases.

(5) Doolee Chand *v.* Oomda Begum, 17 W. R. 472 (1872); Bisvanath Maiti *v.* Baidyanath Mundul, 12 C. 199 (1885); Assanullah *v.* Hafiz Mahomed Ali, 10 C. 932 (1884); Kristo Chunder *v.* Ram Brohmo, *supra*.

(6) Shurbessur Ghose *v.* Sadhoo Churn, 15 W. R. 130 (1871).

(7) Ramessur *v.* Shaikh Banoo, 12 W. R. 272 (1869).

(8) See Doolee Chand *v.* Oomda Begum, 18 W. R. 473 (1872); Ramessur *v.* Bhanoo, 12 W. R. 272 (1869); Kamat *v.* Kamat, 8 B. 368 (1884); Purshotam *v.* Durgoji, 14 B. 452 (1890); Ningappa *v.* Shivappa, 19 B. 323 (1894); Gopal Rao *v.* Kishor Kalidas, 9 B. 527 (1885); Bisvanath Maiti *v.* Baidyanath Mundul, 12 C. 199 (1883); Golam Hossein *v.* Ram Gopal, 12 W. R. 152 (1869); Shumsurooddy *v.* Jan Mahomed, 21 W. R. 260, 261 (1874).

(9) Shurbessur Ghose *v.* Sadhoo Churn, 15 W. R. 130 (1871).

(10) Bhagbut Khan *v.* Puddo Bewa, 3 W. R. 192 (1865).

Sect. 565 of the last Code was held to enable the Appellate Court in some cases to determine a question of fact upon the evidence then on the record, but not to declare a right in favour of one of the parties, where no issue had been framed on the point, and the right had not been set up in the Lower Court.(1) The Judge should specifically decide each point or points raised and give his reasons. It is not sufficient to say that by confirming generally the order of the Lower Court it has therefore virtually tried and disposed of the particular point when no mention has been made by it.(2) Where the Appellate Court does not sufficiently consider important matters, such as sufficiency of notice or a question of the nature of a tenure, its judgment will be set aside.(3)

Clause (*c*).—Having stated the points for determination and the decision thereon, the Court must state its reasons therefor.(4) The provisions of this rule are imperative, and require the Appellate Court to give its own decision and the reasons for it,(5) and a judgment which falls short of complying with the clear provisions of this section is, as such, worthless for the purposes contemplated by the law.(6) It is not, however, laid down in this rule that the judgment of the Appellate Court, any more than the judgment of the Court of the first instance, is to contain a review or setting forth of the whole of the evidence, and therefore it can hardly be assigned as an absolute error if a judgment is defective on this point. Although the law does not require a detailed examination of the evidence, yet the Judge does well who gives an intelligent and clear account of the evidence which he has had to consider, and states the reasons for which he thinks particular portions of the evidence to have been more or less worthy of consideration. The Judge of the Appellate Court who most fully gave his reasons or his judgment, and most fully entered into the merits of the case before him, would be held to have most efficiently and intelligently carried out the duties required of him.(7) In certifying to the High Court the findings on issues sent back on remand, the Lower Appellate Court, in the absence of any distinct admission by the appellant's pleader that the finding of the first

(1) Official Trustee of Bengal *v.* Krishna Chandra, 12 C. 239, 246 (1885); s. c., 12 I. A. 166, 170.

(2) Radha Gobind *v.* Ram Kishore, 8 W. R. 340 (1876); Haimabati Dasi *v.* Govinda Chandra, 2 C. W. N. 675 (1898) [decision by implication].

(3) Pertap Narain *v.* Maigh Lal, 13 C. W. N. 949 (1909); Shaharulla *v.* Bangoo Mondal, 13 C. W. N. 143 (1908); Santishwar *v.* Lakhi Kanta, 13 C. W. N. 177 (1908).

(4) See Shurbessur *v.* Sadhoo Churn, 15 W. R. 130 (1871); Raj Chunder *v.* Ramakant, 15 W. R. 324, 326 (1871); Hossein Buksh *v.* Ameena Khatoon, 15 W. R. 280 (1871); Korban Ali *v.* Ashan Ali, 4 W. R. 4 (1863); Rughubeer Sahai *v.* Chattraput, 1 Agra, 73 (1866); Dhun Rae *v.* Ramphul Rae, 2 N. W. P. H. C. R. 109 (1870); Sohawan *v.* Babu Nand, 9 A. 26, 28 (1886); Karim Baksh *v.* Lucas, 2 C. W. N. ccexxxix. (1898); Srikant *v.* Huri Das, 11 C. L. R. 131 (1882); Rami Deka *v.* Brojo, 25 C. 97 (1897); Gundappa *v.* Lobosa, 1 Bom. L. R. 490 (1899); Appa Kalja Naik *v.* Mallu, 16 B 477 (1891); Imrit Singh *v.* Koylashoo, 11 W. R. 539 (1869); Kartick Napit *v.* Personomoyee, 2 W. R. 77 (1865); Haimabati Dasi *v.* Govinda Chandra, 2 C. W. N. 695, 697 (1898); Chander Kant *v.* Hurrish Chunder, 1 W. R. 214 (1864).

(5) Bhagvan *v.* Kesur Kuverji, 17 B. 428, 430 (1892).

(6) Umed Ali *v.* Salima Bibi, 6 A. 383 (1884); Mumtaz Begum *v.* Fateh Hussain, 6 A. 391 (1884); Ramchandra Govind *v.* Sono Sadashiv, 19 B. 561 (1894).

(7) Noor Mahomed *v.* Zuhoor Ali, 11 W. R. 34 (1869).

Court on the issues was correct, is bound to form its own opinion on the evidence and record its finding with the reasons therefor.(1) It is no judgment to say merely that a point is worthless (2) or absurd; (3) or that the plaintiff has not been able to make out his case; (4) or that on the evidence the claim is proved; (5) or that there is no ground for appeal; (6) or the like. The mere adoption of and concurrence with the reasons given by the Lower Court has been considered insufficient,(7) for an appellant has a right to the opinion of the Appellate Court on the case and the evidence given in support of it. It is sometimes said that where a judgment is one of affirmance the Court need not go very fully into the reasons. It would, however, be more correct to say that if a judgment is defective in this respect the defect is of a more serious character in the case of a judgment of reversal than of affirmance. It is very desirable that the Appellate Court should state, with as much fullness as the nature of the case may require, the reasons for its decision even when it affirms the decision of the first Court.(8) But it is not obligatory on an Appellate Court either to take notice of every item of evidence produced by the parties, or to meet categorically every one of the arguments advanced by the first Court in support of its decision, if it gives special reasons of its own for coming to an opposite conclusion.(9) It is sufficient if the judgment deals with all the material points involved in the case.(10) It is impossible to lay down any general rule as to when the Court should consider that the reasons for a particular finding by the Lower Appellate Court must be stated. There may be cases in which the omission to state the reasons would render the judgments so unintelligible that the High Court could not pronounce any opinion upon whether it was right in law. In

(1) Ramchandra Govind *v.* Sono Sadashiv, 19 B. 551 (1894).

(2) Hossein Buksh *v.* Ameena Khatoon, 16 W. R. 280 (1871).

(3) Hem Chunder *v.* Ahmed Reza, Marsh, 332 (1863); Juggessuree Debia Gudadhura Bonnerjee, 6 W. R. Act. X. 21 (1866).

(4) Karim Baksh *v.* Lucas, 2 C. W. N. cccxxxix. (1898).

(5) Trilochun Dutt *v.* Ishen Chunder, 3 W. R. 176 (1875). (The Court should also state what that evidence consists of, and in what way or for what specific reasons it proves the plaintiff's or defendant's case.)

(6) Assanullah *v.* Hafiz Mahomed Ali, 10 C. 932, 935 (1889).

(7) Sohawan *v.* Babu Nand, 9 A. 26 (1886); Gundappa *v.* Lobosa, 1 Bom. L. R. 490 (1899); Babban Singh *v.* Jaimangal Singh, A. W. N. 86 (1906); Sitaram *v.* Surya Narayana, 22 W. R. 12 (1898); Rajoo *v.* Raj Coomar, 7 W. R. 137 (1867); Ommutul Fatima *v.* Janee Khanum, 1 W. R. 295 (1864); Khelluck Chunder *v.* Nund Ram Sein, 2 W. R. 7 (1865); Kristna Reddi *v.* Srinivasa Reddi, 5 M. H. C. R. 174 (1870).

(8) Ram Rangini *v.* Chandra Benode, 1 C. W. N. 691, 692 (1897); Imrit Singh *v.* Koylashoo, 11 W. R. 559 (1869); Kartick Napit *v.* Personomyee, 2 W. R. 77 (1865); Munsoob Bibee *v.* Ali Meah, 17 W. R. 358 (1872); Shathuk Paul *v.* Gudadhur Roy, 4 W. R. 100 (1865); Babu Madhau *v.* Venkatesh Manjaya, 16 B. 540 (1891); Mahomed Fatteh *v.* Nuseeroddeen, 21 W. R. 284 (1874); Haimabati Dasi *v.* Govinda Chandra, 2 C. W. N. 695, 697 (1898); but see also Juggessar *v.* Gopal Lall, 15 W. R. 54 (1871); Syud Shah Ekbal *v.* Bunsee Sahoo, 25 W. R. 12 (1875); Ramessur Bhuttacharjee *v.* Shaikh Banoo, 12 W. R. 272 (1869) [in which also the meaning of the word "reasons" is described]; Khettur Mohun *v.* Bhyrub Chunder, 3 W. R. 126 (1865).

(9) Jatra Mohan Nandi *v.* Pitambar Mistri, 19 C. L. J. 385 (1913), at p. 387, *per* Jenkins, C.J., following Dabee Pershad *v.* Joy Lall Chowdhry, 12 W. R. 361 (1869).

(10) Krishendro *v.* Digumburee, 16 W. R. 15, 16 (1871).

such case, reasons should be stated. But there may be cases in which the Court would not think it necessary to require them.(1)

Clause (*d*).—When an Appellate Court, in a judgment which in some material matters differs from the conclusion of the first Court, upholds the decree of the first Court, it must specify in the decree the exact modifications which its conclusions have necessitated, as contemplated by this rule,(2) and when it reverses a decree, it should state the relief which it considers the appellant entitled to.(3)

32. The judgment may be for confirming, varying or reversing the decree *from* which the appeal is *preferred*, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be *made* in appeal, the Appellate Court may pass a decree or *make an* order accordingly. [s. 577.]

What judgment may direct.

Judgment in appeal.—As to functions of the Appeal Court, see notes to sect. 96 and r. 4 and the last rule of this Order.(4) The powers conferred by this rule are powers which require that parties should be in accord with each other at the time when the decree is pronounced by the Appellate Court. The use of the word "may" indicates discretion in a Court, and does not force the Court to pass a decree in any manner which goes beyond the scope of its discretionary power. Thus where an application containing the terms of a compromise was presented to the High Court by one of the parties, and the *Solehnama* was sent down to the Lower Court for verification, but the attendance of the parties for that purpose could not be procured, the High Court refused to pass a decree under sect. 577, in accordance with the terms of the *Solehnama*.(5)

33. *The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objections.*

Power of Court of Appeal.

Illustration.

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals, and A and Y are respondents.

(1) Shumshurooddy *v.* Jan Mahomed, 21 W. R. 260 (1874).

(2) Lachho *v.* Har Sahai, 12 A. 46, 48 (1887).

(3) Bell *v.* Gurudas, 1 B. L. R. A. C. 50 (1868).

(4) Kailash *v.* Girija Sundari, 39 C. 925 (1912).

(5) Bandhu Bhagat *v.* Shah Muhammad, 14 A. 350, 352 (1892).

The Appellate Court decides in favour of X. It has power to pass a decree against Y.

Powers.—This rule, which is taken from English O. 58, r. 4, is new, and has been inserted because (as the Select Committee said) it is most imperative that an Appellate Court should have the fullest power to do complete justice between the parties.(1) It is applicable to all cases where an appeal is heard after this Code came into force.(2) The latter part of the clause is explained by the illustration.(3) It is open to the Appellate Court to vary the decree appealed against, either in points (if any) in which it is erroneous or in respect of supplemental matters which are admitted.(4) It is entitled to take cognizance of events which have happened since the filing of the appeal (5) or, in other words, it is open to the Appellate Court to vary a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed.(6) The Courts, in the exercise of the powers conferred by this rule, should not lose sight of the other provisions of the Code, nor of the Court Fees Act, nor of the Limitation Act. In particular, it should bear in mind the case stated in the Illustration.(7) R. 22 of this Order shows that it is intended that (*prima facie* at least) a respondent should not be allowed to take exception to so much of a decree as was against him without complying with the provisions of the rule.(8)

"May not have filed any appeal or objection."—See notes to rr. 4 and 22 of this Order; as also notes to sect. 96, *ante*.

Dissent to be recorded.

34. *Where* the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

Decree in appeal.

Date and contents of decree.

35. (*1*) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

(*2*) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and *a clear specification of* the relief granted or other *adjudication made.*

(*3*) The decree shall also state the amount of costs incurred in the appeal, and by *whom, or out of what property*, and in what proportions such cost and the costs in the suit are to be paid.

(1) Ravaneshwar *v.* Chandi, 38 C. 721 (1911).
(2) Chandramarthy *v.* Narayanasawmy, 33 M. 241 (1909).
(3) Rangam Lal *v.* Jhandu, 34 A. 32 (1911).
(4) Sakharam Mohadev *v.* Hari Krishna, 6 B. 113, 115 (1881).
(5) Ahmadji *v.* Mahamadji, 1 Bom. L. R. 218 (1899).
(6) Rustomji *v.* Purshotam Das, 25 B. 606, 613 (1901).
(7) Rangam Lal *v.* Jhandu, 34 A. 32 (1911).
(8) Ib.

(*4*) The decree shall be signed and dated by the Judge *or* Judges who passed it:

Provided that where there are more Judges than one *and* there *is* a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

Judge dissenting from judgment need not sign decree.

Appellate decree.—The appellate decree is the first decree and the only decree capable of being executed after it has been passed, whether the same reverses, modifies, or confirms the decree of the Court from which the appeal was made.(1) It is clear from the terms of this rule that in any case the decree to be executed, not only for the costs of the appeal, but for the costs of the suit, is the decree of the Appellate Court only. The effect of the rule is to cause the decree of the Appellate Court to supersede the decree of the Court below, even when the decree of the Appellate Court is one which merely affirms that decree below and does not reverse it or modify it. The only decree that can be amended is the decree to be executed; and the decree to be executed is the decree of the Appellate Court and not the decree of the Court below.(2) If a decree is made in appeal so that the appellate decree becomes the one to be executed, time runs from its date and not from that of the original decree.(3) When, however, an appellant withdraws an appeal, no decree is made. The order of the Court does not come within the definition of the word "decree." The litigation commenced with the presentation of the appeal is merely discontinued, and the case remains as if the appeal had never taken place, and the decree appealed against becomes final, and time runs from the date of that decree.(4) The only Court which has jurisdiction to amend an appellate decree is the Court of Appeal.(5) When two parties to a suit appeal, so that the one

(1) Shohrat Sing *v.* Bridgmann, 4 A. 376, F. B. (1882).

(2) Muhammad Sulaiman Khan *v.* Muhammad Yar Khan, 11 A. 267, 273, 274 (1888); Mahmood, J., dissenting. See also Bhanushankar *v.* Raghunathram, 2 Bom. H. C. R. (A. C. J.) 106 (1865); Doulat *v.* Bhukan Das, 11 B. 172 (1886); also Sikhal Chand *v.* Velchand, 18 B. 203 (1893); Arunachellathudayan *v.* Veludayan, 5 M. H. C. R. 215 (1870); Noor Ali Chowdhury *v.* Koni Meah, 13 C. 13 (1886); Kisto Kinkar *v.* Burroda Caunt, 10 B. L. R. 101 (P. C.) (1872); Manavikraman *v.* Unniappan, 15 M. 170, 171, 172 (1891); Nourang Rai *v.* Latif Choudhuri, 13 A. 394 (1891); Jawahir Mal *v.* Kistur Chand, 13 A. 343 (1891); Pichuvayyangar *v.* Seshayyangar, 18 M. 214, 216 (F. B.) (1894); Nan Chand *v.* Vithu, 19 B. 258, 260 (1894); cf. Mulchand *v.* Ram Ratan, 20 A. 493, 495 (1898); Kailash *v.* Girija Sundari, 39 C. 925 (1912).

(3) Patloji *v.* Ganu, 15 B. 370, 375 (1890); Noor Ali Chowdhury *v.* Koni Meah, 13 C. 13 (1886); Muhammad Sulaiman *v.* Muhammad Yar Khan, 11 A. 267 (1888); Rup Chand *v.* Shamah-ul-Jehan, 11 A. 346 (1889); Aruna Chellathudayan *v.* Veludayan, 5 M. H. C. R. 215 (1870); Sakhal Chand *v.* Velchand, 18 B. 203 (1893); Abdul Rahiman *v.* Moidin Saiba, 22 B. 500, 503 (1896).

(4) Patloji *v.* Ganu, 15 B. 370, 375 (1890); Vythilinga *v.* Vijayathammal, 6 M. 43, 46 (1882); Hingan Khan *v.* Ganga Pershad, 1 A. 293 (1867).

(5) Muhammad Sulaiman *v.* Muhammad Yar Khan, 11 A. 267 (1888); Mahmood, J., dissenting; Sheolal *v.* Jumaklal, 18 B. 542, 545 (1893).

appeal is but the cross-appeal of the other, there ought to be only one final decree made between the two parties. Not only is there nothing to prevent, but it is the duty of the Court to make one decree, and only one decree, between the same parties.(1) The date which the decree should bear is the date when the judgment was delivered.(2)

"**Relief granted,**" **etc.**—A decree should be so drawn up as to need no interpretation other than may be gathered from the language of the decree itself, and there should be no need of reference to any document or paper whatsoever, unless such document or paper is attached to the decree and forms part of it. While, on the one hand, it is true that the decree should be drawn up in this manner, it is also just that litigants who have been successful should not be deprived of the fruits of their success owing to carelessness on the part of the Court or officer charged with the preparation of decrees. Thus where a decree, in its terms, is ambiguous, the Court executing the decree can refer to the pleadings in the suit in which the decree was passed to ascertain its precise meaning.(3) Again, where the decree omits to reserve the rights of prior mortgages admitted by all the parties to the suit, it ought to be construed with reference to the admission contained in the pleading or made in the course of the case, and ought not to be so construed as to grant a larger measure of relief than is prayed for or to negative rights admitted by all parties.(4) The decree of the Appellate Court should be drawn up in such a form as will show in itself the ultimate relief granted. If the Appellate Court decrees an additional amount and the decree as drawn up only mentions the amount decreed by the first Court, and the amount due to the decree-holder is ascertainable from the decree of the first Court and the finding of the Lower Appellate Court, then he should obtain execution for the amount found in his favour and for his costs.(5) This rule does not require the claim to be stated in the decree so as to make the statement a part of the decree itself.(6)

Costs.—It was held that the former section, when it provided that the decree of the Appellate Court should state by what parties and in what proportion the costs incurred in the appeal and the costs in the suit were to be paid, referred to the parties who were parties to the appeal, and not to parties who were not arrayed either as appellants or as respondents in the appeal, but who, under sect. 544 of the former Code, might take the benefit of the decree.(7) This section referred (as does also this rule) to cases where there are more parties than one made liable for costs, which necessitate the fixing by the Court of Appeal of the proportion in which the costs are to be paid.(8)

(1) Raghoobuns Sahoy *v.* Asloo, 2 W. R. 294, 296 (1873).

(2) Parbati *v.* Bhola, 12 A. 79, 81 (1889).

(3) Lachmi Narain *v.* Jwala Nath, 18 A. 344, 347 (1896); Robinson *v.* Duleep Singh, L. R. 11 Ch. D. 798, 813, 818, 821 (1878); Muhammad Sulaiman *v.* Muhammad Yar Khan, 11 A. 267, dist. (1888).

(4) Srinivasa *v.* Yamunabhai, 29 M. 84 (1905); s. c., 16 M. L. J. 50.

(5) Jawahir Mal *v.* Kistur Chand, 13 A. 343 345 (1891).

(6) Souda Shrinivasapa *v.* Krishnappa, 11 B. 177 (1886). In this case the decree awarded the plaintiff's claim.

(7) Mulchand *v.* Ram Ratan, 20 A. 493, 495, dist. (1898); Muhammad Sulaiman *v.* Muhamad Yar Khan, 11 A. 267 (1883).

(8) Raj Krishna *v.* Pramoda, 21 W. R. 74 (1873).

It is the business of the Appellate Court finally determining a suit to decide by which of the parties before it the costs shall be borne; it is not at liberty to declare that the costs of the suit shall be borne by the unsuccessful party in a suit to be thereafter brought, because it might be that the suit will not be brought at all, and in that case there will be no execution, or the plaintiff and the defendant might be left to bear their own costs.(1) Though the Judge must state by what parties (and in what proportions if necessary) the costs of the original suits are to be paid, he is not bound to go into particulars, or append to his judgment a schedule setting forth the different items which make up the costs of the first Court. He takes the amount of costs for granted and decides who is to pay them.(2) Where the order of the Appellate Court awarded (*a*) all the costs of the appeal, amounting to a certain sum named,(*b*) all the costs in the original Court, not naming any sum, and (*c*) the costs of the remand, and it was argued that the decree-holders were only entitled to the sum of money specifically named in the High Court's decree for costs, and that they could not have the costs of the first Court, because the amount was not mentioned, nor the costs of the remand because such remand costs if they come in under any head at all would come under the head of costs of the appeal, and that these had not been allowed beyond the sum fixed by the decree; it was *held* that the decree was perfectly clear as to what it meant to give, and there was nothing in the law which made the order for costs bad simply because it did not specify the exact sum to be paid as costs of the Lower Court; that there was nothing to make it incumbent on a Court of Appeal to specify the amount of the costs incurred in the first Court. It had only to declare the proportion in which they were to be paid. As to the costs of the remand, it was held that the decree declared that besides the costs of the appeal and the costs in the original Court the costs of the remand were to be paid; it did not matter whether those costs were included or not in the appeal costs.(3) But though the law does not direct that a Court should annex to every decree the costs incurred by both parties, yet it is a convenient practice to do so.(4) When an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree.(5) When an appeal is dismissed on wholly different grounds from those relied on by the Court below, the dismissal should be without costs.(6)

36. Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the *Appellate* Court and at their expense. [s. 580.]

Copies of judgment and decree to be furnished to parties.

(1) Kashee Chunder *v.* Bungshee Buddun, 23 W. R. 89, 90 (1874).

(2) Mothoora Mohun *v.* Hureekishore, 18 W. R. 286 (1872); Raghu *v.* Rajendra, 14 C. W. N. 556 (1909).

(3) Rajkrishna *v.* Promoda, 21 W. R. 74 (1873).

(4) Nubo Kristo *v.* Parbutty, 13 W. R. 23 (1870).

(5) Busseeroollah *v.* Ram Kant, 16 W. R. 266 (1871).

(6) Fischer *v.* Kamala Naicker, 8 M. I. A. 170, 192 (1860); s. c., 3 W. R. (P. C.) 33.

Certified copy of decree to be sent to Court whose decree appealed *from.*

37. A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed *from* and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

ORDER XLII.

Appeals from Appellate Decrees.

1. *The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.*

Procedure.

Second appeals.—See sects. 100–103 and sects. 107 and 108, *ante*, and notes thereto, and notes to O. XLI.

ORDER XLIII.

Appeals from Orders.

1. An appeal shall lie from the following orders under *the provisions of section 104, namely:—*

Appeals from **orders.**

(*a*) *an* order under rule 10 of Order VII returning *a* plaint to be presented to the proper Court;

(*b*) an order under rule 10 of Order VIII pronouncing judgment against a party;

(*c*) *an* order *under rule 9 of Order IX* rejecting *an* application (in *a* case open to appeal) for an order to set aside the dismissal of a suit;

(*d*) *an* order under *rule 13 of Order IX* rejecting *an* application (*in a case open to appeal*) for an order to set aside a decree *passed ex parte;*

(*e*) an order under rule 4 of Order X pronouncing judgment against a party;

(*f*) an order under rule 21 of Order XI;

(*g*) *an* order under *rule 10 of Order XVI* for the attachment of property;

(*h*) an order under rule 20 of Order XVI pronouncing judgment against a party;

(*i*) *an* order under *rule 34 of Order XXI on an* objection to *the* draft *of a* document *or of an* endorsement;

(*j*) *an* order under *rule 72* or *rule 92 of Order XXI* setting aside or refusing to set aside a sale;

(*k*) *an* order under *rule 9 of Order XXII* refusing to set aside the abatement or dismissal of a suit;

(*l*) *an order under rule 10 of Order XXII* giving or refusing to give leave;

(*m*) *an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;*

(*n*) *an order under rule 3 of Order XXV rejecting an application* (in a case open to appeal) *for an order to set aside the dismissal of a suit;*

(*o*) *an order under rule 3 or rule 8 of Order XXXIV refusing to extend the time for the payment of mortgage-money;*

(*p*) *orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;*

(*q*) *an order under rule 2, rule 3 or rule 6 of Order XXXVIII;*

(*r*) *an order under rule 1, rule 2, rule 4* or rule *10 of Order XXXIX;*

(*s*) *an order under rule 1 or rule 4 of Order XL;*

(*t*) *an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal;*

(*u*) *an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;*

(*v*) *an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV;*

(*w*) *an order under rule 4 of Order XLVII granting an application for review.*

Appeals from Orders.—See the notes to the various rules referred to. As regards clauses (*b*), (*e*), and (*h*), these orders were under the previous law appealable as decrees. But having regard to the present definition of decree they would no longer be appealable in that way, and it has therefore been necessary to make them appealable as orders. It has been held that under this rule an appeal lies from negative orders under O. XXXIX.,(1) and that if there is an appeal against an order made under any rule there is an appeal against any order made under part of that rule.(2)

Procedure.

2. The *rules of Order XLI* shall apply, so far as may be, to appeals from orders. [s. 590.]

"**Appeals from orders.**"—See sects. 104–108, *ante*, and Order XLI., and notes to those sections and orders.

(1) Lachmi Narain *v.* Ram Charan Das, 35 A. 425 (1913); Hari Layal *v.* Prayag Ram, 17 C. W. N. 996 (1913); Zabada Jan *v.* Muhammad Taiab, 152 A. 8 (1892).

(2) Eastern Mortgage and Agency Co. *v.* Fakuruddin, 17 C. W. N. 16 (1912); Mohunt Anand *v.* Ram Perkash, 14 C. W. N. 183 (1909).

ORDER XLIV.

Pauper Appeals.

Who may appeal as pauper.

1. Any person entitled to prefer an appeal, who is unable to pay the fee required for the *memorandum* of appeal, may present an application accompanied by a memorandum of appeal, *and may* be allowed to appeal as a pauper, subject, *in all matters including the presentation of such application*, to the *provisions relating to suits by paupers*, in so far as those *provisions* are applicable:

Procedure on application for admission of appeal.

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appeal*ed from*, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

Inquiry into pauperism.

2. The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court *from* whose decision the appeal is *preferred*:

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court *from* whose decree the appeal is *preferred*, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry.

Application.—In the case of appeals the rule requires two separate documents to be presented—an application for leave to appeal as a pauper, and a memorandum of appeal. When the Judge disposes of the pauper application he does not thereby necessarily dispose of the appeal. There are two separate documents, and in this respect this case differs from a petition to sue as a pauper, which includes both the plaint, the allegations as to pauperism, and the prayer to sue as a pauper. In the latter case, when the pauper petition is rejected under O. XXXIII. r. 7, the proceedings are at an end, and the Judge has no power to allow it to be stamped, as a plaint; r. 15 of that Order providing the course; open to the applicant, viz. to institute a suit in the ordinary manner. On the

other hand, in proceedings under this rule, when the Judge refuses leave to appeal as a pauper, he effectually deals with the pauper application, but he does not necessarily deal with the memorandum of appeal which accompanies it. On his rejection of the application, there is nothing to prevent him from treating the memorandum as still a memorandum of appeal, if the appellant, on being refused leave to appeal as a pauper, desires, with the aid of borrowed funds or the assistance of friends, to continue the appeal. If O. XXXIII. r. 15 applied to the memorandum of appeal, the result would in practice be that the appeal would be time barred when the application was refused. The result is that a Court is under no legal obligation to dismiss the appeal if and when it refused leave to appeal as a pauper.(1)

"**Subject, in all matters.**"—A petition for leave to appeal as a pauper is presented together with a memorandum of appeal. It was held under the last Code that the presentation of the application itself was not subject to the rules contained in Chapter XXVI. of that Code. But, after an application had been presented, all action taken subsequent to such presentation was by the terms of the section to be subject to the rules contained in that Chapter. Therefore sect. 404 of that Code, which required, except in certain circumstances, that the application should be presented in person, did not apply.(2) In any case, if sect. 404 did apply, an appeal presented on behalf of an exempted pauper by a vakil retained under an ordinary retainer, and not authorized to sign as agent, was considered insufficiently presented.(3) A petition presented by a duly authorized agent of an exempted person, though not by an advocate, vakil, or attorney, was properly presented.(4) Although the Madras High Court held that the question of the presentation of an appeal was not subject to the rules contained in Chapter XXXVI. of the former Code, the same Court determined that the question of the right to appeal under the section corresponding with r. 1 of this Order was subject to such rules. Therefore, when at the time of the institution of the suit there was subsisting an agreement falling within the terms of sect. 407 (*d*), now (O. XXXIII. r. 5, cl. (*e*)) no leave to appeal under r. 1 could, it was held, be given to the plaintiff who, by such agreement, had allowed other persons to obtain an interest in the subject-matter

(1) Bai Ful *v.* Desai Manorbhai, 22 B. 849, 850, 855-857 (1897), *per* Farran, C.J. Candy, J., decided the case on the ground that there was sufficient cause for not presenting the appeal within proper time under s. 5 of the Limitation Act. In Bishnath *v.* Jagarnath, 13 A. 305 (1891), where an application to appeal as a pauper was *rejected*, and a regular appeal on a proper stamp was subsequently presented, but after time it was held not to relate back to the time of the application *in formâ pauperis*. As to extension of time when application is rejected, see Jumnabai *v.* Vissondas, 21 B. 576 (1897).

(2) Mailthi *v.* Somappa Banta, 26 M. 369 (1902), dissenting from *In re* Narisi, 8 M. 504 (1885), which foll. Bhugobutty Koer *v.* Gunesh Dutt, 21 W. R. 308 (1874). In Harsaran Singh *v.* Muhammad Raza, 4 A. 91 (1881), also, the High Court refused, under s. 622, to interfere with an order rejecting an application which was presented by a pleader. And Wazir-un-Nissa *v.* Ilahi Baksh, 24 A. 172 (1901), appears to assume that presentation in person is necessary, except in the case of persons exempted. *In re* Narisi, however, states several circumstances in favour of the rule in the text.

(3) Bhugobutty Koer *v.* Gunesh Dutt, 28 W. R. 308 (1874).

(4) Wazir-un-Nissa *v.* Ilahi Baksh, 24 A. 172 (1901).

of the suit.(1) The amendment now includes the presentation of the application, and has been made to avoid the conclusion at which the Madras High Court arrived in the decision cited.

After presentation of the petition an inquiry as to pauperism is directed, and the application to appeal as a pauper is refused or granted.(2) The application must be presented within thirty days from the date of the decree appealed against, and no extension can be allowed under sect. 5 of the Limitation Act.(3) The Code of 1859 directed (4) that the inquiry might be conducted either by the Appellate Court, or by the Court from whose decision the appeal was made under the orders of the Appellate Court; provided that if the applicant was allowed to sue *in formâ pauperis* in the Court below no further inquiry was necessary unless the Appellate Court should see special cause to direct such inquiry, and these provisions have been reproduced in sect. 593 of the last Code and r. 2 of this Order.

The proceedings are subject to the provisions mentioned only "*in so far as those provisions are applicable.*" So if the appellant is found to be a pauper, and the appeal is admitted, he cannot be called in to give security for costs.(5) It would render the section nugatory if the Judge could say that although the applicant was a pauper, and although there was just ground for appealing (for such a decision is required by the proviso), a condition shall be imposed which, in the case of a pauper, would render it impossible to go on with the appeal. The question has already been discussed as to whether this rule is subject to O. XXXIII. r. 3, and a memorandum of appeal to r. 15 of that Order.

Proviso to r. 1.—This is mandatory, being a necessary safeguard for the benefit of litigants who find themselves opposed by paupers, and the Courts should be careful to see that the proviso is satisfied. It is to be noticed that the Court must come to its conclusion upon a perusal only of the application, the judgment, and decree. This proviso is apt to be overlooked, but it would provide a safeguard against this if the Judge or Bench admitting a pauper appeal were to express and record very briefly the reasons for granting leave, so that the Appellate Court may have an assurance that the leave was properly given.(6)

Appeal.—The Code gives no appeal from an order refusing leave to appeal as a pauper.(7) As regards appeal from orders of a single Judge rejecting

(1) Hanifa Bai *v.* Haji Siddick, 30 M. 547 (1906); s. c., 17 M. L. J. 447.

(2) See Bai Ful *v.* Desai Manorbhai, 22 B. 849, 850 (1897). An application need not be preceded by a separate formal application for inquiry into the pauperism of the applicant; Kamod Poory *v.* Sheo Poory, 1 A. H. C. R. 246 (1869).

(3) Parbati *v.* Bhola, 12 A. 79, 93 (1889); Bechi *v.* Ahsanulla, 12 A. 461, 465, 488 (1890); Mahadev *v.* Lakshman, 19 B. 48 (1895).

(4) Act VIII. of 1859, s. 370. See ss. 367-371, ib.

(5) Nusseerooddeen Biswas *v.* Uggal Biswas, 17 W. R. 68 (1871); *aliter*, however, where the application to sue as a pauper is dismissed: *In re* Jogendra Deb Roykut, 18 W. R. 102 (1872).

(6) Sakubai *v.* Ganpat Ramkrishna, 28 B. 451 (1904).

(7) In one suit, however, the High Court sent the case back for re-consideration, with an expression of their opinion: *In re* Moshaollah Khan, 14 W. R. 445 (1870). In Harsaran Singh *v.* Muhammad. Reza, 4 A. 91 (1881), the High Court refused to interfere under s. 622 of the last Code.

an application on the original side of the High Court, it was held that no appeal lay from an order of a single Judge of the High Court made under this rule rejecting an application for leave to appeal *in formâ pauperis*.(1) These decisions, however, proceeded on the ground that the right of appeal given by the Letters Patent is subject to the limitations on appeal presented by the Code.(2) It is, however, now law, so far as the Calcutta and Madras High Courts are concerned, that the interpretation to be placed on the decision of the Privy Council,(3) is that sect. 588 (now 104) of the Code does not touch the right of appeal given by the Letters Patent.(4)

Respondents.—The Code provides for pauper plaintiffs and appellants, but not for pauper defendants and respondents. Objections by a respondent to a decree under O. XLI. r. 22 cannot be filed *in formâ pauperis*. If a pauper desires to contest any part of the decree of the Court of first instance which is unfavourable to him, he should directly appeal as a pauper, and, as an appellant, claim the benefit of this section.(5) The opinion has been expressed that the omission was unintentional,(6) but, on the other hand, it has been said that the reason why no exception is made in favour of a pauper respondent probably was that he already had the opportunity of directly making an appeal without expense for court-fees, and that an inquiry into his pauperism at the last stage of the case would involve great delay and inconvenience.(7) The omission now must be taken to be intentional, the Legislature considering that the exceptional liberty of moving a Court *in formâ pauperis* should not extend to objections to appeals.

(1) *In re* Rajagopal, 9 M. 447 (1886); Banno Bibi *v.* Mehdi Husain, 11 A. 375 (1889).

(2) As to whether these decisions are defensible on any other ground, see *arg.* in Toolsee Money *v.* Sudevi Dasse, 26 C. at p. 364 (1899).

(3) Hurrish Chunder *v.* Kali Sunderi, 9 C. 482; 10 I. A. 4 (1882).

(4) Toolsee Money *v.* Sudevi Dossee, 26 C. 361 (1899); Chappan *v.* Moidin Kutti, 22 M. 68 (1898); Sabhapathi Chetti *v.* Narayanasami Chetti, 25 M. 555 (1901).

(5) Narayana *v.* Krishna, 8 M. 214 (1884); Brojeshwari Dasi *v.* Guroo Churn, 11 C. 735 (1885); Rashomonee Dossee *v.* Junmojoy Mullick, 9 W. R. 356 (1868); Babaji Hari *v.* Rajaram Ballal, 1 B. 75, 79 (1875); as regards pauper defendants, see notes to O. XXXIII. r. 1, *ante*.

(6) Narayana *v.* Krishna, *supra*, at p. 217.

(7) Babaji Hari *v.* Rajaram Ballal, *supra*, at p. 79.

ORDER XLV.

Appeals to the King in Council.

"Decree" defined.

1. In this *Order*, unless there *is* something repugnant in the subject or context, the expression "decree" *shall* include *a final* order.

"**Decree.**" "**Final order.**"—See as to these terms notes to sects. 109-111, *ante*.

Application to Court whose decree complained of.

2. Whoever desires to appeal to *His* Majesty in Council *shall* apply by petition to the Court whose decree is complained of.

"**Shall apply.**"—An application for leave to appeal is not an appeal.

"**To the Court.**"—Application for leave to appeal must be made in the first instance to the proper Court in India, *i.e.* to the Court whose decree is complained of, before making any such application before the Judicial Committee.(1)

Certificate as to value of fitness.

3. (*1*) Every petition *shall* state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to *His* Majesty in Council.

(*2*) Upon receipt of such petition, the Court *shall* direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

"**Pray for a certificate.**"—A Judge sitting to admit appeals from the decisions of the High Court on the Appellate side, has, in the majority of cases, no independent authority whatsoever. The case has been finally heard and

(1) Suttees Chunder *v.* Gunesh Chunder, 8 M. I. A. 164 (1860); Mutusawany Jagavera *v.* Vencataswara, 10 M. I. A. 313, 320 (1865); s. c., L. R. 1 P. C. 1, 7. As to appeal from order of District Judge see Saadutmand *v.* Phul Kuar, 251 A. 146 (1898).

determined by a Division Bench of the High Court, which in theory of law is a decision of the High Court. All that a Judge of the High Court can in most cases do after that, is to assist the parties in bringing their appeal before the Privy Council. Of course, an Act of the Imperial Parliament, or a provision of the Letters Patent, issued in pursuance of an Act of Parliament or an order issued by His Majesty in Council, might confer upon the High Court, or a Judge of that Court, not only power to admit or reject an appeal, but might make the right to appeal dependent upon that admission or rejection. But if that has been done in any case whatever, it is only in the cases in which the High Court has power to declare that the case is a fit one for appeal. The Courts in India have no power to admit or allow an appeal unless expressly authorized to do so by competent authority.(1) The admission of an appeal to the Privy Council is not a matter as to which the High Court has any discretion, provided that the requirements of the law are satisfied. All that the High Court has to do is to see that the requirements of sect. 110 are satisfied. If they are, an appeal lies under sect. 109 as a matter of right. The application for a certificate that these requirements are satisfied is merely preliminary and ancillary to the admission of the appeal.(2)

"**Amount or value.**"—See notes to sect. 110, *ante*.

"**Otherwise.**"—By sect. 109 and this rule, an appeal may be granted if the High Court certifies that the case is fit for appeal "otherwise," *i.e.* when not meeting the conditions of sect. 110. That is clearly intended to meet special cases; such, for example, as those in which the point in dispute is not measureable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which cannot be performed without special exercise of that discretion, evinced by the fitting certificate. In the absence of the conditions required by the Code, to give the right of appeal, no certificate under this rule can be issued even with the assent of the other party.(3) When the matter is under the appealable value, there should be an application under this clause before the proper Court in India, for a certificate.(4)

"**Notice . . . on the opposite party.**"—If a respondent appears on a notice served, of an intended application to have a petition of appeal to the Privy Council received, but does not object, his costs of that application will not

(1) But the King in Council possesses by virtue of the Royal Prerogative, a clear appellate jurisdiction over the judgment of all Courts of Justice established in any of the British dominions beyond the seas, and it has been repeatedly held that, notwithstanding the Statutes which prescribe the time and mode of appealing, and the limits in point of amount, the power of the King in Council to entertain petitions for leave to appeal, where the conditions imposed by the Statute have not been complied with, remains in full force: Salik Ram *v.* Azim Ali, 8 M. I. A. 270, 272 (1862); note. In the matter of the petition of Feda Hossein, 1 C. 431, 444 (1876); see sect. 112.

(2) Thurai Rajah *v.* Jainilabdeen, 18 M. 484 (1895).

(3) Banarsi Prasad *v.* Kashi Krishna, 23 A. 227, 231, 232 (1900); s. c., 28 I. A. 11; Radha Krishen *v.* Rai Krishen Chand, 28 I. A. 182, 184 (1901); s. c., 23 A. 415; 5 C. W. N. 689.

(4) Moti Chand *v.* Ganga Prasad, 24 A. 174, 176 (1901); s. c., 29 I. A. 40; 6 C. W. N. 362; 4 Bom. L. R. 159.

be allowed.(1) If after the filing of petition of appeal to the Privy Council and after the draft of the notice, to be served on the opposite party, has been sent to the petitioner's attorney for his approval, no steps have been taken to prosecute the appeal, with the result that no notice was served on the opposite party under this rule, the opposite party may apply to have the petition of appeal struck off the file for want of prosecution, and such an application will be granted for the reason that as no formal notice of abandonment of the appeal has been given, the Registrar may be called upon at any time to issue the notice upon the opposite party.(2)

Consolidation of suits.

4. *For the purposes of the pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated: but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.*

Consolidation.—Where several suits (the amount involved in each suit was under Rs.10,000, but the aggregate amount claimed exceeded that amount) were brought by the same plaintiff against the same defendants in respect of the same property and involving the same question of law, and one judgment and decree was pronounced in all the suits by the first Court, and the Lower Appellate Court pronounced a judgment and decree in the first suit and appeal only, stating that the decree of the first suit governed the four other suits on appeal; leave to appeal to the Privy Council in these suits was granted by the Privy Council upon the undertaking that the parties consented to abide by the decision of the Privy Council in the first appeal, as governing the appeals in other cases.(3) Where several suits involving the same issue were filed by different plaintiffs against the same defendants, and where the Lower Court ordered, with the consent of all parties, that all legal evidence to be taken in one action should be evidence in the several other actions, and the decision in one case governed other cases and the appealable value in each case was below Rs.10,000, but the aggregate value of the suits was above that amount, leave to appeal was granted on the ground that the appealable value involved indirectly in the claim was above Rs.10,000.(4) Leave was granted on the above-mentioned ground in the following cases: where three different plaintiffs claiming through the same original title to be the owners of a certain *Mahal*, sued the same defendant in separate suits for possession and for the mesne profits of their respective shares (each suit being for less than Rs.10,000, but the aggregate value of the three suits amounted to more than that amount), and the defence raised was the same in all those cases and the cases were heard

(1) Prawnkissen *v.* Muttysoondery, Fulton, 400 (1841).

(2) Moorajee Poonja *v.* Visranjee, 12 C. 658 (1886)

(3) Gopal Lal Thakoor *v.* Teluk Chunder Rai, 7 M. I. A. 548, 549, 550 (1860).

(4) Kokhim *v.* Snadden, L. R. 2 P. C. 50, 53, 54 (1868); see also Ajnas Koeer *v.* Lutcefa, 18 W. R. 21 (1872); Byjnath *v.* Graham, 11 C. 740, 745 (1885).

together, and the decree in one applying in principle to the other two suits,(1) as also where A and B purchased the same properties deriving title from different persons. The value of the properties with mesne profits was over Rs.10,000. B granted two patni leases of the properties to different persons; A was, therefore, obliged to bring two suits for the recovery of the properties, and the value of the subject-matter in each suit was less than Rs.10,000.(2) But where there were distinct causes, separate judgments given in each suit and the suits were not consolidated in Courts below, but were all along treated as separate and distinct actions, such suits, it was held, could not be consolidated for the purpose of appeal to the Privy Council.(3) These principles have been embodied in this rule, which is new. And it has been held under it that where the fundamental question is common to all the suits, and the cases are tried together and decided by the same judgment, the suits will be consolidated for purposes of pecuniary valuation, even though a substantial question of law arises in some of the suits and not in others.(4)

When an application for leave to appeal to the Privy Council is made in more than one suit which have not been consolidated, though the points to be decided are the same in all of them, it must be shown that in each of the suits the amount or value of the matter in dispute in appeal to His Majesty in Council is Rs.10,000 or upwards.(5) But in a recent case a large number of suits for recovery of possession of distinct parcels of land were tried together, dealt with in one judgment, and were decreed in favour of the plaintiffs; of these some were for sums over Rs.10,000, and leave to appeal was granted; of the remaining cases, each taken separately, the value was below Rs.10,000, yet if taken collectively the aggregate reached that amount, and all the cases were dependent on the same judgment; leave to appeal was granted in the suits where the value of the subject of each suit was below Rs.10,000.(6)

Remission of dispute to Court of first instance.

5. *In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.*

Inquiry as to value.—Where there has been a contest as to the true value of the matter in dispute, it has hitherto been the invariable practice to ascertain

(1) Ashanulla *v.* Karoonamoyi, 4 C. L. R. 125, 127 (1879).

(2) Joogul Kishore *v.* Jotindra Mohun, 8 C. 210 (1882).

(3) Moofti Mohummud Ubdoollah *v.* Mooti Chand, 1 M. I. A. 363, 365 (1837); s. c., 5 W. R. 34 (P. C.).

(4) Banga *v.* Jagat, 13 C. L. J. 503 (1910).

(5) Royal Insurance Coy. *v.* Akhoy Coomar Dutt, 6 C. W. N. 41 (1901).

(6) Deonarain *v.* Guni Singh, 34 C. 400, 402 (1907).

by evidence and inquiry what the true value is.(1) The present rule now gives legislative sanction to this practice.

Effect of refusal of certificate.

6. *Where* such certificate *is* refused, the petition shall be dismissed.

"**Refused.**"—The High Court, in refusing a certificate for leave to appeal to His Majesty in Council, should state their reasons for refusing it.(2)

Restoration.—After an appeal has been dismissed for default or for any reason removed from the file, the High Courts have power to restore an appeal.(3) It may bring an appeal on to the file after it has struck it off the file on the application of the appellant himself.(4)

Security and deposit required on grant of certificate.

7. (*1*) *Where* the certificate *is* granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(*a*) *furnish* security for the costs of the respondent, and

(*b*) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to *His* Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of *His* Majesty in Council in force for the time being;

(2) papers which the parties agree to exclude;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded.

(*2*) *Where* the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in *sub-rule* (*1*), deposit the amount required to defray the expense of printing such copy.

"**Certificate is granted.**"—As to the functions of a Court granting a certificate, see notes to r. 3, *ante*. The certificate under r. 7 may be given by a

(1) Amrita Nath *v.* Abhoy Charan, 9 C. W. N. 370, 371 (1905).

(2) Venganat Swaroopathil *v.* Cherakennath, 29 M. 194 (1906); s. c., 10 C. W. N. 545; 4 C. L. J. 305.

(3) In the matter of the petition of Radha Benode Misser, B. L. R. Sup. vol. 730 (1867); s. c., 7 W. R. 531.

(4) Shankar Baksh *v.* Hardeo Baksh, 16 C. 397, 403; s. c., 16 I. A. 71, 73.

single Judge called the "Judge of the Privy Council Appeal Department,"(1) and there is no appeal from the order of such a Judge,(2) or it may be given by a Bench consisting of more than one Judge hearing the applications for leave to appeal to the Privy Council. The certificate and not the order, for the certificate is the document which their Lordships are bound to consider and act upon; and unless the certificate upon which the leave to appeal is based is in such a form as to justify the leave, their Lordships will hold that leave has not been properly given. Thus where the order for the certificate was "Let certificate issue, that the case is fit one for appeal to Her Majesty in Council," but the certificate stated "The Court, having had before it an application for leave to appeal to Her Imperial Majesty the Queen in Her Privy Council presented on behalf of the appellant aforesaid, it is certified that though the valuation of the case is below Rs.10,000, yet as regards the value and nature of the case it fulfils the requirements of sect. 596 (Act XIV. of 1882)," held that the leave was granted without jurisdiction. Valuation is an essential part of the requirements under that section, and when the valuation of the case is below the amount mentioned in that section, leave cannot be granted under that section. An erroneous certificate to the effect that the case fulfils the requirements of sect. 110 is ineffectual even if assented to by the respondent. In cases below Rs.10,000, there must be a special certificate that the case is "otherwise" fit for appeal (3) under sect. 109 (*c*) and r. 3. Where in the petition for leave to appeal the prayer was that a certificate might be granted that, as regards value and nature, the case fulfilled the requirements of sect. 596 (now sect. 110), but the order on it was "Let a certificate be granted that this is a fit case for appeal to His Majesty in Council, and let the usual notices be issued," held by the Privy Council that the leave was given pursuant to sect. 595 (*c*) (now sect. 109 (*c*)) and the latter alternative of sect. 600 (now r. 3), and was properly given.(4) When the petition for leave stated "the appeal involved some substantial questions of law and the case fulfilled the requirements of sect. 596, and was a fit case for appeal to His Majesty in Council," and the order was "we think on the whole that this is a case in which a certificate for leave to appeal to His Majesty in Council ought to be granted," held that the certificate was properly given.(5) But where the certificate was "certified that the above case fulfils the requirements of sect. 596 (now sect. 110) as regards value and nature inasmuch as the value of the subject-matter of the suit in the Court of first instance was upwards of Rs.10,000 and the value of the matter in dispute on appeal to His Majesty's Privy Council also exceeds that amount,

(1) Amirunnessa *v.* Behary Lall, 25 W. R. 529 (1876); Tara Chand *v.* Radha Jeebun, 24 W. R. 148 (1875); Hurrish *v.* Kali Sundari, 9 C. 482, 493 (1882).

(2) Lutf Ali Khan *v.* Asgar Riza, 17 C. 455, 458 (1890); Kishen Pershad *v.* Tiluckdhari, 18 C. 182, 186 (1890); Amirunnessa *v.* Behary Lall, *supra*; Tara Chand *v.* Radha Jeebun, *supra*; Manley *v.* Patterson, 9 C. L. R. 166 (1881); s. c., 7 C. 339.

(3) Radha Krishna *v.* Rai Krishna Chand, 28 I. A. 182, 184 (1901); s. c., 23 A. 415; 5 C. W. N. 689; cf. Moti Chand *v.* Ganga Parshad, 29 I. A. 40, 42 (1901); s. c., 24 A. 174; 6 C. W. N. 362; Webb *v.* Macpherson, 30 I. A. 238 (1903); s. c., 31 C. 57; Amar Chand *v.* Soshi, 31 C. 305, 310 (1903).

(4) Webb *v.* Macpherson, 31 C. 57 (1903); s. c., 30 I. A. 238.

(5) Amar Chand *v.* Soshi Bhusan, 31 C. 305, 310 (1903).

and as the decree appealed from does not affirm the Court immediately below," and the Privy Council held that the decree appealed from did affirm the Court immediately below, and as the certificate did not state that the appeal involved a substantial question of law, their Lordships advised the dismissal of the appeal, but the report was withheld for three months to enable the appellant to produce a certificate that the appeal involved a substantial question of law.(1) Where the order allowing leave to appeal stated "There seems to be a point of law, which, however, does not appear to have been argued here," it was held by the Privy Council that the leave was granted contrary to the provisions of the Code.(2)

The Calcutta High Court has treated the rule as applicable to cases where special leave has been granted by the Privy Council.(3)

Date of the decree.—It has been held that within the meaning of this rule, the date of the decree is the date on which it is pronounced, not that on which it is signed.(4)

"Furnish security."—Under r. 7 the party to whom a certificate has been granted is bound to furnish security within six weeks from the date of such certificate. If he fails to do so, and also fails to satisfy the Judge in the Privy Council Department that there were sufficient reasons for extending the time in his favour, then it cannot be declared that the appeal has been admitted under r. 8, and the application for leave to appeal to the Privy Council will be struck off the file.(5) A Hindu widow's interest in her husband's property should, it was held, not be taken as security for the purposes mentioned.(6) Notwithstanding the admission of the appeal under r. 8, a surety is not precluded from disputing the validity of the security bond in execution proceedings.(7) As to revocation of and power to order further security, see rr. 9–11, *post*, and as to increase of security, r. 14.

Deposit of amount of estimate.—The petitioner for leave to appeal has no right, after getting the estimate from the officer of the Court, to change it from an estimate for translating, printing and transmitting, to an estimate for translating, transcribing and transmitting. If he is dissatisfied with the estimate he can apply to the officer to have the estimate amended, or, failing that, he may apply to the Court to direct it to be amended, he has no right to amend the estimate himself, still less has he any right to amend the estimate in the way in which he thinks fit to amend it. If he does not deposit the amount mentioned in the estimate of costs by the officer of the Court within the prescribed time, his application for leave will be stayed.(8) As to refund of amount deposited, see r. 12, *post*.

(1) Tasadduq Rasul *v.* Manik Chand, 30 I. A. 35, 40 (1902); s. c., 25 A. 109.

(2) Karuppanan *v.* Srinivas, 6 C. W. N. 241 (1901); s. c., 25 M. 215; 4 Bom. L. R. 248.

(3) Roy Jotindra Nath Chowdhury *v.* Rai Prasanna Kumar, 11 C. W. N. 1104 (1907).

(4) Harendra *v.* Hari Dasi, 14 C. W. N. 420 (1909); cf. O. 20, r. 7.

(5) Kishen Pershad *v.* Tilukdhari, 18 C. 182, 186 (1890).

(6) Phool Koer *v.* Dabee Pershad, 12 W. R. 187 (1869).

(7) Girindra Nath *v.* Bejoy Gopal, 26 C. 246, 249 (1898); s. c., 3 C. W. N. 84.

(8) In the matter of Gour Surn Dass, 19 W. R. 305, 306 (1875).

Extension of time.—The High Court may extend the time allowed for giving the security and making the deposit required as the words in the section relating to the giving of security are directory only, but not to be departed from without cogent reason.(1) The "cogent reasons" referred to by the Privy Council must be such, according to the decisions of the Madras High Court, as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from making his deposit, not owing to absence or difficulty of getting funds, but owing to some circumstances accidental or otherwise over which he had no control, or owing to mistake which the Court would consider not unreasonable or caused by negligence. Best, J., considered that absence of funds or difficulty in raising the same, if true, was a very cogent reason for granting an application for extending the time, but that the decisions cited bound him.(2)

Admission of appeal and procedure thereon.

8. *Where* such security has been *furnished* and deposit made to the satisfaction of the Court, the Court *shall*— [s. 603.]

(*a*) declare the appeal admitted,

(*b*) give notice thereof to the respondent,

(*c*) transmit to *His* Majesty in Council under the seal of the Court, a correct copy of the said record, except as aforesaid, and

(*d*) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

"**Declare the appeal admitted.**"—Until a petition of appeal has been admitted and allowed, a party has no right of appeal, and if the petition is allowed to remain on the file of the Court, and is not prosecuted within a reasonable time, the opposite party can apply to have the petition struck off the file, and the Court may order its removal.(3)

"**Correct copy of the said record.**"—After the appeal has been allowed and transcript of the list of the documents to be used in the appeal sent to the Privy Council, an application for a certificate by the High Court that the note of the Bench clerk made on two exhibits during the hearing of the appeal and which was printed in the paper book, had a particular limited meaning only,

(1) Burjore *v.* Bhagana, 11 I. A. 7, 10 (1883); s. c., 10 C. 557; Fazul-un Nissa *v.* Mulo, 6 A. 250 (1884); Roy Jotindra Nath *v.* Rai Prasanna Kumar, 11 C. W. N. 1104 (1907). See also Damodar *v.* Gokul Chand, 7 A. 79, 93 (1884).

(2) Rangasayi *v.* Mahalakshmamma, 14 M. 391, 395, 396 (1890).

(3) Gobardhan *v.* Mano Bibi, 5 B. L. R. 76 (1870); Thakoor Kapil Nath *v.* The Government, 1 C. 142 (1876); Moorajee *v.* Visranjee, 12 C. 658 (1886); Aghore Nath *v.* Damodar Das, 2 C. W. N. xlvii. (1897).

could not, it was held, be made before the High Court, but the Judicial Committee might deal with the question when the whole case was before them.(1)

For the rule as to transmission of evidence and other documents, see clause 42 of the Charter. The Charters of the High Courts expressly require that the reasons of their decisions should be recorded by the Judges and transmitted for the information of the Privy Council with the records.(2) All costs and expenses unnecessarily occasioned by the inclusion in the transcript sent from India of matters improperly introduced therein will be disallowed.(3) All petitions and applications connected with appeals to His Majesty in Council except *Mooktarnamas* should be drawn up in the English language. Security bonds are not made a part of the proceedings transmitted to England, and so need not be drawn up in that language.(4) Where an appeal to the Privy Council has been admitted against a regular decree made in appeal, such proceedings as applications for review of the judgment and the order of the Court should not form part of the transcript, and should not be sent to England with the record of the original appeal to the Privy Council.(5) Nor will the appellant be allowed to refer to or read as evidence in the appeal to the Privy Council the documents tendered to the Court on the application for the review of judgment as the order refusing such application has not been appealed from.(6) Where the Court of first instance framed and decided several issues, and the High Court on appeal confined their decision to the questions which in their opinion governed the case, leaving other issues undecided as not affecting the result of the suit, only so much of the original records as properly bore upon and might be natural for the decisions of the questions of law, decided by the High Court and the subject of the appeal, should, it was held, be printed and transmitted.(7)

Revocation of acceptance of security.

9. At any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

Power to order further security or payment.

10. *Where* at any time after the admission of *an* appeal but before the transmission of the copy of the record, except as aforesaid, to *His* Majesty in Council, such security appears inadequate,

(1) Ratan Koer *v.* Chotay Narain, 21 C. 476 (1894).

(2) Katche Kaleyana *v.* Kachivijaya, 12 M. I. A. 495, 502 (1869); Enayet Hossein *v.* Rowshan Johan, 10 W. R. (F. B.) 1, 4 (1868).

(3) Tarakant *v.* Puddomoney, 10 M. I. A. 476, 489 (1866); s. c., 5 W. R. P. C. 63.

(4) Meer Mahomed Tukee *v.* Luchmeeput, 7 W. R. 291, 292 (1867). For rule as to transmission of copies of evidence and other documents, see cl. 42 of the charter.

(5) Shiekh Imdad Ali *v.* Kootby Begum, 3 M. I. A. 1, 7 (1841–42); Enayet Hossein *v.* Rowshan Jehan, 10 W. R. (F. B.) 1, 4 (1868); Fukheerooddeen Mahomed *v.* Nujmoonissa, 11 W. R. 145 (1869); in this decision a case is cited in which such proceedings were sent for by the Privy Council under the special circumstances of that case.

(6) Shiekh Imdad Ali *v.* Kootby Begum, *supra.*

(7) Venkata Surya Mahipati *v.* Court of Wards, 26 I. A. 194 (1897); s. c., 20 M. 395.

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

11. *Where* the appellant fails to comply with such order, [s. 606.]

Effect of failure to comply with order.

the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of *His* Majesty in Council,

and in the meantime execution of the decree appealed *from* shall not be stayed.

12. When the copy of the record, except as aforesaid, [s. 607.]

Refund of balance deposit.

has been transmitted to *His* Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under *rule 7*.

Security and deposit.—See notes to r. 7, *ante*.

13. (*1*) Notwithstanding the *grant of a certificate for* the [s. 608.]

Powers of Court pending appeal.

admission of any appeal, the decree appealed *from* shall be unconditionally *executed*, unless the Court otherwise directs.

(*2*) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(*a*) impound any moveable property in dispute or any part thereof, or

(*b*) allow the decree appealed *from* to be *executed*, taking such security from the respondent as the Court thinks fit for the due performance of any order which *His* Majesty in Council may make on the appeal, or

(*c*) stay the execution of the decree appealed *from*, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed *from*, or of any order which *His* Majesty in Council may make on the appeal, or

(*d*) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, *by the appointment of a Receiver or otherwise.*

"**The grant of a certificate.**"—It was evident from the express terms of sect. 608 of the last Code that the intention of the Legislature was to confer on the High Court the powers therein indicated only in the event of the appeal having been already admitted. The Calcutta High Court accordingly uniformly refused to grant any application under that section before an appeal was finally admitted.(1) But the Bombay High Court held that it could order stay of execution of its decree when only the necessary petition for admission had been presented, but that petition had not come before the Court and the appeal had not been declared admitted.(2) Under the section as it now stands, the application may be made before the appeal is finally admitted under r. 8. It was formerly doubted whether the High Court could act under this rule where the appeal had not been certified by itself, but special leave had been granted by the Privy Council.(3) But it has now been held by the Privy Council that the High Court has power to stay execution in such a case.(4) The Calcutta High Court has held that it has no power to stay proceedings in a suit following a preliminary decree for partition against which it has granted leave to appeal to the Privy Council, and that the latter alone can do so since it has seisin of the appeal.(5)

Preservation of property pending appeal.—The principle which underlies all orders for the preservation of property pending litigation is that the successful party in the litigation—that is, the ultimately successful party—is to reap the fruits of that litigation and not obtain merely a barren success.(6) Property may be thus preserved, either by taking possession of it when movable, under clause (*a*), taking security for its restitution under clause (*b*), by stay of execution under clause (*c*), or by making such other order as may be necessary (and as to this the Court is given a complete discretion) under clause (*d*).

"**Taking such security,**" **clause** (*b*).—The object of security being taken from the holder of a decree from which an appeal has been preferred to the Privy Council, is to indemnify the appellant for any loss he may suffer owing to the execution being taken out by the decree-holder during the pendency of the appeal in the Privy Council. It is therefore only on the execution of the decree that the surety becomes liable. If the decree-holder, after applying for execution of the decree, does not take any further steps for execution, and the decree remains unexecuted, the terms of the security bond falls to the ground, and the surety cannot in any way be made liable for costs or anything else

(1) Jarao Kumari *v.* Gopi Chand, 5 C. W. N. 562 (1900). See Burra Lall *v.* Court of Wards, 16 W. R. 289 (1871), *per* Paul, J.

(2) Dame Janbai *v.* Sab Mahomed, 19 B. 10 (1894).

(3) Mohesh *v.* Satrughan, 26 I. A. 281, 283 (1899).

(4) Nityamoni *v.* Madhusudan, P. C. 38 I. A. 74 (1911); cf. 38 C. 335 (1911); and see Nanda Kishore Singh *v.* Ram Golam Sahu, 40 C. 955 (1912); inherent power to stay execution in view of an application for special leave to appeal to the Privy Council.

(5) Lalitessur *v.* Bhabessur, 13 C. W. N. 690 (1909).

(6) Mt. Brij Coomaree *v.* Ramrick Das, 5 C. W. N. 781 (1901), and the cases there cited in argument. The Privy Council cases cited at p. 789 show that the principles laid down in the English decisions as to stay and security have their approval.

awarded by the High Court.(1) The Court may require security although possession of the property in dispute has been already obtained without the giving of security.(2) Security to the extent of the whole sum decreed need not always be taken from the decree-holder. When security is taken for less than the full amount decreed, the decree-holder should be restrained from issuing process of execution with a view to realizing any sum in excess of the amount for which security is given.(3) The ordinary practice is that calculation is made for an amount sufficient to meet the mesne profits which are to go to the hands of the decree-holder from the date of his obtaining possession to the probable date of the eventual execution of the decree of the Privy Council. That period is generally taken to be three years.(4) A Hindu widow's interest in her husband's estate has been refused as such security.(5) Judges, in reporting upon the securities, should state particulars of the documents which have been produced and proved before them, and upon which the title of the surety appears to be made out, but they need not transmit to the High Court the documents produced before them.(6) The High Court, under whose directions security has been taken, can release a surety; a District Judge has no right to do so.(7) A judgment-debtor, pending an appeal to the Privy Council, having been ordered by the High Court to furnish security within two months, put in a petition in the District Court on the last day allowed by the order, tendering a *dur patni* mehal as security; and on the following day gave an unregistered security bond, which was rejected by the Judge on the grounds that the bond was unregistered and "there being no guarantee that the property pledged will turn out available." Held that the bond offered as security was not required to be registered until the security had been accepted; and before rejecting it the Judge should direct an investigation into the sufficiency or otherwise of the property tendered.(8) In the case cited it was held that the provisions of the Contract Act relating to revocation of a surety were inapplicable to a person who had stood as a surety under this rule, because there was no personal guarantee given by him.(9)

Stay of execution, clause (*c*).—See *ante*, "*Preservation of property pending appeal.*" After the admission of an appeal to the Privy Council, with leave granted by a High Court, application for stay of execution of a decree pending an appeal to His Majesty in Council ought always to be made, in the first instance at any rate, to the Court in India, which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details which the Privy Council cannot possess on an interlocutory

(1) Nuffer Chunder *v.* Soorendro Nath Roy, 14 W. R. 410, 411 (1870).

(2) Hukum Chand Baid *v.* Kamalanand Singh, 3 C. L. J. 67, 73, 77–79 (1905); and cases there cited, including Jariut-ool-Begum *v.* Hosseinee Begum, 10 Moo. I. A. 196, 202 (1865).

(3) Molka *v.* Sumput, 6 W. R. Misc. 62 (1866).

(4) Ameeroonissa *v.* Dunne, 14 W. R. 361 (1870).

(5) Phool Koer *v.* Dabee Pershad, 12 W. R. 187 (1869); see also Indar Kuar *v.* Lalta Prasad, 4 A. 532 (1882), at p. 542.

(6) In the matter of Ameeroonnissa, 14 W. R. 94 (1870).

(7) Abedoonissa Khatoon *v.* Ameeroonissa Khatoon, 17 W. R. 464 (1872).

(8) Dunne *v.* Ameeroonissa Khatoon, 13 W. R. 41 (1870).

(9) Narayanan *v.* Arunachellam, 19 M. 140, 143 (1895).

application. Where, on an application, the High Court made an order "that execution be stayed for three months from this date so as to give the defendants an opportunity to apply to the Privy Council for stay of execution," the Judicial Committee held that the application should have been made to the Court in India, but acting upon the suggestion of the High Court, their Lordships recommended stay of execution on terms.(1) The Privy Council stated that they could not stay execution, but where special leave was given they have advised it.(2) But where, after the declaration that an appeal has been admitted, an application for stay of execution was rejected (the Judges hearing the application differing in their opinion, and the adverse judgment of the Senior Judge prevailing) on a petition for special leave to appeal, the Judicial Committee, being of opinion that as the two judges in the High Court had differed in opinion, the discretion of the High Court had not in fact been exercised, made an order for stay of execution.(3) And where the High Court refused to make an order for want of jurisdiction in an appeal not certified by itself, the Judicial Committee advised the grant of an order of stay.(4) The under-mentioned case dealt with the procedure to be followed, where there was an order of Court to stay the execution of a decree obtained by a party who had appealed to the Privy Council from another decree against himself, if the holder of the decree which was appealed against attempted to execute it.(5) Where a judgment-debtor who has appealed to the Privy Council obtained a rule *nisi* from the High Court suspending execution until security was given, which was subsequently made absolute, it was held not to operate against the decree-holder in the matter of time, limitation not running against him until the result of the appeal was known, or the rule otherwise fell to the ground.(6) An application for staying execution for costs pending an appeal is not granted as a matter of course unless evidence be adduced to show that the respondent to the appeal will be unable to repay the amount levied by execution; if the appellant be successful, such an application is in England not granted.(7)

"Such other direction," clause (*d*).—The words "*by the appointment of a receiver or otherwise*" have been added, thus authorizing the High Courts in India to grant such relief when necessary. This provision as well as the others would appear to apply to appeals certified by the High Court itself, when a certificate was refused, but special leave was granted by the Judicial Committee. The latter said that it was impracticable that they should directly interfere to continue the manager or to appoint a receiver. "Interference has been effected in cases where the Courts in India had jurisdiction over the subject-matter, and an intimation to them would be effective; or where, the appellant

(1) Vasudeva Modeliar *v.* Shadagopa, 29 M. 379 (1906); s. c., 4 C. L. J. 101; 10 C. W. N. 945.

(2) Maharani Inder Kumari *v.* Maharani Jaipal Kumari, 14 I. A. 1; s. c., 14 C. 290, 295 (1886); and see Nityamoni *v.* Madhusudan, P. C., 38 I. A. 74 (1911).

(3) Chutraput Singh *v.* Dwarka Nath Ghosh, 21 I. A. 170; s. c., 22 C. 1 (1894).

(4) Mohesh Chandra *v.* Satrughan Dhal, 26 I. A. 281, 283 (1899); and see Nityamoni *v.* Madhusudan, P. C., 38 I. A. 74 (1911).

(5) Dwarkanath *v.* Wooma Soonduree, 14 W. R. 329 (1870).

(6) Gunesh Dutt Singh *v.* Mungree Ram Chowdhry, 19 W. R. 186 (1873).

(7) Barker *v.* Lavery (1885), 14 Q. B. D. 769.

being in possession, a stay of proceedings would keep the position of things intact." Where the High Court had no jurisdiction it could not be directed to act, but their Lordships ordered a stay of proceedings.(1) The High Court can, it would seem, make an order for restitution under this clause as to that part of the decree which has been executed.(2)

14. (*1*) *Where* at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security. [s. 609.]

Increase of security found inadequate.

(*2*) In default of such further security being furnished as required by the Court,—

(*a*) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed *from* as if the appellant had furnished no such security;

(*b*) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay *the* further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

15. (*1*) Whoever desires to obtain execution of any order of *His* Majesty in Council shall apply by petition, accompanied by a certified copy of the decree *passed* or order made in appeal and sought to be executed, to the Court from which the appeal to *His* Majesty was preferred. [s. 610.]

Procedure to enforce orders of *King* in Council.

(*2*) Such Court shall transmit the order of *His* Majesty *in Council* to the Court which *passed* the first decree appealed from, or to such other Court as *His* Majesty *in Council* by *such* order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the *provisions* applicable to the execution of its original decrees.

(*3*) When any monies expressed to be payable in British currency are payable in India under such order, the amount so

(1) Mohesh *v.* Satrughan, 27 C. 1, 4; s. c., 26 I. A. 281; 4 C. W. N. 34 (1899).

(2) Ashanulla *v.* Karoonamoyi, 4 C. L. R. 125, 129 (1879). The provisions of this rule are wider than those of the Regulation of 1797, as to which, see Rajkissen *v.* Baroda Dabee, 6 W. R. Misc. 111 (1866).

payable shall be estimated according to the rate of exchange for the time being fixed *at the date of the making of the order* by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of *His* Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments.

"**Shall apply by petition.**"—The practice with respect to the decrees of His Majesty in Council is as follows: The original decree is given to the successful party, or to one of the successful parties, to the appeal. That is brought to India, and it is the duty of the person to whom it is given to file that original decree in the High Court from the decision of which the appeal was preferred, and that being done, the proper officer of that High Court will be able to give a certified copy, or the Registrar of the Judicial Committee will be able to do the same. In this case it was also held that where the party, having the original decree, neglects to file it, a copy, though not certified, may be properly admitted in evidence.(1) The party then applies by petition accompanied by the certified copy.

"**Certified copy.**"—A mere copy of the printed judgment is not sufficient.(2) The provision cannot be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the subject of any order in Council should be supplied to the Court in India. See last paragraph.

"**To the Court from which the appeal to His Majesty was preferred.**"—Such applications must be made to the High Court, and if proceedings are commenced in a wrong Court, they are invalid.(3) If an application is made to a District Court, the Judge ought to hold his hands and refer the parties to the High Court.(4) It is the duty of the High Court to give directions for executing the decree to the Court of first instance.(5)

"**Shall transmit.**"—When a decision of the Judicial Committee has been reported to His Majesty and has been sanctioned and embodied in an order of Council, it becomes the decree or order of the final Court of Appeal, and it is the duty of every subordinate tribunal, to whom the order is addressed, to carry it into execution.(6) In receiving and filing for the purpose of execution an order of His Majesty in Council made on appeal from an order or decree of the Court of first instance, the latter Court does not exercise a discretionary power, but performs a function of a purely ministerial character. The Court to which an order in Council is transmitted for execution must enforce or execute in the manner and according to the rules applicable to

(1) Hurrish *v.* Kali Sundari, 10 I. A. 4, 15; s. c., 9 C. 482 (1882).

(2) Joy Narain Giree *v.* Goluck Chunder Mytee, 20 W. R. 444 (1873); Juggernath *v.* Judoo Roy, 5 C. 329 (1879).

(3) Joy Narain *v.* Goluck, 22 W. R. 102 (1874).

(4) Hubeeboollah *v.* Gowher Ali, 7 W. R. 225 (1867).

(5) Barlow *v.* Orde, 18 W. R. 175 (1872).

(6) Pitts *v.* La Fontaine, 6 App. C. 482, 483 (1880).

the execution of its original decrees.(1) The Court which formerly had, but no longer has, territorial jurisdiction ought, when the decree is sent to it, to transfer the decree for execution to the Court which has territorial jurisdiction. But the question whether or not the decree ought to be sent direct from the High Court to the Court having territorial jurisdiction was not decided.(2) When the Privy Council remits a case to India with directions that the District Court may arrive at certain results by certain inquiries, the objects and reasons of those inquiries, as set forth in the judgment of the Privy Council, are part of the judicial record, and may be forwarded to the District Court with the decree of the Privy Council.(3) Where the Privy Council, being doubtful whether the respondents were, on the face of the plaint, entitled by Mahomedan law to the full amount claimed by them, left the matter to be determined by the High Court in execution, the latter, being satisfied that the doubt had arisen simply from a slip in the English translation of the plaint, allowed the respondents to take out execution for the whole amount.(4) Where a judgment of the Privy Council ordered execution for mesne profits to be taken out first against one particular defendant (J), and only on failure to obtain satisfaction from him against the others, *held* that before the assets of the former (J) had been exhausted, attachment could not issue against the property of the latter, even by way of a preliminary and protective step. The inquiry whether or not the assets of (J) have been exhausted, should be made by calling upon the other defendants to show cause why execution should not issue against them.(5)

"**In the manner and according to the provisions.**"—Thus where, pending an appeal to the Privy Council, certain property forming part of the subject-matter of the suit in which such appeal had been preferred was sold by auction in execution of a money-decree against the plaintiff who held the decree of the High Court under appeal, and the appeal to the Privy Council was decreed, *held* that the successful appellant was entitled to recover the property sold as mentioned above, by an application under the corresponding former section read with sect. 244 (now 47), and this right was not affected by the fact that the auction purchasers were not parties to the decree of the Privy Council.(6)

"**Rate of exchange.**"—"Rate of exchange for the time being fixed *at the date of the making of the order* by the Secretary of State." The portion italicized was not in the former section, and has been introduced as there were conflicting decisions on the question of the date for fixing the rate. In the case (7) cited the words "for the time being" were construed to mean the year in which

(1) Premlall Mullick *v.* Sumbhoonath Roy, 22 C. 960, 972 (1895); Gooroo Surun *v.* Hunooman Pershad, 20 W. R. 419 (1873); Garurdhuj *v.* Baiju Mal, 28 A. 337, 339 (1906).

(2) Girindra Chunder Roy *v.* Jarawa Kumari, 20 C. 105 (1891).

(3) Goluck Chunder *v.* Mohun Lall, 5 W. R. 271 (1866).

(4) Meer Mozaffer Hossein *v.* Ameeroonissa, 17 W. R. 340 (1872).

(5) Dhunput Singh *v.* Forbes, 22 W. R. 104 (1874).

(6) Garurdhuj Prasad Singh *v.* Baiju Mal, 28 A. 337, 339 (1906).

(7) Parain Sukh *v.* Ramdoyal, 8 A. 650, 652 (1886).

the amount is realized or paid or execution taken out, and not the year in which the decree was passed. Oldfield, J., said in that case "the rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application for execution was the proper rate of exchange the decree-holders were entitled to." But this ruling was dissented from by the Calcutta High Court, and it was held (1) that the words "for the time being" have reference only to the time at which the order of the Privy Council was passed. This case has been followed in several other cases in Calcutta,(2) and the matter is now settled by the adoption of the rulings of the Calcutta High Court.

Costs.—The costs assessed in England are only the costs incurred before the Privy Council, and do not include the costs of translation, etc., incurred in India.(3) In almost all the appeals which go to the Privy Council there are costs incurred here for translating and preparing the record for transmission to England, and it has never been the practice of the Privy Council to make any order in specific terms as to these costs, and that whenever a specific sum is allowed by the Privy Council as costs of appeal, that is considered to cover the costs of appeal in England only, and it has always been assumed that an order drawn in this form covers the costs in India though they are not mentioned.(4) When the Privy Council decrees not only a certain specified sum as the costs of the appeal in England, but also awards the costs incurred in the Courts in India, the decree-holder is entitled to the costs for translating the record of the appeal and for transmitting it to England.(5) Where only one defendant appeals successfully to the Privy Council and obtains his costs, his co-defendants who did not appeal are not entitled to their costs.(6) If costs are occasioned by the introduction of unnecessary and irrelevant matter into the record, they will be disallowed by the Privy Council.(7) Where an order of the Judicial Committee is silent as to interest upon the costs decreed, the Judge of the lower Court which has to execute the decree has no power to direct payment of those costs with interest.(8) Where the decree of the first Court, confirmed by the Privy Council, allowed interest on costs incurred, the decree-holder was held entitled to interest on the costs incurred on account of translation and printing, because the Privy Council had adopted the decree of the local Court and made it a dominant decree as regards costs in all Courts. The effect of that decree is that the Privy Council decree became a decree for

(1) Dakhina Mohun *v.* Saroda Mohun, 23 C. 357, 359 (1896); Lakhpatty *v.* Leelanund, 4 I. A. 137 (1877); s. c., 3 C. 161 distinguished.

(2) Mahomed Abdul Hye *v.* Gajraj, 25 C. 283; s. c., 2 C. W. N. 89 (1897).

(3) Oomatool Fatima *v.* Azhar Ali, 15 W. R. 356 (1871).

(4) Sharada Pershad *v.* Luchmeeput, 18 W. R. 89, 91; s. c., 9 B. L. R. Ap. 23 (1872).

(5) Asgar Ali *v.* Nagendra, 23 W. R. 463 (1875); Muddun Thakoor *v.* Morrison, 18 W. R. 253 (1872); Oomatool Fatima *v.* Azhar Ali, 15 W. R. 356 (1871); Ram Coomar *v.* Prasanno, 10 C. 106 (1883).

(6) Brojo Soondaree *v.* Anund Moyee, 16 W. R. 302 (1871).

(7) Bishenmun Singh *v.* Land Mortgage Bank of India, 12 I. A. 7, 12; s. c., 11 C. 244 (1884); and see Khirodamoyee Dasi *v.* Prodyot Kumar, 18 C. L. J. 122 (1913), plaintiff's right to exclude irrelevant documents.

(8) Forester *v.* Secretary of State, 4 I. A. 137, 144 (1877); s. c., 3 C. 161, 170, and the cases cited there; cf. Ram Sahai *v.* Bank of Bengal, 8 A. 262 (1886).

costs and interest expressly. But if no provision for interest on the specific sum mentioned, as costs in the Privy Council, is made in the order of the Privy Council, then no interest will be allowed on that sum.(1) On the other hand, if the decree of the Privy Council and the decree of the local Court, confirmed by the Privy Council, are silent on the question of interest, no interest will be allowed.(2) Where a decree of the Privy Council gives interest, but does not clearly specify the rate, the Court should ascertain if possible, from other parts of the decree itself, or from other documents which may be read in conjunction with the decree, what rate was intended to be given.(3) When an appeal to the Privy Council was allowed by the High Court in a suit instituted by a Hindu widow as the guardian of her husband's adopted son, then a minor, but who on attaining majority petitioned for the withdrawal of the appeal, this petition also referred to the Judicial Committee, and on the petition of the respondent the appeal was dismissed by the Privy Council, the costs incurred by the widow being ordered to be recouped from the adopted son's estate.(4) If a suit is dismissed on a preliminary point in the Court of the first instance, and this decree is confirmed by the Appellate Court in India, but set aside by the Privy Council, and the case is remanded for the trial of the suit, a refund of the costs which have been taxed and paid under the reversed decrees may be ordered by the Court of first instance, on motion.(5) The third and fourth paragraphs of the former section as to the execution of a decree for costs against a surety have been omitted. The Legislature by Act VII. of 1888 made express provision with regard to matter coming under sects. 549, 610 of the former Code by declaring that the liabilities of a surety for costs might be enforced in execution of a decree of the particular Court in the same manner as if he were a party to the appeal, but the Calcutta High Court held that a security bond given by a third party for the due performance of the decree of the Appellate Court under sect. 546 of the last Code could not be enforced in execution of that decree.(6) The matter is now regulated by sect. 145, *ante*. See notes thereto. A surety is not precluded from questioning

(1) Muddun Thakoor *v.* Morrison, 18 W. R. 253 (1872); s. c., 9 B. L. R. Ap. 22; cf. Dakhina Mohun *v.* Saroda Mohun, 23 C. 357, 360 (1896); following Forester *v.* Secretary of State; cf., however, Nil Madhub *v.* Bissumbhur, 21 W. R. 411 (1874), where Jackson, J., allowed interest, though the Privy Council decree was silent about it.

(2) Lekhraj *v.* Mahtab Chand, 21 W. R. 147 (1874); Dakhina Mohun *v.* Saroda Mohun, 23 C. 357 (1896). In this case it is not mentioned whether the decree of the local Court, confirmed by the Privy Council, allowed interest or not. See also Broja Sundaree *v.* Anund Moyee, 16 W. R. 302 (1871) [cited in Forester *v.* Secretary of State, 3 C. 161, 170 (1877)]; Ameeroonissa *v.* Meer Mahomed, 18 W. R. 103 (1872); Mahtab Chunder *v.* Ram Lall, 3 C. 351 (1877); Gooroo Dass Roy *v.* Stephens, 21 W. R. 195 (1874).

(3) Ameeroonnissa *v.* Meer Mahomed, 18 W. R. 103 (1872).

(4) Bistoopria *v.* Nund Dhul, 13 M. I. A. 602 (1870).

(5) Dorab Ally *v.* Abdool Azeez, 3 C. L. R. 358 (1871); s. c., 4 C. 229. In this case interest was allowed on the amount to be refunded at the rate of 6 per cent. from the date of the order made on motion till realization. But interest from the time when the money was paid was not allowed.

(6) Surjoo Dass *v.* Balmukund, 23 C. 212, 215 (1895). The decision in the case of Radha Pershad Singh *v.* Phuljuri Koer, 12 C. 402, was superseded by Act VII. of 1888 sect. 58, amending sect. 610 of the last Code.

the validity of the security bond in execution proceedings, as he was not a party to the order of the High Court, and if the bond is invalid it cannot be enforced against the surety.(1)

Mesne profits; interest.—It is settled law that where a decree is silent touching interest on mesne profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mesne profits.(2)

Appeal *from* order relating to execution.

16. The orders made by the Court which executes the order of *His* Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

Appeal.—An appeal to the Privy Council will lie as of right from the order of a single Judge of the High Court as to execution of a decree of the Privy Council when the property is over Rs.10,000.(3) Whether or not an order under the rule is a ministerial proceeding, if a judicial discretion is exercised thereunder, it may amount to a "judgment" under sect. 15 of the Charter and may be appealable. If in such exercise of judicial discretion a Judge usurps jurisdiction, that alone would be a valid ground of appeal.(4)

(1) Girindra Nath Mukerjee *v.* Bejoy Gopal, 26 C. 246, 249; s. c., 3 C. W. N. 84 (1898).

(2) Sada Siva Pillai *v.* Ramalinga Pillai, 2 I. A. 219; 15 B. L. R. 383; 24 W. R. 193 (1875); Ram Kanye *v.* Gooroo Prasunnoo, 16 W. R. 30, 31 (1871); Fakharuddin *v.* Official Trustee of Bengal, 8 C. 178 (1881); Chunder Coomar *v.* Gonesh, 13 C. 283, 290 (1886); but see Leelanund Singh *v.* Lakchmiput, 14 W. R. P. C. 23; s. c., 5 B. L. R. 605; 13 M. I. A. 490, 496 (1870); Gooroo Dass Roy *v.* Stephens, 21 W. R. 195 (1874); Taramonee *v.* Radha Jeebun, 14 W. R. 485 (1870); Lati Kooer *v.* Sobadra, 3 C. 720, 725 (1873); Gogun Chunder *v.* Laidlay, 5 C. L. R. 189, 191 (1879); Arunachellam *v.* Arunachellam, 15 M. 203 (1891). See index, *sub voc.* "Mesne Profits."

(3) Lilanand *v.* Luckmiput Sing, 5 B. L. R. 605, 608; s. c., 13 M. I. A. 490 (1870); and cf. Leelanund *v.* Lakchmiput, 14 W. R. P. C. 23.

(4) Hurrish Chunder *v.* Kali Sundari, 10 I. A. 4, 16, 17; s. c., 9 C. 482 (1882). Such cases to be distinguished from those in which a single Judge grants a certificate for leave to appeal to the Privy Council and which are not appealable: Lutf Ali Khan *v.* Asgur Reza, 17 C. 455, 457 (1890), *per* Wilson, J.; Manly *v.* Paterson, 7 C. 339 (1881).

ORDER XLVI.

Reference.

Reference of question to High Court.

1. *Where*, before or on the hearing of a suit or an appeal in which the decree is *not subject to appeal*, or *where*, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court. [s. 617.]

Court may pass decree contingent upon decision of High Court.

2. The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or *make an* order contingent upon the *decision* of the High Court on the point referred; [s. 618.]

but no *decree or order made* shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

Reference.—Any Judge may make a reference provided the terms of the rule are complied with.(1) This rule applies only when doubts arise in the hearing of a suit, or appeal, or execution, or other proceeding. It was not intended to apply to supposititious cases, which do not actually arise in a proper proceeding before the Court.(2) It does not authorize a reference except on a point arising in a litigation between parties, or in a matter wherein the Court is called on to adjudicate, that is, to pronounce, on the opposite pretensions of contending parties.(3) So it has been held not to apply to an application by the alleged trustee of a mosque for permission to grant a lease of lands alleged

(1) See Abdul Gafur *v.* Albyn, 30 C. 713 (1903) [reference by Munsif]; Mahamad Haji Zakeria *v.* Ahmadbhai, 25 B. 327 (1900) [reference by District Judge].

(2) Mahamad Haji Zakeria *v.* Ahmadbhai, *supra*; s.c., 3 Bom. L. R. 368. S. 28, Act XXIII. of 1861, was held not to apply to applications for review: Bonomally Deo *v.* Ram Sadoy, 17 W. R. 95 (1872).

(3) Yashvant Narayan *v.* De Souza, 12 B. 78 (1887).

to belong to the mosque,(1) or to an order fining a pleader.(2) The proceeding in which the reference is made must be one in which there may be a decree,(3) and in which such decree, when passed, is final.(4) For in appealable cases a remedy to correct possible error is provided by the appeal. The question must be one of law, and the Court cannot make a reference on a point merely on the application of the parties unless it entertains a reasonable doubt upon the matter; (5) nor on a point on which a Division Bench of the High Court has expressed an opinion.(6) A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his Presidency, unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council.(7) In r. 1 the words "*or the construction of a document which construction may affect the merits*" have been omitted as they are sufficiently covered by the power to refer any question of law. The alterations in r. 2 are verbal only. It has been held that a Collector hearing an application under sect. 23 of the Bombay Mamlatdar's Court Act, 1906, has no power to make a reference to the High Court, not being a Court trying a suit or appeal or executing a decree.(8)

Presidency Small Cause Courts.—Sect. 69 of Act XV. of 1882 provides for a compulsory reference where the Judges differ in opinion as to any question of law or construction of a document affecting the merits, and also where, in suits exceeding Rs. 500 in amount or value, any such question arises upon which the Court entertains reasonable doubt, and either party so requires.(9) The provisions of rr. 3–5, so far as they are applicable, are deemed to apply as if such reference had been made under the present rules. It was formerly said (10) not to be an easy matter to make sect. 69 dovetail with the present rules, and divergent views (11) were entertained upon the question whether

(1) Mahamad Haji Zakeria *v.* Ahmadbhai, 25 B. 327 (1900).

(2) Yashvant Narayan *v.* De Souza, 12 B. 78 (1887).

(3) See Ramphul *v.* Durga, 7 A. 815 (1885).

(4) Krishna Nath *v.* Ram Kumar, 7 C. L. R. 144 (1880) [where the matter referred could be made subject of second appeal]; Secretary of State *v.* Fazal Ali, 18 C. 234, 236, 239 (1891) [objection overruled]; Mahant Ishwargar *v.* Chudusama Manabhai, 12 B. 30 (1887) [amount of security required on granting stay of execution, a question under s. 244, and therefore appealable, and see as to s. 244 (now 47), Rangji *v.* Bhaiji, 11 B. 57 (1886)]; Oriental Loan Association *v.* Hatch, 17 B. 735 (1892) [a question arising in execution cannot be referred except where the decree is final]; *In re* Monohur Mookerjee, 5 C. 756 (1879) [order on application for Probate not being final cannot be referred]; s. c., 6 C. L. R. 228.

(5) Cf. Hurish Chunder *v.* O'Brien, 14 W. R. 248 (1870).

(6) Naru Koli *v.* Chima Bhosle, 13 B. 54, 55 (1888).

(7) Bhanaji *v.* De Brito, 30 B. 226 (1905); Fillingham *v.* Dunn, 8 P. R. 22 (1914).

(8) Dalpat Zopdoo *v.* Mahadu Uka, 14 Bom. L. R. 259 (1911).

(9) See Benode Lall *v.* River Steam Navigation Co., 1 C. W. N. 143 (1897); Ishwardas Tribhovandas *v.* Kalidas Bhaidas, 20 B. 779 (1896); Ralli Bros. *v.* Goculbhai Mulchand, 15 B. 376 (1890); Oakshott *v.* British India Steam Navigation Co., 15 M. 179 (1881); Seshammal *v.* Munusami 20, M. 358 (1896); Bank of Bengal *v.* Vyabhoy Gangji, 16 B. 618 (1892); Ishan Chunder *v.* Haran Sirdar, 11 W. R. 525 (1869).

(10) Garling *v.* Secretary of State, 30 C. 456 (1903), at p. 461.

(11) See Benode Lall *v.* River Steam Navigation Co., *supra*; Garling *v.* Secretary of State, 30 C. 458 (1903); *contra*, Ralli Bros *v.* Goculbhai Mulchand, 15 B. 376 (1890), at p. 386; Nicol *v.* Mathoora Das, 15 C. at p. 509 (1888).

sect. 69 was controlled by them. It is now unnecessary to further consider the matter, as by Act IV. of 1906 the Presidency Small Court Act was amended with a view to remove the difficulties which had been experienced.

Judgment of High Court to be transmitted, and case disposed of accordingly.

3. The High Court, *after* hear*ing* the parties *if they appear and desire to be heard*, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court. [s. 619.]

"After-hearing the parties."—The rule has here been altered, as the language of the former section might, if strictly interpreted, require a hearing of the parties even though they had not appeared.

"Dispose of the case."—The word "*case*" in the last part of the rule refers to "the case" in the first part, showing that what is intended is the suit and not the subject of the reference.(1) Where the Small Cause Court passed a decree for the plaintiffs, but contingent on the opinion of the High Court, and on the reference the latter decided that upon the plaint before the Court the plaintiffs could not recover, it was held that the Small Cause Court had no jurisdiction to allow the suit to be withdrawn, but on receipt of the copy of the judgment of the High Court was bound to enter judgment for the defendants. Had the case been referred in an intermediate stage, the final judgment being withheld until the decision on the point referred to the High Court, the Small Cause Court would then have been in possession of the case; but having pronounced judgment contingent upon the opinion of the High Court, which opinion was against that judgment, there was only one course to take.(2)

Review.—The judgment passed by the High Court is not a decree or order within clause (*b*) of O. XLVII. r. 1, but simply a statement of the grounds in conformity with which the Subordinate Judge is to dispose of the case as provided by this rule.(3) A review is expressly given by that order and rule in the case of a judgment on a reference from a Court of Small Causes, but not one from a Subordinate Judge exercising the powers of a Small Cause Court.(4)

Costs of reference to High Court.

4. *The* costs (if any) consequent on a reference for the *decision* of the High Court shall be costs in the case. [s. 620.]

Costs.—Costs "*in the case*" means costs of the suit or appeal, as in r. 1, this rule being the one under which the costs are dealt with, and the costs being

(1) Yule & Co. *v.* Mahomed Hossain, 24 C. 129 (1896).
(2) Ib.
(3) Ramchandra Babaji *v.* Sitaram Vinayak, 10 B. 68 (1885).
(4) Ib.

made costs in this case.(1) Under this rule the costs of a reference cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit.(2)

Power to alter, etc., decrees of Court making reference.

5. *Where* a case is referred to the High Court under *rule 1*, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed *or made* in the case out of which the reference arose, and make such order as it thinks fit.

"**Amendment.**"—The case may be returned for amendment, as in the decision noted below.(3)

Power to refer to High Court questions as to jurisdiction in Small Causes.

6. (1) *Where* at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation *to* such other Court as it may in its order declare to be competent to take cognizance of the suit.

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in Small Causes.

7. (1) *Where* it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement the High Court may *make* such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this *rule*, the

(1) Nicol *v.* Mathoora Das Dumani, 15 C. 507 (1888), at p. 510.

(2) Ib.

(3) Garling *v.* Secretary of State, 30 C. 458 (1903) [on the point dealt with the S. C. C. Act has been since amended by Act IV. of 1906].

High Court may make such order as in the circumstances appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this *rule*.

Power to refer.—Act VII. of 1888, sect. 60. Rule 6 applies only to a case before judgment.(1)

Submission for revision.—It has been held by the Madras (2) and Calcutta (3) High Courts that the Judge is bound to make a reference if one of the parties requires him to do so. The Allahabad Court has, however, held that the word "shall" in the former section was not mandatory but directory, and that before a District Court could make a reference under it, it must be of opinion that the Subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that therefore the matter was one in which the interference of the High Court should be sought.(4) When a reference is made to the High Court under r. 7, the Court which makes it should state its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous.(5) Notwithstanding sect. 16 of the Provincial Small Cause Courts Act, the High Court has, on a case being submitted to it under this rule, full power to consider the matter of jurisdiction or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial. Where a suit cognizable by a Small Cause Court was tried both in the Munsif's and District Judge's Court without objection to the jurisdiction, *held*, on a second appeal to the High Court, that the former section must be read with sect. 19 of the Provincial Small Cause Courts Act, so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken in appeal to the District Court: both parties having submitted to the jurisdiction it was not competent to either of them on second appeal to plead the want of jurisdiction, so as to render the proceedings taken in the suit void.(6) In a suit for damages on account of use and occupation of land brought in a Court of Small Causes, exception was taken to the plaintiff's title. The plaint was returned by the Judge, under sect. 23 of the Provincial Small Cause Courts Act (IX. of 1887), for presentation in the ordinary Civil Court, and it having been presented to the Munsif, who tried the suit, and passed a decree in favour of the plaintiff. On appeal the Subordinate Judge reversed that decree, holding that the Munsif had no jurisdiction to try the suit. *Held*, that under sect. 23 of the Provincial Small Cause Courts Act the order of the Small Cause Court Judge was regularly made, and the Munsif had, therefore, jurisdiction to entertain the plaint. *Semble*:

(1) Diwalibai *v.* Sadashivdas, 24 B. 310 (1899); s. c., 1 Bom. L. R. 836.

(2) Simson *v.* McMaster, 13 M. 344 (1890); and the fact that an appeal lay to the District Judge from the order made by the District Munsif did not preclude him from making the reference: ib., at p. 346

(3) Suresh Chunder *v.* Kristo Rangini, 21 C. 249, 254 (1893).

(4) Madan Gopal *v.* Bhagwan Das, 11 A. 304 (1888).

(5) Chhotu *v.* Jawahir, 28 A. 293 (1905).

(6) Suresh Chunder *v.* Kristo Rangini, 21 C. 249 (1893).

It is doubtful whether the Appellate Court would have been right in dismissing the suit for want of jurisdiction, even supposing that the order made under sect. 23 of the Provincial Small Cause Courts Act had not expressly conferred jurisdiction upon the Munsif.(1) This rule does not apply to every case in which a Court of Small Causes has failed to exercise a jurisdiction vested in it by law, or has exercised a jurisdiction not vested in it by law, but only to a restricted number of such cases, namely, those cases in which a Court of Small Causes has erroneously held a suit to be, or not to be, cognizable by it. Where no question as to the Court's jurisdiction was raised by either party, and the Court of Small Causes proceeded to judgment as if the case was properly cognizable by it, the High Court refused to interfere upon a reference made by the District Judge purporting to be made under the former section.(2) The rule is an enabling one, and does not cut down the jurisdiction of the appellate tribunal.(3)

(1) Mahamaya Dasya *v.* Nitya Hari, 23 C. 425 (1895).

(2) Ram Lal *v.* Kabul Singh, 25 A. 135 (1902).

(3) Sri Raja Simhadri *v.* Chelasane Bhadrayya, 30 M. 41 (1906).

ORDER XLVII.

Review.

1. (*1*) Any person considering himself aggrieved— [s. 623.]

Application for review of judgment.

(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(*b*) by a decree or order from which no appeal is hereby allowed, or

(*c*) by a *decision* on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(*2*) A party who is not appealing from a decree *or order* may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Application for review of judgment.—This rule corresponds with sect. 376 of Act VIII. of 1859. That section was modified by sect. 623 of Act X. of 1877, by which Act the sub-clauses (*a*), (*b*), and (*c*) were substituted for "*by a decree of a Court of original jurisdiction from which no appeal shall have been preferred to a Supreme Court, or by a decree of a District Court in appeal from which no appeal shall have been admitted by the Sudder Court, or by a decree of the Sudder Court from which either no appeal may have been preferred to Her Majesty in Council, or an appeal having been preferred no proceedings in the suit have been transmitted to Her Majesty in Council*," the words "*and important*" "*after the exercise of due diligence*," "*or order made or an account of some mistake or error apparent on the face of the record*," "*or order made*" and the second clause were

added, and "*produced*" substituted for "*adduced*," "*any other sufficient reason*" for "*any other good and sufficient reason*," "*desires to obtain*" for "*may be desirous of obtaining*," "*decree passed*" for "*judgment passed*," and "*review of judgment to the Court*" for "*review of judgment by the Court.*" The present Code substitutes "*decision*" for "*judgment*" in sub-clause (*c*), adds the words "*or order*" in the second clause and omits the words "*hereby*" before "*allowed*" in clause (*a*), and "*or to the Court, if any, to which the business of the former Court has been transferred,*" which had been added at the end of the first clause by Act X. of 1877. See sect. 114, *ante*.

No Court has the power of setting aside an order which has been properly made, unless it is given by statute.(1) The High Court has no power to amend its own decree except under the provisions of sect. 206 (now sect. 152) or sect. 114 or this rule; (2) and inferior Courts in the Mofussil have no jurisdiction to review their own judgments except under the circumstances and with the limitations set forth in this Code.(3) A Court for the relief of insolvent debtors has jurisdiction to review its own orders; (4) so had a Provincial S. C. Court.(5) The former section did not apply to proceedings before the Special Judge under the Dekkhan Agriculturists' Relief Act (XVII. of 1879),(6) but he had power to review an *ex parte* order made by him; (7) nor was it affected by sect. 42 of the Lower Burma Courts Act, 1900. It was held that the former section did not admit of an application that a case be re-instated where, the suit having been dismissed under sect. 98 (now O. IX. r. 3) for non-appearance of the parties, the plaintiff had by his own negligence allowed his rights under sect. 99 (now O. IX. r. 4) to be barred; (8) but where a suit had been dismissed under sect. 102 (now O. IX. r. 8) and no application had been made under sect. 103 (now O. IX. r. 9), an application for review was held admissible.(9) It has been held that an application for review is not a suit within the meaning of sect. 13 of the last Code (now represented by sect. 11) and therefore cannot operate as constructive *res judicata*.(10)

The section was held to include an order in execution of a decree; (11) such as one dismissing an execution case; (12) even after satisfaction of the decree, the decree-holder could re-open the matter under sect. 244 (now sect. 47) and sect. 623 (r. 1), on the ground that he had acted under a mistake of calculation in fixing the amount that was due; (13) as also an order disallowing a

(1) Drew *v.* Willis, L. R. 1 Q. B. D. (1891) 452.

(2) Kotaghiri *v.* Vellanki, 4 C. W. N. 725; 24 M. 1; 27 I. A. 197 (1900).

(3) Burra Fukeer *v.* Fukeer Doss, 20 W. R. 180 (1873); and see Chandi Charan *v.* Monranjan, 17 C. L. J. 415 (1913).

(4) In the matter of Thucker Bhagvandas, Insolvent; Creditor, Murarji, 4 B. 489 (1883).

(5) Isan Chunder *v.* Luchun Gope, 5 C. 699 (1880).

(6) Babaji *v.* Babaji, 15 B. 650 (1891).

(7) Ramchandra *v.* Draupadi, 20 B. 281 (1895).

(8) Koilash Mondol *v.* Nabadwip, 2 C. W. N. 318 (1896).

(9) Raj Narain *v.* Ananga Mohan, 26 C. 598 (1899).

(10) Srish Chandra Pal Chowdry *v.* Triguna Prasad Pal Chowdry, 40 C. 541 (1913).

(11) Haradhun *v.* Chunder Mohun, W. R. Spec. No. p.6 6 (1862); Lotf Ali *v.* Court of Wards, 6 W. R. Mis. 127 (1866); Narayanbhai *v.* Gangakrishna, 4 B. H. C., A. C. 87 (1867).

(12) Asoka Kumar *v.* Khettramoni, 2 C. W. N. 606 (1898).

(13) Nilratan *v.* Ram Rutton, 5 C. W. N. 627 (1901).

claim to property attached; (1) and an application to amend a sale certificate.(2) An order refusing leave to sue as a pauper under sect. 409 (now O. XXXIII. r. 7) may be reviewed; (3) also an order giving leave to appeal to the Privy Council; (4) and an order refusing such leave; (5) and an *ex parte* order admitting an appeal under sect. 5 of the Limitation Act,(6) and an order under sect. 76 of the Registration Act of 1871 rejecting an application for registration, such order being in the nature of a decree within the meaning of the corresponding section of the Code of 1859; (7) also an order made on an application under sect. 63 of Act II. of 1874, such application being a suit; (8) and an order dismissing for default an application under O. XXI. r. 89.(9) It applied to proceedings under Act XXVII. of 1860 in Bengal and the N. W. P.,(10) but not in Madras.(11) But a decision under sect. 5 of the Court Fees Act is not open to revision; (12) nor did the former section apply to proceedings under Bengal Acts VII. of 1868 or VII. of 1880; (13) nor to suits and proceedings under the N. W. P. Rent Act, 1881; (14) but it did apply to proceedings under sect. 103 of the Bengal Tenancy Act as being suits between landlord and tenant.(15) It has recently been held by the Privy Council that a Revenue Commissioner acting under Act XI. of 1859, as amended by Bengal Act VII. of 1868, had no power to review his own order setting aside a sale held for arrears of revenue, for such an order, even if bad in law, was good and final as an order, and could not be altered by him.(16)

"**Any person considering.**"—Where a decree against several defendants has been treated as separate decrees for the purposes of special appeal, the Court was held to have no power to modify the decree on review in respect of defendants who had not applied for review, otherwise if the decree were common to all.(17)

"**Decree or order.**"—An *ex parte* order may be reviewed; (18) so may an *ex parte* decree, although it is open to be dealt with under sect. 108 (now O. IX.

(1) Cochrane *v.* Heera Lal, 7 W. R. 79 (1867).

(2) Boojha Roy *v.* Ram Kumar, 3 C. W. N. 374 (1899).

(3) In the matter of Umasundari, 5 B. L. R. App. 29 (1870); Adarji *v.* Manikji, 4 B. 414 (1880).

(4) *Per* Prinsep, J., in Gopinath *v.* Goluck, 16 C. 291 note (1884): *contra* Ameerunissa *v.* Indurjeet, 6 W. R. Mis. 97 (1866); *in re* Woomatara, 6 W. R. Mis. 120 (1866).

(5) Nand Kishore *v.* Ram Golam, 39 C. 1037 (1912); 16 C. W. N. 1089.

(6) Venkatrayudu *v.* Nagadu, 9 M. 450 (1886); Mashaullah *v.* Ahmedullah, 13 C. 79 (1886).

(7) Reasut *v.* Abdoollah, 2 C. 131; 3 I. A. 221 (1876).

(8) Smith *v.* Secretary of State, 3 C. 340 (1878).

(9) Swaminatha *v.* Paul, 22 M. L. J. 148 (1911).

(10) In the matter of Poona Kooer, 1 C. 101 (1875); 24 W. R. 376; Hameeda Beebee *v.* Noor Beebee, 9 W. R. 394; In the matter of Rukmin, 1 A. 287 (1876).

(11) Sivu *v.* Chenamma, 5 M. H. C. 417 (1870).

(12) Balkaram *v.* Gobind Nath, 12 A. 129, 156 (1890).

(13) Lala Pryag *v.* Jai Narayan, 22 C. 419 (1895).

(14) Wazir Singh *v.* Thakur Kishori, 19 A. 522 (1897).

(15) Achha Mian *v.* Durga Churn, 25 C. 146; 2 C. W. N. 137 (1897).

(16) Baijnath Ram Goenka *v.* Nand Kumar Singh, P. C., 40 C. 552 (1913).

(17) Pegoo *v.* Waizooddeen, 18 W. R. 464 (1872).

(18) Amir Hasan *v.* Ahmad Ali, 9 A. 36 (1886).

r. 13).(1) When an appeal has been dismissed under sect. 551 (now O. XLI. r. 11), the Lower Court has no jurisdiction to review its judgment or decree, that decree having merged in the decree of the Appellate Court.(2) The Code of 1859 only referred to review of decrees; but where a Judge had reviewed an order passed confirming a sale in execution of a decree, the Privy Council did not treat that review as a nullity, but dealt with the case on its merits.(3)

Clause (a).—The admission of a special appeal debarred a review, even though the person applying did not prefer the appeal; (4) likewise if the special appeal has been tried and disposed of.(5) In such a case the Lower Court could not review so as to modify the substance of its decree, but it might for the purpose of correcting a clerical error; (6) but if a review be applied for in proper time and before an appeal has been preferred, the Judge was held not prevented from proceeding upon the application for review by the subsequent presentation of an application to appeal to the Privy Council, and he had full power and was bound to proceed under the application for review; (7) but in that case the application for leave to appeal had not been granted, and the Madras High Court formerly held that the preferring of an appeal subsequent to the application for review, stays the review proceedings.(8) But the Allahabad High Court apparently hold a contrary opinion, for there an order passed on review, purporting merely to amend the original decree, was held to amount to a new decree superseding the original decree, and an appeal filed pending review could not be heard as the decree under appeal had ceased to exist.(9) A Full Bench of the Madras High Court has now held that the review proceedings are not stayed by the preferring of an appeal.(10) An applicant may withdraw his appeal and apply for a review,(11) as by the cancellation of the order for admission of the appeal it may be taken that no appeal had been admitted or preferred, but not where the appeal instead of being withdrawn is actually dismissed.(12)

Clause (c).—This does not include a judgment on a reference from a Subordinate Judge exercising the powers of a Small Cause Court.(13) The Madras

(1) Bibi Mutto *v.* Ilahi Begam, 6 A. 65 (1883); Harihar *v.* Buddu, 13 C. L. R. 254 (1883); Poresh Nath *v.* Khettro Monee, 20 W. R. 284 (1873); Ali Azim *v.* Ram Manick, 12 W. R. 195 (1869); Hakimgir *v.* Basdeo, 17 C. W. N. 631 (1911); Lal Chet Narain *v.* Rampal, 16 C. W. N. 643 (1911).

(2) Peary Mohan *v.* Mohendra, 4 C. L. J. 566 (1906).

(3) Girdhari Singh *v.* Hurdeo Narain, 3 I. A. 230; 26 W. R. 44 (1876).

(4) Lucas *v.* Stephen, 9 W. R. 301 (1868).

(5) Raj Dharee *v.* Mohadeo, 11 W. R. 511 (1869).

(6) Oomanund *v.* Suttish, 9 W. R. 471 (1868).

(7) Bhurrut Chunder *v.* Ram Gunga, 5 W. R. 59 (1866); B. L. R., F. B. 362; Thacoor Prosad *v.* Baluck Ram, 12 C. L. R. (1882); Hurbuns *v.* Thakoor Proshad, 13 C. L. R. 297 (1883).

(8) Ramanadhan *v.* Narayanan, 27 M. 602 (1904); overruled in Chema Reddi *v.* Peddaobi Reddi, F. B., 32 M. 416 (1909).

(9) Kanhaiya *v.* Baldeo, 28 A. 240 (1905)

(10) Chema Reddi *v.* Peddaobi Reddi, F. B., 32 M. 416 (1909); overruling Ramadhan *v.* Narayan, 27 M. 602 (1904).

(11) Nanabhai *v.* Nathabhai, 9 B. H. C., A. C. 89 (1872); Pandu *v.* Devji, 7 B. 287 (1883).

(12) Ramappa *v.* Bharma, 30 B. 625; 8 Bom. L. R. 842 (1906); Raru Kutti *v.* Mamad, 18 M. 480 (1895); but see Pandurang *v.* Moro, 6 B. H. C., A. C. 69 (1869), where the special appeal was dismissed to enable an application for review to be made to the Lower Court.

(13) Ramchandra *v.* Sitaram, 10 B. 68 (1885).

High Court has held that sect. 17 of the Provincial Small Cause Court Act is merely directory and not mandatory,(1) but the Calcutta High Court has held the contrary.(2)

"**Discovery of new and important matter or evidence.**"—Though review is allowed on this ground, the Privy Council have recently pointed out that the Code exacts strict conditions so as to prevent litigants lying on their oars when they ought to be looking for evidence.(3) It must be shown that it is *primâ facie* evidence in the cause.(4) The new evidence must be clear and conclusive.(5) It need not be sufficient *per se* to show that the previous decision was wrong, or be such as to cause an overpowering balance of evidence in favour of the applicant.(6) But the discovery of evidence not originally available tending to prove that a decree had been obtained by perjury is ground for an application for review.(7) A judgment on special appeal cannot be reviewed merely on the ground that new evidence to prove a fact had been discovered,(8) inasmuch as it would have been inadmissible to impeach the decree on the hearing of the special appeal itself; (9) though it might be good ground for an application for review to the Lower Court.(10)

There has been a conflict of decisions as to whether a new and authoritative exposition of the law is or is not new and important matter justifying the granting of a review. On the one hand it has been held that the publication of a decision subsequent to the case sought to be reviewed being decided was ground for a review,(11) that where a review was sought on the strength of a Full Bench decision it should have been made within ninety days of that decision,(12) and that where a review had been properly granted the case should be governed by any new exposition of the law laid down since the date of the original decision; (13) also that the decision of the Privy Council in an appeal is "new and important matter" for the purposes of an application for review in respect of a decree made on a subsequent accrual of the same cause of action as that on which the decree appealed against was based.(14) On the other hand it has been held that a subsequent Full Bench case overruling the authority on

(1) Ramasami *v.* Kurisu, 13 M. 178 (1889).

(2) Jogi Ahir *v.* Bishen Dayal, 18 C. 83 (1890).

(3) Kessowji Issur *v.* G. I. Ry. Co., 11 C. W. N. 721 (1907).

(4) Ram Dhun *v.* Joy Narain, 12 W. R. 536; 8 B. L. R. App. 36, note (1869).

(5) Heera Lall *v.* Ram Taruck, 23 W. R. 323 (1875); see Mahabir Prasad *v.* Collector of Allahabad, 36 A. 277 (1914), where a suit had been dismissed on two grounds, new evidence on one alone is not ground for review.

(6) *In re* Appa Rao, 10 M. 73; 13 I. A. 155 (1886).

(7) Munshi Mosuful *v.* Surendra, 16 C. W. N. 1002 (1912); Abdul Huq *v.* Abdul Hafiz, 14 C. W. N. 695 (1910); Lakhmi *v.* Nur Ali, 38 C. 936 (1911); 15 C. W. N. 1010.

(8) Bhyrub Nath *v.* Kally Chunder, 16 W. R. 112 (1871).

(9) Jackammal *v.* Palneappa, 5 M. H. C. 464 (1870).

(10) Panchanan *v.* Radha Nath, 4 B. L. R. 213 (1870); Nand Kishore (*in re* the Petition of), 32 A. 71 (1909).

(11) Achuta *v.* Mammavu, 10 M. 357 (1886); Bance Pershad *v.* Radha Pershad, 15 W. R. 143 (1871).

(12) Forbes *v.* Dyanutoollah, 10 W. R. 415 (1868).

(13) Shama Churn *v.* Bindabun, 9 W. R. 181 (1868); Bura Boodho *v.* Koylash Chunder, 6 W. R. 100 (1866).

(14) Waghela *v.* Masludin, 13 B. 330 (1888); Ram Lal *v.* Kalka, 33 A. 566 (1911).

which the judgment sought to be reviewed had been based,(1) or the discovery of a fresh authority,(2) were not grounds for granting an application for review. In the last cited case it was, however, held that when a Court is satisfied that its judgment had proceeded upon an erroneous view of the law this rule allows a review. A new exposition of the law is, however, not a just and reasonable cause for not having applied for a review within the time prescribed for such application.(3)

"**After the exercise of due diligence.**"—This is the effect of the decisions in the cases cited,(4) in the second of which it was held that although the petitioner stated he did not know of the existence of the evidence at the time the suit was tried, it by no means followed that he ought not to have known of it, and that if he had made due search he might not have discovered it.

"**Could not be produced.**"—This must be proved to the satisfaction of the Court before it grants an application for review; (5) but an application for review having been admitted on other grounds, fresh evidence may be received, though no reason has been assigned for its non-production at the original trial.(6)

"**At the time when the decree was passed.**"—This rule does not authorize the review of a decree which was right when made, on the ground of the happening of some subsequent event.(7)

"**Mistake or error.**"—If the mistake or error is on the face of the judgment, or if it is shown that the decision has proceeded upon a mistaken view of the law,(8) or if the error be on the face of the record,(9) or on the face of the judgment or the decree, it is clear that it is irregular and incorrect or not in compliance with the provisions of the law, a review lies.(10) The absence of a formal finding on an issue tried and decided by a High Court is not an error calling for review of judgment.(11)

"**Any other sufficient reason.**"—Whilst an error on a point of law is a ground for review,(12) the reason is not confined to either positive error in law

(1) Amrit Lal *v.* Madho Das, 6 A. 292 (1884); see also Madhub Chunder *v.* Radhika, 7 W. R. 405 (1867); Dwarkanath *v.* Manick Chunder, 9 W. R. 102 (1868).

(2) Vellaya *v.* Jaganatha, 7 M. 307 (1883); see also Bance Pershad *v.* Radha Pershad, 15 W. R. 143 (1871); Chandi Charan *v.* Monoranjan, 17 C. L. J. 416 (1913).

(3) Shama Churn *v.* Bindabun, 9 W. R. 181 (1863); Bura Boodho *v.* Koylash Chunder, 6 W. R. 100 (1866); Punchanan *v.* Gurudas, 9 B. L. R. 187; 18 W. R. 317 (1872).

(4) Seetanath *v.* Sham Soonduree, 14 W. R. 26; 8 B. L. R. App. 37 (1870); Heera Lall *v.* Ram Taruck, 23 W. R. 323 (1875).

(5) Dwarkanath *v.* Kishenlall, Marsh, 553 (1863); Omrao Thakoor *v.* Gocool Mundul, 16 W. R. 7 (1871); Nubokishore *v.* Jadub Chunder, 20 W. R. 426 (1873).

(6) Bihari Lal *v.* Trailakhomayi, 3 B. L. R., A. C. 346 (1869).

(7) Kotagiri *v.* Vellanki, 24 M. 1; 27 I. A. 197; 4 C. W. N. 725 (1900); 2 Bom. L. R. 771.

(8) Sharup Chand *v.* Pat Dassee, 14 C. 627 (1887).

(9) Husaini *v.* Collector of Muzaffarnagar, 11 A. 176 (1889).

(10) Barhamdeo *v.* Banarsi, 3 C. L. J. 119 (1901).

(11) Sabapathi *v.* Subraya, 2 M. 58 (1878).

(12) Koh Poh *v.* Moung Tay, 10 W. R. 143 (1868).

or new evidence to be brought forward which could not be produced on the first hearing.(1) And the cases do not limit the discretion of the Court, in saying what reason is good and sufficient or what may be so far requisite to the ends of justice as to support an application for review.(2) The Court must decide this in each case on its own circumstances. The reason must be one sufficient to the Court before which the application for review is made. It may depend upon a question of law or upon a question of fact or of mixed law and fact. It is not limited only to the cases in which the right to review is extended in England.(3) It cannot, moreover, be treated as an universal rule that no point can be raised on an application for review which has already been discussed and decided on the original hearing or that no new point which was not raised on the hearing can be argued on the application for review. In each case the Court must consider and decide whether a review is necessary to correct any evident error or omission or is otherwise requisite for the ends of justice.(4) The following cases therefore are cited, as instances only, of the exercise of the power, which, however, is not limited to such cases. Where a Court wrongly excluded material evidence; (5) or refused to admit additional evidence on appeal; (6) or the parties and the Judge were under a misapprehension as to the contents of a document, or the Judge alone was misled on the point; (7) or the Judge in deciding the case omitted to consider the effect of important documentary evidence filed with the plaint, which was not taken issue upon, and which materially affected the merits of the case; (8) or the question of limitation; (9) or discredited material documentary evidence without inspecting it, or declared the report of a Commissioner unworthy of reliance because he was a muharrir,(10) or omitted to try a point which was urged before him,(11) by mistake; (12) or had placed the onus of proof on the wrong party; (13) it was held that there was sufficient ground for granting a review. As also in the case of omission to serve the respondent with notice of appeal and his consequent absence at the hearing; (14) or the dismissal of a suit for non-joinder of parties necessary under sect. 85 of the Transfer of Property Act; (15) or the dismissal on the technical ground that the stamp was originally insufficient, but which was subsequently found to have been sufficient; (16) or

(1) Reasut Hossein *v.* Abdullah, 2 C. 131; 31 A. 221 (1876).

(2) Ib. As to the generality of these terms, see Gopal Chandra Lahiri *v.* Solomon, 13 C. 62 (1886); and the case in next note.

(3) Amir Hasan *v.* Ahmad Ali, 9 A. 36 (1886).

(4) Chintamani *v.* Pyari Mohan, 6 B. L. R. 176 (1870); 15 W. R. F. B. 1; Bhawabal *v.* Rajendra, 5 B. L. R. 321 (1870); Huree Pershad *v.* Nund Kishore, 17 W. R. 479 (1872); Kalu *v.* Vishram, 1 B. 543 (1877).

(5) Reasut *v.* Abdullah, 2 C. 140; 3 I. A. 221 (1876).

(6) Ram Lall *v.* Rung Lall, 17 W. R. 47 (1871).

(7) Gopal Chandra *v.* Solomon, 13 C. 62 (1886).

(8) Mahadeva *v.* Sappani, 1 M. 398 (1878).

(9) Ramu Rai *v.* Dayal Singh, 16 A. 389, 394 (1894).

(10) Abdul Rahim *v.* Racha Rai, 1 A. 363 (1877).

(11) Hussun Ali *v.* Nasirooddeen, 16 W. R. 134 (1871); Beharee Lall *v.* Troyluckho, 12 W. R. 223 (1869); 3 B. L. R., A. C. 346.

(12) Wise *v.* Huro Lall, 16 W. R. 150 (1871).

(13) Harihar *v.* Madab Chandra, 8 B. L. R., P. C. 580 (1871).

(14) Ghansham *v.* Lal Singh, 9 A. 61 (1886).

(15) Girish Chunder *v.* Juramoni, 5 C. W. N. 83 (1900).

(16) Ali Akbar *v.* Khurshed, 27 A. 695; 2 A. L. J. 465 (1905).

where the point was raised for the first time in delivering judgment; (1) or the Judge had made an error in calculation; (2) or had based his decision on a decree which was subsequently set aside on appeal.(3) The production of an authority, which ought to have been but which was not cited at the first hearing, laying down a view of the law contrary to that taken by the Judge, is sufficient ground,(4) though formerly it was held otherwise.(5) So where the Privy Council had given an authoritative exposition at variance with the decision of the High Court on which the decree sought to be reviewed had been based a review was allowed.(6)

A decree against a minor properly represented in the suit cannot be re-opened on review by the minor on attaining majority, on the ground that the decree did not reserve an opportunity to him to show cause against it on attaining majority,(7) but otherwise where the Court passing the decree in terms of a compromise against a minor did not inquire into the circumstances which led to the filing of the petition of compromise nor granted any leave to compromise under sect. 462 (now O. XXXII. r. 7).(8) Where, however, he seeks to set aside a decree on the ground that the compromise made by his guardian and on which the decree was based was fraudulent, his remedy was formerly held to be by suit and not by way of review.(9) But by a later decision it was held that fraud practised upon a party in connection with a petition of compromise was a good ground for reviewing the decree made thereon.(10) A mistake in copying out a petition of compromise may not itself be a good ground for review, but coupled with an allegation of fraud it is.(11)

A review has been refused to be allowed on the ground that if the facts had been better or more fully placed before the Court the decision would have been different,(12) even coupled with the fact that there was a subsequent decision of the Privy Council on the point, the petition being seven years after the decision sought to be reviewed; (13) or merely to supply defects on the part of pleaders in their conduct of appeals; (14) or to enable the Court to reconsider its judgment on the same evidence; (15) or on the ground that the Court improperly neglected to examine a witness, if the objection was not taken when the case was heard by the Court of Appeal; (16) or that the Court's decision is contrary to the

(1) Gungapershad *v.* Maharani, 12 I. A. 51 (1884); Sulliman *v.* New Oriental Bank, 15 B. 274 (1890).

(2) Mirza Akbur *v.* Mullick, 25 W. R. 63 (1875).

(3) Mooraree *v.* Mahomed Akmal, 22 W. R. 161 (1874).

(4) Muhammad Yusuf *v.* Abdul Rahman, 16 I. A. 104 (1889); Jatra *v.* Aukhil, 24 C. 336 (1896).

(5) Ellem *v.* Basheer, 1 C. 185; 24 W. R. 382 (1875).

(6) Banee Pershad *v.* Radha Pershad, 15 W. R. 143 (1871).

(7) Cursandas *v.* Ladkavahu, 19 B. 571 (1895).

(8) Barhamdeo *v.* Banarsi, 3 C. L. J. 119 (1901); see also Aushootosh *v.* Tara Prasanna, 10 C. 612 (1884).

(9) Ib.

(10) Rasik Chandra *v.* Rajani Ranjan, 10 C. W. N. 286 (1905).

(11) Ib.

(12) Chunder Churn *v.* Loodunram, 25 W. R. 324 (1876).

(13) Jadub Ram *v.* Ram Lochun, 19 W. R. 189 (1873).

(14) Prosunnonath *v.* Judoonath, 9 W. R. 589 (1868).

(15) Lachman *v.* Mohan, 2 A. 505 (1879).

(16) Munshad *v.* Luchmeeput, 9 W. R. 129 (1868).

weight of evidence.(1) The Privy Council has, however, held that the decision in the last-mentioned case does not limit the discretion of the Court in saying what reason is good and sufficient or what may be so far requisite to the ends of justice as to support an application for review.(2) That the Appeal Court's decision was based on a ground first raised in appeal was held no reason for granting a review.(3) And grounds which virtually disclose reasons for an appeal from a decision cannot, it has been said, be the bases of a review.(4) It has also been held that a point raised on appeal but abandoned in argument cannot ordinarily be a ground for review; (5) and that the fact that one Divisional Bench of the High Court has decided a point at variance with the decision of another Divisional Bench is not such a ground.(6)

"**May apply.**"—The proceedings taken to obtain a review pass through three stages. In the first place the party applies for a rule, which application is either granted or rejected. This is the first stage. If the rule is granted the other side shows cause, upon which the rule is made absolute or discharged. This is the second stage. The last stage is where, if the rule is made absolute, the case is directed to be reheard, and an order or decree passed upon such hearing. The application should if possible be to the Judge who passed the decree or order sought to be reviewed; or as the Privy Council has put it:—"We do not say that there might not be cases in which a review might take place before another and a different Judge; because death or some other unexpected or unavoidable cause might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only *ex necessitate*. We do say that in all practicable cases the same Judge ought to review." (7) Expedition in presenting a petition for review is indispensable.(8) A party applying must show that there is good and sufficient cause for granting the review before he can be heard to argue that the decision is erroneous.(9) There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of His Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties; but this is an indulgence with a view mainly to prevent irremediable injustice when by some accident, without any blame, the party has not been heard, and an order has been made, inadvertently, as if he had been heard.(10) An application for review is the proper method of setting aside a decree made on a compromise.(11) As to whether a second application can be made for review, see r. 9, *post*.

(1) Nasiruddin *v.* Indronarayan, B. L. R., F. B. 367; 5 W. R. 93 (1866).

(2) Reasut *v.* Atoloollah, 2 C. 140; 3 I. A. 221 (1876).

(3) Cowell *v.* Mohadeb, 17 W. R. 182 (1872).

(4) Sheo Ratan *v.* Lappu Kuar, 5 A. 14 (1882); but see Amir Hasan *v.* Ahmad Ali, 9 A. 36 (1886).

(5) Sabapathi *v.* Subraya, 2 M. 58 (1878).

(6) Nobeen Kishen *v.* Shib Pershad, 9 W. R. 161 (1868).

(7) Moheshur Singh *v.* Government of India, 3 W. R. 45; 7 Moo. I. A. 304 (1859); followed in Surut Soonduree *v.* Rajendur Kishore, 9 W. R. 125 (1868); and see O. XLVII. r. 2.

(8) Moheshur Singh *v.* Government of India, 3 W. R. 45; 7 Moo. I. A. 30 (1859).

(9) Bhowabal *v.* Rajendra, 5 B. L. R. 321 (1870).

(10) *In re* Appa Rao, 10 M. 73; 13 I. A. 155 (1886).

(11) Aushootosh *v.* Tara Prasanna, 10 C. 612 (1884).

"**Review of judgment.**"—"Review of judgment" and "review of decree" are used interchangeably in sect. 114 and in O. XLVII. rr. 1 and 2.(1) Where on an application for review on several points the Judge allowed it on only one point which might have been dealt with under sect. 206 (now 152), it was held still to be an application for review; (2) and an order for amendment of a decree under that section is an order passed upon review of judgment within the meaning of Art. 179, Schedule II. clause (5) of the Limitation Act.(3) As a general principle no review can be admitted of a judgment passed on a compromise; (4) though where it is necessary to set aside a decree made upon a compromise, the proper course is by way of review.(5) The expression "review of judgment" has been held to include an amendment of decree that does not necessitate any alteration in the judgment.(6)

Practice.—An application for review commences ordinarily with an *ex parte* application under this rule. The Court may then either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage, the application may either be admitted or rejected; and it is obvious that the hearing of this rule may involve, to some extent, an investigation into the merits. If the rule is discharged the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached, the case is re-heard on the merits, and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the rule is discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest on, the old decree.(7) In practice, however, these three stages are not always kept distinct, but are sometimes combined.(8) The Allahabad High Court has held that it is not necessary that an application for review should be accompanied by a copy of the decree, order, or judgment sought to be reviewed.(9) It has been held that the Code does not contemplate that the Court on being satisfied of the existence of good grounds for review, should (instead of making an order admitting the review) admit the new evidence and hear the case, not on the merits but as to admissibility of review on the basis of such evidence taken with

(1) Kali Prosunno *v.* Lal Mohun, 25 C. 258 (1897); 2 C. W. N. 219.

(2) Joykishen *v.* Ataoor Rohoman, 6 C. 22 (1880).

(3) Aushootosh *v.* Tara Prasanna, 10 C. 612 (1884).

(4) Purmessuree *v.* Romeezooddeen, 5 W. R. 226 (1866).

(5) Aushootosh *v.* Tara Prasanna, 10 C. 612 (1884). See Srish Chandra Pal Chowdry *v.* Triguna Prasad Pal Chowdry, 40 C. 541 (1913). As when there has been fraud, Rasik Chandra *v.* Rajani Ranjan, 10 C. W. N. 286 (1905).

(6) Kali Prasanno Roy *v.* Lal Mohun Guha, 2 C. W. N. 219 (1897); dist. in Raghu Nath Ghoshal *v.* Mafakshar Hossain, 5 C. W. N. 192 (1900); s. c., 28 C. 177. As to remedy in case of mistake in decree, see Jogeswar Atha *v.* Ganga Bishnu, 8 C. W. N. 473 (1904).

(7) Vadilal *v.* Fulchand, 30 B. 56; 7 Bom. L. R. 664 (1905).

(8) Lekhraj *v.* Kanhya Singh, 18 W. R. 494 (1872).

(9) Wajid Ali *v.* Nawal Kishore, 17 A. 213 (1893); but see Adarji Edulji *v.* Manikji Edulji, 4 B. 414 (1880); and as to the Calcutta High Court, r. 2, Ch. XI. Part II. of the Appellate Side Rules.

other evidence in the case, and finally reject the review on the ground that the new evidence so taken did not assist the applicant.(1)

"Party who is not appealing . . . may apply."—This is the effect of the decision in the case cited.(2)

Appeal.—An appeal lies in certain cases from an order granting a review.(3) But it does not lie from an order rejecting an application for review. The proper procedure where that is open is to appeal from the order sought to be reviewed.(4) No appeal lies from an order on review amending a sale certificate,(5) or of an order dismissing an execution case for non-payment of process fees.(6) Where a decree-holder made an application under sect. 108 (now O. IX. r. 13), to set aside an adjustment of decree, and on its being refused applied that the application be treated as one for review, and on its refusal appealed against the order under sect. 108, and also took the ground that the review should have been allowed, the Appeal Court refusing to interfere with the order under sect. 108 could not, it was held, remand the case in regard to the application for review.(7) See r. 7, *post*

Limitation.—Under the Code of 1859 the period of limitation was ninety days as prescribed by sect. 377 of that Code. Now it is governed by the Limitation Act IX. of 1908, Sched. I., Arts. 161, 162 and 173. The pendency of a special appeal is not "a just and reasonable cause" for extending the time for the admission of an application for review.(8) Where there were a number of *pro forma* defendants and the decree was against "the defendant," an application for review by one of the *pro forma* defendants made within three months of an application for execution against him, though five years after the decree, was not barred.(9) As to the effect of an application for review in calculating the limitation on appeals there was a diversity of opinion in the case cited,(10) Rampini, J., holding that the general rule for extending the time to prefer an appeal and for excluding the time taken up in prosecuting an application for review is, that the delay may be excused if the applicant can show that he had reasonable grounds for applying for a review instead of preferring an appeal; and Mookerjee, J., holding that the general rule deducible from judicial decisions is that a *bonâ fide* application for review presented and prosecuted with due diligence should, except in special cases, be regarded as a sufficient cause for not presenting an appeal within the prescribed period.

Court fees.—On an application to review the portion of a decision relating to costs only, the applicant must pay stamp duty on the entire claim of the

(1) Purander *v.* Ramnarain, 14 C. L. J. 103 (1911).

(2) Bunkoo *v.* Basoomunissa, 7 W. R. 166 (1867).

(3) O. XLVII. r. 7.

(4) Vadilal *v.* Fulchand, 30 B. 56; 7 Bom. L. R. 664 (1905); Nanda *v.* Ramji Lal, 3 A. L. J. 119 (1906); and O. XLVII. r. 7 and the cases thereunder; but see Reasut *v.* Abdoollah, 3 C. 141; 3 I. A. 221 (1876).

(5) Boojha Roy *v.* Ram Kumar, 26 C. 529; 3 C. W. N. 374 (1899); see also Saddo Kunwar *v.* Bansi Dhar, 23 A. 476 (1901).

(6) Raja Pudmanund Singh *v.* Doorga Pershad Doobey, 4 C. W. N. 39 (1899).

(7) Nanda *v.* Ramji Lal, 3 A. L. J. 111 (1906).

(8) Lucas *v.* Stephen, 9 W. R. 301 (1868).

(9) Bunkoo *v.* Basoomunissa, 7 W. R. 166 (1867).

(10) Gobinda Lall *v.* Shibdas, 33 C. 1323 (1906); 10 C. W. N. 986; 3 C. L. J. 545.

suit under Art. 5, Sched. I. of the Court Fees Act; (1) but the Bombay High Court have held that the Court fee need only be sufficient to cover the amount of the claims in regard to which review was sought.(2) In calculating the eighty-nine days within which an application for review may be presented on payment of half the fee leviable on the plaint or memorandum of appeal under Art. 5, Sched. 1. of the Court Fees Act, 1870, the time during which the Court is closed for vacation cannot be excluded.(3)

To whom applications for review may be made.

2. *An* application for review of a *decree or order* of a Court, *not being* a High Court, upon *some* ground *other than* the discovery of such new and important matter or evidence as *is referred to in rule 1 or the existence of a* clerical or *arithmetical mistake or* error apparent on the face of the decree, shall be made *only* to the Judge who *passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.*

To whom applications for review may be made.—This rule combines sect. 624 of Act X. of 1887 and the last clause added to sect. 626 of Act XIV. of 1882 by Act VII. of 1888. The wording has been changed, and the rule has been framed to include orders as well as decrees, the words "*or the existence of a*" have been substituted for "*same*" and the word "*arithmetical mistake*" added.

"**Upon some ground other than.**"—This does not include supposed errors of judgment; (4) nor the ground that the order complained of was made in the absence of or without notice to a party.(5) But where a minor on attaining majority applied to set aside a decree made on a compromise during his minority on the ground that the Court did not inquire into the circumstances which led to the filing of the petition of compromise, and that the record showed no leave to compromise had been granted under sect. 462 (now O. XXXII. r. 7), it was held that the successor to the Subordinate Judge who heard the original case was competent to entertain the application for review.(6)

"**New and important matter.**"—A decision of the Privy Council in an appeal has been held to be new and important matter for the purposes of an application for review in respect of a decree made on a subsequent accrual of the same cause of action as that on which the decree appealed against was based.(7) See also notes to r. 1.

(1) Nobin Chundra *v.* Mohamed Uzir, 3 C. W. N. 292 (1898).

(2) *In re* Manohar G. Tambekar, 4 B. 26 (1879).

(3) *In re* Kota, 9 M. 134 (1885).

(4) Behari Loll *v.* Mungolanath, 5 C. 110 (1879).

(5) Khema Kanuji *v.* Dhanji Framji, 14 B. 101 (1889).

(6) Barhamdeo *v.* Banarsi, 3 C. L. J. 119 (1901).

(7) Waghela *v.* Masludin, 13 B. 330 (1888); Ram Lal *v.* Kalka, 33 A. 566 (1911).

"**Shall be made.**"—The remarks of the Privy Council in regard to expedition in presenting applications for review should be borne in mind. Their Lordships said, "We do not say that there might not be cases in which a review might take place before another and a different Judge; because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only *ex necessitate*. We do say that in all practicable cases the same Judge ought to review; and that for the attainment of that object, expedition in presenting a petition for the review is indispensable, and the only practical course for attaining that end is by accelerating the hearing of the review before accident or unexpected events shall have removed the original Judge." (1)

"**Made.**"—Where a petition for review of judgment is presented to the Judge who delivered it and he directs notices to issue thereon,(2) or directs the application to be entered on the register and that the fees for service of notice be deposited, and is then transferred, his successor has jurisdiction to make the order sought to be revised.(3) In such cases the grounds for review are not confined to those mentioned in this rule. But it would be otherwise where the Judge to whom the petition was presented merely ordered a copy of the decree to be produced and did not issue notice.(4) The Allahabad High Court, however, have construed "made" to include a hearing and determination of the application for review.(5) This variance of opinion has been set at rest by the concluding clause of this rule, which has affirmed the decisions of the High Courts of Calcutta, Madras, and Bombay.

"**Only to the Judge.**"—The primary intention of granting a review is a reconsideration of the same subject by the same Judge as distinguished from an appeal, which is a hearing before another tribunal.(6) If a Court has been abolished and its business transferred to another Court presided over by another Judge, the latter cannot entertain an application for review except in the cases mentioned in this rule; (7) nor can a Judge by transferring a case to his own file confer on himself the power to review an order of dismissal pronounced by a Judge subordinate to him.(8) A Judge of a Mofussil Small Cause Court has jurisdiction to review a case tried by his predecessor subject to the provisions of this rule.(9)

Form of applications for review.

3. The *provisions* as to the form of *preferring* appeals shall apply, *mutatis mutandis*, to applications for review. [s. 625.]

(1) Moheshur Singh *v.* Government of India, 3 W. R. 45; 7 Moo. I. A. 304 (1859).

(2) Karoo Singh *v.* Deo Narain, 10 C. 80; 13 C. L. R. 261 (1883); Ramasami *v.* Kurisu, 13 M. 178 (1889); Ganpat *v.* Jivan, 16 B. 603 (1891).

(3) Fazel Biswas *v.* Jamadar, 13 C. 231 (1886).

(4) Cheru *v.* Cheru, 12 M. 509 (1889).

(5) Pancham *v.* Jhinguri, 4 A. 278 (1882).

(6) Moheshur Singh *v.* Government of India, 3 W. R. 45; 7 Moo. I. A. 304 (1859); Shamser Ali *v.* Jagannath, 17 C. W. N. 403 (1912).

(7) Sarangapani *v.* Narayanasami, 8 M. 567 (1885).

(8) Golam *v.* Hurrish Chunder, W. R. (1864), Mis. 29; Ram Nath *v.* Gowhur, 2 N. W. P., H. C. 230 (1870).

(9) Shumsher *v.* Kurkut, 6 C. 236 (1880).

Form of applications for review.—This rule corresponds with sect. 625 in the Codes of 1877 and 1882, save that "*provisions*" has been substituted for "*rules hereinbefore contained*" and "*preferring*" for "*making*." Applications for review should be drawn up in the same manner as applications for the admission of special appeals, and should set forth concisely the grounds of objection to the decision sought to be reviewed.(1) The Bombay High Court has held that the petition for review must be accompanied by a copy *of the decree sought to be reviewed*; (2) but the Allahabad High Court has *held the contrary.(3) If the grounds* of review are certified they should be certified by the pleader who appeared originally in the appeal.(4) In granting a review the Court should not travel beyond the grounds mentioned in the application for review.(5)

4. (1) *Where* it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application *where* rejected.

(2) *Where* the Court *is* of opinion that the application for review should be granted, it shall grant the same:

Application where granted.

Provided that—

(*a*) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree *or order*, a review of which is applied for: and

(*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed *or made*, without strict proof of such allegation.

Applications where rejected and when granted.—This rule embodies part of sect. 378 of Act VIII. of 1859, and corresponds, save for the words in italics and the omission noted below, with sect. 626 of the Codes of 1877 and 1882. In Act VIII. of 1859 the first clause ran, "*If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application;*" the present wording of that clause was adopted by Act X. of 1877. In the second clause that Act added the words "*application for the*" before "*review*" and substituted "*should be granted*" for "*desired is necessary to correct an evident error or omission or is otherwise requisite for the ends of justice*,"

(1) Mahadaji *v.* Vithal, 1 B. H. C. 185 (1864).

(2) Adarji Edulji *v.* Manikji Edulji, 4 B. 414 (1880).

(3) Wajid Ali *v.* Nawal Kishore, 17 A. 213 (1893).

(4) Rousseau *v.* Pinto, 10 W. R. 54 (1868); Toong Oung *v.* British India Steam Navigation Co., 24 W. R. 430 (1875).

(5) Purna Chandra *v.* Nil Madhub, 5 C. W. N. 485 (1901).

and "*grant the same*" for "*grant the review.*" Proviso (*b*) was added by the Code of 1877. The present Code has substituted "*where*" for "*if*" and added the words "*or order*" and "*or made*" appearing in italics, but has omitted the words "*and the Judge shall record with his own hand his reasons for such opinion*" before the first proviso.(1) Clause (*c*) of the former section has been embodied in r. 2, *ante*. The form of Notice is given in the First Schedule, Appendix G, No. 14.

This rule applies to orders rejecting or admitting reviews and not to judgments on review.(2) A decree of a Division Bench of the High Court dismissing an appeal for default in depositing the estimated costs of preparation of the paper book can only be set aside by an order under this rule.(3)

An application for review involves three stages. It commences ordinarily with an *ex parte* application under sect. 623 (now O. XLVII. r. 1). The Court then may either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the application may either be admitted or rejected; and it is obvious that the hearing of the rule may involve, to some extent, an investigation into the merits. If the rule is discharged, then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached, the case is heard on the merits, and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the rule is discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest on, the old decree.(4) In practice these three stages are not always kept distinct, but are sometimes combined.(5)

"**Shall reject the application.**"—Such rejection cannot alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree.(6) Where on special appeal the case was remanded for trial of a particular issue, and an application for review was made in order that the suit might be remanded for the trial of another issue, it was held that as that would involve going through the record again the application could not be granted, as it would in fact be to grant a second special appeal.(7)

"**Shall grant the same.**"—Under the Code of 1859 which provided that where an application for review was beyond the prescribed time a Judge should record his reasons for admitting it, such proceeding and the order

(1) See Thakur Shunker Buksh *v.* Balwant Singh, 4 C. W. N. 203 (1899); s. c., 27 C. 333.

(2) Apcar *v.* Howah Bye, 1 Ind. Jur. N. S. 237 (1866).

(3) Fatimunnissa *v.* Deoki Pershad, 24 C. 350 (1896).

(4) Vadilal *v.* Fulchand, 30 B. 56 (1905); 7 Bom. L. R. 664.

(5) Lekhraj *v.* Kanhya Singh, 18 W. R. 494 (1872).

(6) Ramhurry *v.* Mothoor Mohun, 20 W. R. 450 (1873).

(7) Juggobundhoo *v.* Wise, 12 W. R. 400 (1869).

admitting the review could be made in one and the same proceeding.(1) An order intended to operate as an order for review is not invalidated by an irregularity in its form by reasons of which it purports to be an order made on an application to set aside the decree and restore a suit for trial.(2) The order made under this rule is not one on the re-hearing of the case on review; that comes later.(3) Although a District or Assistant Judge or Special Judge under sect. 74 of the Dekkhan Agriculturists Relief Act is not governed by this Code, he has discretion to grant a review on the ground of mistake,(4) or non-service of notice; (5) and he may review an *ex parte* order; (6) but notice of the application must be served on the other side.(7) The Codes of 1877 and 1882 required the Judge granting an application for review to record with his own hand his reasons for his opinion, and it was held that this should be done before the review of judgment was granted.(8) The failure to do so did not necessarily make the act one without jurisdiction,(9) but such an order was bad and the case must be remanded.(10) This was not a hard-and-fast rule; the words were directory, and the order was not necessarily invalid, though there might be cases in which it was necessary in the interests of justice that the reasons should be recorded, and in such cases the recording would be essential to the validity of the order.(11) In granting a review the Court should not travel beyond the grounds mentioned in the application for review.(12)

Clause (*a*).—Notice must be served on the opposite party to appear before a suit can be revived; (13) but not in the case of a review of an application for the admission of a special appeal, as such application being *ex parte*, a review of the same is also *ex parte*.(14) In the Codes of 1877 and 1882 this clause only made mention of decrees and not orders. The omission has been rectified by the present rule.

Clause (*b*).—Lord Romilly, M.R., said, "Re-hearing a cause upon obtaining fresh evidence is a most dangerous practice. It is the duty of suitors to bring forward all their evidence at the first, and nothing would be more mischievous than to allow the principle to prevail, that a person should endeavour to get a case heard upon imperfect evidence, and trust to succeeding on that evidence, and then, when it is found that he has not succeeded, to bring forward further evidence." (15) When a Judge wrongly construed a document, an application

(1) Aujonnissa *v.* Sarj Kant, 11 W. R. 56 (1869); s. c., 2 B. L. R. A. C. 181.

(2) Manicka *v.* Gurusami, 23 M. 496 (1899).

(3) Rajendro Protab *v.* Bhowabul, 14 W. R. 105 (1870).

(4) Badaricharya *v.* Ramchandra, 19 B. 113 (1893).

(5) Ramsing *v.* Babu, 19 B. 116 (1893).

(6) Ramchandra *v.* Draupadi, 20 B. 281 (1895).

(7) Rupchand *v.* Balvant, 11 B. 591 (1887).

(8) Bhairon *v.* Ram Sahai, 3 A. 316 (1888).

(9) Ashrafannissa *v.* Inaet Hossein, 13 W. R. 439 (1870); 5 B. L. R. 316.

(10) Gyanund *v.* Bepin Mohun, 22 C. 734 (1895).

(11) Manicka *v.* Gurusami, 23 M. 496 (1899).

(12) Purna Chandra *v.* Nil Madhub, 5 C. W. N. 485 (1901).

(13) *In re* Huro Mohun Mookerjee, 16 W. R. 135 (1871).

(14) Joy Koomar *v.* Esharee, 18 W. R. 475 (1872); 10 B. L. R. 155.

(15) Land Credit Company *v.* Lord Fermoy, L. R. 5 Ch. A. C. 768 (1870); and see Kessowji Issur *v.* G. I. P. Ry. Co., 11 C. W. N. 721 (1907) P. C.

for the purpose of correcting the error on review accompanied by another similar document to assist the Court was held not to be an application coming within this rule.(1) When the new evidence was available to the applicant and might, with anything like diligence, have been produced by him, the application for review was refused ; (2) but where the applicant produced with his application for review certain documents to show that the Judge's decision was erroneous on the evidence originally before him, it was held that he was not in fault in not producing them previously, as they were not originally necessary to the proof of his claim.(3) The applicant must also show that the new evidence is *primâ facie* evidence in the cause.(4)

"**Strict proof.**"—The Privy Council have recently emphasized this condition.(5) Want of such proof is a ground of appeal ; (6) and the decision on review must be reversed ; (7) but where a party had no opportunity of giving such proof owing to the opposite party, who had notice, not appearing and making no objection, the opposite party cannot afterwards be allowed to object.(8) Strict proof means proof according to the forms of law, that is, with close adherence to rule.(9) It is not sufficient to make an affidavit that the applicant was not aware of the existence of a document, but he must also show that he used due diligence and made inquiries to ascertain its existence and found it was not available ; (10) but an applicant for review on the ground that he had not been afforded sufficient time to produce a document at the original hearing has not to prove the document was not within his knowledge.(11)

Application for review in Court consisting of two or more Judges.

5. *Where* the Judge or Judges, or any one of the Judges, who passed the decree or *made the* order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order

(1) Gunesh Ram *v.* Rohinee, 14 W. R. 236 (1870).

(2) Brojendro *v.* Wise, 19 W. R. 130 (1873) ; Ram Dhun *v.* Joy Narain, 12 W. R. 536 (1869) ; 8 B. L. R. App. 36, note.

(3) Gunesh Ram *v.* Rohinee, 14 W. R. 236 (1870).

(4) Ram Dhun *v.* Joy Narain, 12 W. R. 536 (1869) ; 8 B. L. R. App. 36 note.

(5) Kessowji Issur *v.* G. I. P. Ry. Co., 11 C. W. N. 721 (1907).

(6) Shamsheir *v.* Ram Chunder, 2 W. R. 174 (1865) ; Khelut Chunder *v.* Prankisto, 11 B. L. R. 428 note ; 12 W. R. 461 (1869) ; Bhyrub Chunder *v.* Madhub Ram, 20 W. R. 84 ; 11 B. L. R. 423 (1873).

(7) Naffar Chand *v.* Sandes, 8 B. L. R. App. 35 ; 10 W. R. 432 (1868) ; Umrao *v.* Goakul, 8 B. L. R. App. 34 ; 16 W. R. 7 (1871) ; Nudarchund *v.* Reedoy, 11 B. L. R. 424 note ; 17 W. R. 458 (1872) ; Nissa Bibee *v.* Abdoor Ruhman, 18 W. R. 413 (1872) ; see also Jhubhoo *v.* Jusoda, 17 W. R. 230 (1872) ; and Brojendro *v.* Wise, 19 W. R. 130 (1873).

(8) Ram Joy *v.* Jugodessurree, 22 W. R. 399 (1874).

(9) Ahir Kond Kar *v.* Mohendra Lal De, App. 26 of 1911 (Letters Patent), 31 March, 1915, Calcutta (cor. Jenkins, C.J., and Woodroffe, J.).

(10) Seetanath *v.* Shama Soondaree, 14 W. R. 26 ; 8 B. L. R. App. 37 (1870).

(11) Goor Dyal *v.* Deka Noonya, 22 W. R. 446 (1874).

to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

Applications for review in Courts consisting of two or more Judges.—This rule is a modified form of sect. 379 of Act VII. of 1859. That section commenced, "*If the Court to which the application for a review of its judgment has been presented, be a Court consisting of two or more judges whenever the judge or judges who may have passed the decree, or if the decree have been passed by two or more judges, when any of such judges shall.*" By sect. 627 of Act X. of 1877 these words were altered to the form the rule now takes, save for the words in italics, down to the words "*continues or.*" That Act also substituted "*is not or are not*" for "*shall not be,*" "*considering the decree or order*" for "*considering the judgment,*" and the concluding words as they now appear from "*such judge*" for "*it shall not be competent to any other judge or judges of the same Court to enter upon a consideration of the merits of the application and record an order or opinion thereon.*" The present Code substituted "*Where*" for "*If*" and added the words "*made the*" appearing in italics. An application for the re-admission of an appeal dismissed by two Judges for default in depositing the estimated amount of costs for the preparation of the paper book was held not an application for review, and could not be disposed of by one of such Judges under this rule; (1) but a later decision, of the Full Bench, has overruled that decision so far as it held it was not an application for review,(2) and presumably therefore the rest of that decision is not law.

"**Attached to the Court.**"—A Judge absent on leave and for whom another is officiating is not "attached to the Court," and the review may be disposed of by the remaining Judge who heard the appeal originally.(3)

"**No other Judge . . . shall hear the same.**"—A review may be admitted by the sole remaining Judge of the Bench which heard the case originally.(4) If it be admitted by the two Judges who originally heard the case it may be disposed of by the sole remaining Judge. The Chief Justice cannot appoint a Bench to do so.(5)

628.] **6.** (*1*) *Where* the application for a review *is* heard by more than one Judge, and the Court *is* equally divided, the application shall be rejected.

Application where rejected.

(*2*) *Where* there *is* a majority, the decision shall be according to the opinion of the majority.

(1) Ramhari *v.* Madan Mohan, 23 C. 339 (1895).

(2) Fatimunnissa *v.* Deoki Pershad, 24 C. 350; 1 C. W. N. 21 (1896).

(3) Aubhoy Churn *v.* Shamont, 16 C. 788 (1889).

(4) Jardine Skinner & Co. *v.* Dhun Kishen, 13 W. R. 82 (1870).

(5) Aubhoy Churn *v.* Shamont, 16 C. 788 (1889).

"**Application where rejected.**"—This rule was introduced into the Code by sect. 628 of Act X. of 1877. By the present Code the word "*Where*" has been substituted for "*If*" and "*is*" for "*be.*"

Order of rejection *not appealable*. Objections to *order granting application.*

7. (*1*) An order of the Court rejecting the application shall *not* be *appealable*; but *an order granting an* application may be objected to on the ground that *the application* was—

(*a*) in contravention of the provisions of *rule 2*,

(*b*) in contravention of the provisions of *rule 4*, or

(*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be *taken* at once by an appeal *from* the order granting the application or in any appeal *from* the final decree or order *passed or* made in the suit.

(*2*) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, *where* it *is* proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(*3*) No order shall be made under *sub-rule* (*2*) unless notice of the application has *been* served *on* the opposite party.

Order of rejection not appealable: objections to order granting application.—This was introduced by sect. 629 of Act X. of 1877. The words "*An order of the Court rejecting the application shall be final*" (the form they then took) were taken from sect. 378 of Act VIII. of 1859. That section also provided that an order granting the review should be final. This provision was repealed by sect. 629 of Act X. of 1877. The present rule corresponds with that section, save that the words "*not be appealable*" have been substituted for "*be final,*" and "*the application*" for "*it,*" "*taken*" for "*made,*" "*from*" for "*against,*" and "*where it is*" for "*if it be,*" the words "*passed or*" added, the wording of sub-rule (3) rearranged, and the last clause of the former section, which now forms the basis of O. XLVII. r. 9, omitted.

"**Shall not be appealable.**"—The wording used in the earlier Codes was "*shall be final*" and was held to preclude appeals.(1) That decision was in reference to the wording as it appeared in sect. 378 of the Code of 1859, but

(1) Nusseerooddeen *v.* Indurnarain, 5 W. R. 93 (1866); B. L. R., F. B. 367. See also Nobin Chunder *v.* Gridharee, 11 W. R. 264 (1869); Banee Ram *v.* Hossein Ali, 11 W. R. 184 (1869); Modhoomutty *v.* Dhunput, 13 W. R. 167 (1870).

the word "*final*" in the late Code has been similarly interpreted.(1) No appeal lies, even if the application be rejected by a single Judge on the Original Side of the High Court; (2) or if the application be for the review of an order dismissing an execution for non-payment of process fees.(3) An opinion was expressed under the last Code that an order of rejection was not open to revision.(4) It must, however, be now noted that the order is not now "final" but "not appealable." The effect of an order rejecting an application for review is not to alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree.(5) When an order is made rejecting a review, the time allowed for appeal to the Privy Council against the judgment sought to be reviewed runs from the date of the judgment and not that of the order rejecting the review.(6)

"**May be objected to.**"—The appeal may be on the grounds mentioned in this rule and on no other.(7) An order admitting a review is not a judgment within the meaning of sect. 15 of the Letters Patent, so as to admit of an appeal from it save on the grounds mentioned in this rule; (8) but it may be dealt with under sect. 622 (now sect. 115).(9) Where a Court with materials before it comes to the conclusion that a review which has been applied for is necessary to correct an evident error or omission or for the ends of justice and grants the application accordingly, the order so made is not open to be questioned on special appeal; (10) nor is an order, directing the parties to examine the persons who had sworn the affidavits on which the application for review was based, as also to produce other evidence, being an interlocutory order, neither granting nor rejecting the review, appealable.(11) That there is no sufficient reason for granting the review is no ground of appeal.(12) No second appeal lies from an

(1) Gobinda Ram *v.* Bholanath, 15 C. 432 (1888).

(2) Achaya *v.* Ratnavelu, 9 M. 253 (1885).

(3) Pudmanund *v.* Doorga Pershad, 4 C. W. N. 39 (1899).

(4) Ram Lal *v.* Ratan Lal, 26 A. 572 (1904). But see Ramanadhan Chetty *v.* Narayanan Chetty, 27 M. 602, 607 (1904), where it was held that if there was no appeal the Court could interfere in revision.

(5) Ramhurry *v.* Mathoor Mohun, 20 W. R. 450 (1873).

(6) Soudaminee *v.* Dheraj Mohatab, B. L. R., F. B. 585 (1866).

(7) Bombay and Persia Steam Navigation Co. *v.* S. S. Zuari, 12 B. 171 (1887); Abhoy Churn *v.* Shamont, 16 C. 788 (1889); Har Nandan *v.* Behari Singh, 22 C. 3 (1894); Baroda Churn *v.* Gobind Proshad, 22 C. 984 (1895); Mahabir *v.* Nathin, 1 C. W. N. 338 (1895); Daryai *v.* Badri, 18 A. 44 (1895); Munni Ram *v.* Bishen Perkash, 24 C. 878 (1897); Lalit Mohun *v.* Purna Chandra, 3 C. W. N. cxxxv. (1899); Ramanadhann Chetty *v.* Narayanan Chetty, 27 M. 602, 607 (1904); Srimath Daivasi Kamani *v.* Noor Mahomed, 31 M. 47 (1907); Tholan *v.* Kunhikutty, 24 M. L. J. 93 (1912); and see Gopala Aiyar *v.* Ramasami Sastrial, 31 M. 49 (1907); and Sadaruddin *v.* Ekramuddin, 19 C. L. J. 225 (1913), p. 228, if an order is made without jurisdiction, the remedy is by way of revision under sect. 115.

(8) Aubhoy Churn *v.* Shamont, 16 C. 788 (1889).

(9) Chunilal *v.* Sonibai, 21 B. 328 (1895).

(10) Sahebjan *v.* Sufdur, 22 W. R. 288 (1874).

(11) Dwarka Nath *v.* Bhabatarini, 1 C. W. N. vii.

(12) Munni Ram *v.* Bishen Perkash, 24 C. 878 (1897); Ali Akbar *v.* Khurshed, 27 A. 695; 2 A. L. J. 465 (1905).

order granting an application for review,(1) but it does from an original decretal order as amended on review.(2) An appeal under this rule is not controlled by sect. 104, sub-sect. (2). An appeal against an order granting a review would lie under sub-rule (1) of this order, even where no appeal would lie against the final decree disposing of the case.(3)

Clause (*b*).—Appeals have been allowed where the Judge has not recorded his reason for granting an application for review; (4) or where he has granted a review without inquiry or proof that the new evidence was not within the knowledge of the applicant at the hearing or could not be adduced by him before the decree was passed; (5) or on the ground that by going through the evidence a second time the Judge might come to a different conclusion; (6) or merely to enable the case to be re-argued.(7) Upon an appeal it may be open to the Court of Appeal to say that the Judge ought not to have admitted a review.(8) The clause does not refer to the weight or sufficiency of evidence, and an Appellate Court cannot set aside an order of review merely because in its opinion the probative force of the evidence is insufficient to establish the allegations made in support of the application for review, though such evidence had such probative force to the Court granting the review.(9)

Clause (*c*).—This is the effect of the decisions cited.(10) The object of placing a limitation on the time within which applications for review may be made is that the finality of a decision should be left in doubt no longer than the requisites of justice imperatively demand.(11) Though an appeal lies in such cases, an application under sect. 15 of the High Court Charter Act does not necessarily lie.(12) Unless the delay was accounted for (13) and the Court was satisfied as to there being good and sufficient cause for the delay, the application for review ought to have been rejected; (14) and the review and

(1) Than Singh *v.* Chundun Singh, 11 C. 296 (1885); Papayya *v.* Chelamayya, 12 M. 125 (1888); Gopal Das *v.* Alaf Khan, 11 A. 383 (1889).

(2) Bala Natha *v.* Bhiva Natha, 13 B. 496 (1889).

(3) Shamseir Ali *v.* Jagannath, 17 C. W. N. 403 (1912).

(4) Gyanund *v.* Bepin, 22 C. 734 (1895).

(5) Bhyrub Chunder *v.* Madhub Ram, 11 B. L. R., F. B. 423; 20 W. R. 84 (1873); Jhubhoo Sahoo *v.* Jussoda, 17 W. R. 230 (1872); Nubokishore *v.* Jadub, 20 W. R. 426 (1873).

(6) Chunder Churn *v.* Loodunram, 25 W. R. 324 (1876).

(7) Koleemooddeen *v.* Heerun, 24 W. R. 186 (1875).

(8) Reasut *v.* Abdoollah, 3 I. A. 221; 2 C. 131 (1876); and see Manindra *v.* Balaram, 11 C. L. J. 161 (1909).

(9) Ahir Kond Kar *v.* Mohendra Lall De App. 26 of 1911 (Letters Patent), Calcutta, 31 March, 1915 (cor. Jenkins, C.J., and Woodroffe, J.).

(10) Shama Churn *v.* Bindabun, 9 W. R. 181 (1868); Kristo Gobind *v.* Jugobundhoo, 12 W. R. 94 (1869); Gour Pershad *v.* Anjub Ali, 24 W. R. 294 (1875); Madho Das *v.* Rukman, 2 A. 287 (1879); Purna Chandra *v.* Nil Madhub, 5 C. W. N. 485 (1901).

(11) Moheshur Sing *v.* Bengal Government, 7 M. I. A. 283, 304 (1859); 3 W. R., P. C. 45.

(12) Ashrafannissa *v.* Inaet Hossein, 5 B. L. R. 316; 13 W. R. 439 (1870); but see Sreenath *v.* Kritatto Inyee, 18 W. R. 286 (1872).

(13) Kasheenath *v.* Luckheenarain, W. R. (1864) 91; Jhubhoo Sahoo *v.* Jusoda, 17 W. R. 230 (1872).

(14) Assur Ali *v.* Woolfutoonessa, 13 W. R. 33; Joogul Kishore *v.* Oogur Narain, 8 W. R. 483.

all subsequent proceedings under it are invalid.(1) But if there be just and reasonable cause for the admission of the application for review even after two years, the High Court will not interfere under sect. 15 of the Charter Act.(2) It has been held that ignorance of the legal effect of the judgment is not a justification of delay; (3) nor ignorance on the part of legal advisers of the contents of a document, copy of which was in their possession at the time of the original hearing; (4) nor that an application presented in time was refused as not properly stamped; (5) nor the omission of contentions and arguments which might have been adduced within proper time; (6) nor where the applicant was a minor till shortly before the making of the decree sought to be reviewed,(7) or even till after it was made; (8) nor is the pendency of a special appeal,(9) nor the pendency of an appeal dismissed on the ground of want of jurisdiction.(10) The time occupied in the appeal should not be deducted; (11) nor can the time occupied in prosecuting a prior application for review be deducted in calculating limitation.(12) A new exposition of the law was held not to be a just and reasonable cause for not having presented the application for review within the prescribed time.(13) When, however, a suit was dismissed as wrongly framed, and the plaintiff brought a second suit in which the Full Bench held that the course taken in the first suit was the proper one, the plaintiff was allowed a review in the first case though out of time, that being a very different thing from interfering with previous decisions of the Court in other cases between other parties.(14) The period of limitation is now prescribed by Art. 173, Sched. I., Division III., Limitation Act IX. of 1908. Under the Code of 1859 it was governed by sect. 377 of that Code, which fixed the period at ninety days.

"**Such objections may be taken.**"—The provision, that objection can be taken by appeal against the order or on appeal against the final decree, has been held not to be controlled by sect. 591 (now sect. 105).(15) The fact that a party on the re-hearing of the case produced fresh evidence himself did not debar him on appeal from objecting on the same ground, namely, that the opposite party had not established that with due diligence he could not have

(1) Gunganarain *v.* Gonomoonee, 8 W. R. 184 (1867); Luchmon Singh *v.* Shumshere Singh, 3 I. A. 58, 69 (1874); s. c., 14 B. L. R. 373.

(2) Ajonnissa *v.* Surja Kant, 2 B. L. R., A. C. 181 (1869); 11 W. R. 56.

(3) Gulam Husen *v.* Sayad Musa, 8 B. 260 (1884).

(4) Gopal Chandra *v.* Solomon, 13 C. 62 (1886).

(5) Munro *v.* Cawnpore Municipal Board, 12 A. 57 (1889).

(6) Madho *v.* Rukman, 2 A. 287 (1879).

(7) Gopal Narhar *v.* Hanmant, 6 B. 107 (1881).

(8) *In re* Appa Rao, 10 M. 73 (1886) [P. C.]; but see Hoghton *v.* Fiddey, L. R. 18 Eq. 573 (1874).

(9) Lucas *v.* Stephen, 9 W. R. 301 (1868); Fakira *v.* Basapa, 8 B. H. C., A. C. 284 (1871).

(10) Gulam Husen *v.* Sayad Musa, 8 B. 260 (1884).

(11) Ib.

(12) Vaman *v.* Malhari, 26 B. 485 (1902).

(13) Onoop Chunder *v.* Ekkowtee, 6 W. R. 167 (1866); Shama Churn *v.* Bindabun Chunder, 9 W. R. 181, 185 (1868); Pran Kishen *v.* Bukshee Cazee, 10 W. R. 26 (1868); Ramkuvarbai *v.* Damodhar, 6 B. H. C., A. C. 146 (1869).

(14) Jonmenjoy *v.* Dassmoney, 8 C. 700.

(15) Gyanund *v.* Bepin Mohun, 22 C. 734 (1895).

adduced the new evidence on which his application for review was based, as he had urged in opposition to such application.(1) Where in the opinion of the Privy Council the High Court had wrongly allowed a review and had admitted additional evidence, their Lordships did not consider it right to exclude that evidence from their consideration.(2)

Registry of application granted, and order for re-hearing.

8. When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

Registry of application granted, and order for re-hearing.—This rule corresponds with sect. 380 of Act VIII. of 1859. That section after the word "*register*" ran "*of suits or appeals (as the case may be) and the Court shall give such order in regard to the re-hearing of the suit as it may deem proper in the circumstances of the case.*" The present wording was adopted by sect. 630 of Act X. of 1877. There has been some diversity of decision on the question as to what may be gone into at the re-hearing. The Calcutta High Court formerly held that the applicant was only entitled to go into the points on which the rule granting the review was allowed, and that matters not mentioned when the rule was argued could not be gone into; (3) but later the same Court held it was discretionary with the Court to re-hear the whole case or only the particular point on which the review was granted.(4) The Bombay High Court has, however, held that when a review has been admitted the whole case is reopened.(5) And it has recently been held by the Calcutta High Court that the expression "rehear the case" means "rehear the whole case," and that if the case is to be reheard only upon special points, the order must be made under the last words of the section, which enable the Court to make such orders as it thinks fit.(6) It has been held that where a case is admitted to review by the deciding Judge and is afterwards tried by another Judge, the new Judge must try the point directed by the order of review; (7) and that a Judge granting a review on one point has no power to go into or to decide a matter already decided finally and as to which no application for review was made.(8) When a plaintiff obtained a review on the ground that he was entitled, upon the allegations and proofs on the record, to the full relief which

(1) Pran Nath *v.* Sree Kant, 2 C. L. R. 257 (1878).

(2) Rajlukhee *v.* Gokool Chunder, 12 W. R. 47 (1869); 13 Moo. I. A. 209, 226; but see Pran Nath *v.* Sree Kant, 2 C. L. R. 257 (1878).

(3) Dhuronidhur *v.* Agra Bank, 5 C. 86, 89 (1879). This case was recently discussed in Sadaruddin *v.* Ekramuddin, 19 C. L. J. 225 (1913), pp. 229, 230, when it was suggested by Mookerjee, J., that the real intention was to decide that the Court had a discretion to refuse to entertain a new question.

(4) Hurbans *v.* Thakoor Purshad, 9 C. 209; 13 C. L. R. 285 (1882); Thacoor Prosad *v.* Baluck Ram, 12 C. I. R. 64.

(5) Sainal Ranchhod *v.* Dullabh, 10 B. H. C. 360 (1873).

(6) Sadaruddin *v.* Ekramuddin, 19 C. L. J. 225 (1913), Jenkins, C.J., and Mookerjee, J.

(7) Hurro Chunder *v.* Ram Kissore, W. R. (1864) 141.

(8) Byjnath *v.* Wuzeer, 24 W. R. 427 (1875).

he had sought, it was held not to be open to the defendant on the re-hearing to adduce evidence he ought to have done at the hearing.(1) A Court should in its judgment on the re-hearing give reasons for coming to a different conclusion from that which it had previously formed.(2) When a case is re-heard on review the order on the rehearing is a new decree whatever the result is ; (3) even though on the application for review coming on for re-hearing the Judge allowed it on a comparatively insignificant point and forthwith directed a clerical error in the decree to be rectified ; and the time within which to appeal on the decree runs from the date of such order.(4)

Practice.—See notes to rr. 1 and 4, *ante*.

Bar of certain applications.

9. No application to review an order *made* on an application for a review or *a decree or* order passed *or made* on *a* review shall be entertained.

Review of review.—With verbal alterations and a transposition this rule is the same as the last paragraph of sect. 629 of the former Code. The first portion of the rule refers to the second, and the second portion refers to the third, stage of the proceedings through which an application for a review may pass.(5) It has been a question whether these words are tantamount to saying "no second application for review shall be made ;" that is, whether such an application is barred in all cases.(6) As regards this, it is clear that if an application for review is allowed at the second stage, then the order allowing the application cannot, as being an order made on an application for review, be itself reviewed. Similarly an order made in the third stage after the admission of the application for review and after the case has been re-heard, whether that order confirm, alter, or reverse the decree sought to be reviewed, is a new decree.(7) There is here a decree or order, as the case may be, passed or made upon a review, and this rule prohibits a further review.(8) There remains a third case, viz. where the application for review is rejected at the first or second stage, and the case is in consequence not re-heard. In this case the order itself rejecting the application for review cannot be reviewed. But the question then arises whether a second application for review of the original order or decree may be made on different grounds. For instance, does the rejection of an application based on the ground of alleged error apparent on the face of the record preclude a subsequent application based on the ground of the discovery of new evidence ? It may be

(1) Bance Madhub *v.* Pakaktur, 20 W. R. 225 (1873).

(2) Chund Moyee *v.* Kalu Koomar, 6 W. R. 18 (1866).

(3) Soudaminee *v.* Mahatab Chand Bahadur, B. L. R., F. B. 585 (1866).

(4) Joykishen *v.* Ataoor Rohoman, 6 C. 22 (1880).

(5) See as to these stages, Vadilal *v.* Fulchand, 30 B. 56, at p. 60 (1905).

(6) See Gobinda Ram Mondal *v.* Bholanath Bhatta, 15 C. 432, 435 (1888); Vaman *v.* Malhari, 26 B. 485, 491 (1902), and cases there cited.

(7) Vadilal *v.* Fulchand, 30 B. 56, 60 (1905); Joykishen Mookerjee *v.* Ataoor Rohoman, 6 C. 22 (1880); Soudaminee Dossee *v.* Mahatab Chand Bahadur, B. L. R., F. B. 585, 586 (1866).

(8) Muhammad Yusuf *v.* Abdul Rahaman, 16 I. A. 104, 106 (1889); s. c., 16 C. 749, 752.

contended that this rule does not cover the case, because on the facts stated the second application is not for a review of the order made on an application for review, nor is it for a review of a decree or order passed or made on a review. On the other hand, though the original order is directly attacked by such a subsequent application, the effect of the latter, if successful, is to grant the review which, though on different grounds, was previously refused. It has been said (1) that the present provision was first inserted in the Code of 1877 to meet the decision of the Full Bench in Nasiruddin Khan *v.* Indronarayan Chowdhry,(2) that the Court may admit a review even after a prior order rejecting it. On the other hand, the Calcutta High Court has held (3) that though the order of rejection is final in the sense that it cannot be made the direct subject of review, these provisions do not prohibit the admission of a subsequent application for review of the original decree on a different ground from that which was the basis of the previous application which was refused.

(1) Vaman *v.* Malhari, 26 B. 485, 491 (1902): s. c., 4 Bom. L. R. 121.

(2) B. L. R., F. B. 367 (1866).

(3) Gobinda Ram Mondal *v.* Bholanath Bhatta, 15 C. 432 (1888), and the case cited in last note.

ORDER XLVIII.

Miscellaneous.

Process to be served at expense of party issuing.

1. (*1*) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Costs of service.

(*2*) The court-fee *chargeable* for such service shall be *paid* within a time to be fixed before the process is issued.

"**Unless the Court otherwise directs.**"—In the matter of H. C. Studd,(1) Rampini, J., said: "This provision of the Civil Procedure Code does not appear to me to give a Court any power to depart from the rules of the High Court on the subject of the levy of process fees, or to remit those fees. The section relates to the payment of process fees by the parties to a suit, and gives the Court, acting judicially, power to make an order, between party and party only, as to who should pay the process fees. It does not expressly give power to remit the fees, or, what comes to the same thing, to order that the process should be served free, or, in other words, at the expense of Government, and in the present case we cannot, I think, make such an order under sect. 93, C. P. C., seeing that the Government is no party to the suit." Ghose, J., however, declined to express any opinion upon the question, "whether or not the Court has the power to relax in any case the process-fee rules," and Rampini, J., himself pointed out that some Benches readily grant a relaxation of these rules.

Within a time to be fixed by the Court.—If no time is fixed, there is no obligation to pay the court-fee; and where processes could not be served on witnesses for non-payment of the court-fee, in such a case it was held that the suit could not be dismissed for default of evidence.(2)

Orders and notices how served.

2. All orders, notices and *other documents* required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

(1) 3 C. W. N. 82 (1898).

(2) Purshadee Lal *v.* Umbika Pershad, 3 B. L. R. App. 25; s. c., 11 W. R. 290 (1869); and see Mohun Mundur *v.* Brij Bhookun, 9 W. R. 127 (1868), where it was held that the party was not bound to pay into Court until the latter had fixed what was reasonable.

Services of notices.—This includes service by post where the person resides out of British India, as provided by O. V. r. 25, *ante*.(1)

Use of forms in *appendices*.

3. The forms *given* in the *appendices*, with such variation as the circumstances of each case *may* require, shall be used for the purposes therein mentioned.

Forms.—It is fair to assume that those forms do not exceed that which is permissible.(2)

(1) Ghamshamlal *v.* Bhansali, 5 B. 249, 251 (1881).

(2) Achalabala Bose *v.* Surendra Nath, 24 C. 766, 772 (1897).

ORDER XLIX.

Chartered High Courts.

Who may serve processes of High Court.

1. Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices *to respondents* may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.

Saving in respect of Chartered High Courts.

2. *Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.*

High Courts.—This rule, which embodies sect. 633 of the last Code, empowers the Court to determine whether the judgments should be given orally or in writing, or according to any mode which might appear to it best in the interests of justice; and where rules have been made the rules and not sect. 574 (now O. XLI. r. 31) apply.(1)

Application of rules.

3. The following *rules* shall not apply to *any Chartered* High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely:—

(*1*) *rule 10 and rule 11, clauses* (*b*) *and* (*c*), *of Order VII;*

(*2*) *rule 3 of Order X;*

(*3*) *rule 2 of Order XVI;*

(*4*) *rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16* (*so far* as relates to the manner of taking evidence) *of Order XVIII;*

(*5*) *rules 1 to 8 of Order XX; and*

(*6*) *rule 7 of Order XXXIII* (*so far* as relates to the making of a memorandum);

and *rule 35 of Order XLI* shall not apply to *any such* High Court in the exercise of its appellate jurisdiction.

(1) Sundar Bibi *v.* Bisheshur Nath, 9 A. 93 (1886).

ORDER L.

Provincial Small Cause Courts.

1. *The provisions hereinafter specified shall not extend to* Courts constituted under the Provincial Small Cause Courts Act, 1887, *or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—*

Provincial Small Cause Courts.

(*a*) *so much of this schedule as relates to—*

(*i*) *suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;*

(*ii*) *the execution of decrees against immoveable property or the interest of a partner in partnership property;*

(*iii*) *the settlement of issues; and*

(*b*) *the following rules and orders—*

Order II, r. 1 (frame of suit);

Order X, r. 3 (record of examination of parties);

Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment;

Order XVIII, rules 5 to 12 (evidence);

Orders XLI to XLV (appeals);

Order XLVII, rules 2, 3, 5, 6, 7 (review);

Order LI.

ORDER LI.

Presidency Small Cause Courts.

Presidency Small Cause Courts.

1. *Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts Act, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.*

Appendices to the First Schedule: Forms.

APPENDIX A.

PLEADINGS.

(1) TITLES OF SUITS.

IN THE COURT OF

A. B. (*add description and residence*) *Plaintiff*,

against

C. D. (*add description and residence*) *Defendant*.

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES

The Secretary of State for India in Council.

The Advocate General of

The Collector of

The State of

The A. B. Company, Limited, having its registered office at

A. B., a public officer of the C. D. Company.

A. B. (*add description and residence*), on behalf of himself and all other creditors of C. D., late of (*add description and residence*).

A. B. (*add description and residence*), on behalf of himself and all other holders of debentures issued by the Company, Limited.

The Official Receiver.

A. B., a minor (*add description and residence*), by C. D. [*or* by the Court of Wards], his next friend.

A. B. (*add description and residence*), a person of unsound mind [*or* of weak mind] by C. D., his next friend.

A. B., a firm carrying on business in partnership at

A. B. (*add description and residence*), by his constituted attorney C. D. (*add description and residence*).

A. B. (*add description and residence*), Shebait of Thakur.

A. B. (*add description and residence*), executor of C. D., deceased.

A. B. (*add description and residence*), heir of C. D., deceased.

(3) PLAINTS

No. 1.

MONEY LENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , he lent the defendant rupees repayable on the day of .

2. The defendant has not paid the same, except rupees paid on the day of 19 .

[*If the plaintiff claims exemption from any law of limitation, say*:—]

3. The plaintiff was a minor [*or* insane] from the day of till the day of .

4. [*Facts showing when the cause of action arose and that the Court has jurisdiction.*]

5. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees and for the purpose of court-fees is rupees.

6. The plaintiff claims rupees, with interest at per cent. from the day of 19

No. 2.

MONEY OVERPAID.

(*Title.*)

A. B., the above-named plaintiff, states as follows —

1. On the day of 19 . , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.

2. The plaintiff procured the said bars to be assayed by *E. F.*, who was paid by the defendant for such assay, and *E. F.* declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant rupees.

3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.

4. The defendant has not repaid the sum so overpaid.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 3.

GOODS SOLD AT A FIXED PRICE AND DELIVERED

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , *E. F.* sold and delivered to the defendant [one hundred barrels of flour, *or* the goods mentioned in the schedule hereto annexed, *or* sundry goods].

2. The defendant promised to pay rupees for the said goods on delivery [*or* on the day of , *some day before the plaint was filed*].

3. He has not paid the same.

4. *E. F.* died on the day of 19 . By his last will he appointed his brother, the plaintiff, his executor.

[*As in paras. 4 and 5 of Form No. 1.*]

7. The plaintiff as executor of *E. F. claims* [*Relief claimed*].

No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , plaintiff sold and delivered to the defendant [sundry articles of house-furniture], but no express agreement was made as to the price.

2. The goods were reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 5.

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , *E. F.* agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that *E. F.* should pay for the goods on delivery rupees.

2. The plaintiff made the goods, and on the day of 19 , offered to deliver them to *E. F.*, and has ever since been ready and willing so to do.

3. *E. F.* has not accepted the goods or paid for them.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 6.

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION].

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff put up at auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the

purchaser within [*ten days*] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [*one crate of crockery*] at the auction at the price of rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [*ten days*] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [*ten days*] after the sale, nor afterwards.

5. On the day of 19 , the plaintiff re-sold the [*crate of crockery*], on account of the defendant, by public auction, for rupees.

6. The expenses attendant upon such re-sale amounted to rupees.

7. The defendant has not paid the deficiency thus arising, amounting to rupees.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 7.

SERVICES AT A REASONABLE RATE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. Between the day of 19 , and the day of 19 , at , plaintiff [executed sundry drawings, designs and diagrams] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.

2. The services were reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 8.

SERVICES AND MATERIALS AT A REASONABLE COST.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , at , the plaintiff built a house [known as No. , in], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 9.

USE AND OCCUPATION.

(*Title.*)

A. B., the above-named plaintiff, executor of the will of *X. Y.*, deceased, states as follows :—

1. That the defendant occupied the [house No. , Street], by permission of the said *X. Y.* from the day of 19 . until the

day of 19 , and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1.*]

6. The plaintiff as executor of *X. Y.* claims [*Relief claimed*].

No. 10.

ON AN AWARD.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil, which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of *E. F.* and *G. H.*, and the original document is annexed hereto.

2. On the day of 19 , the arbitrators awarded that the defendant should [pay the plaintiff rupees].

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 11.

ON A FOREIGN JUDGMENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , at in the State [*or* Kingdom], of , the Court of that State [*or* Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff rupees, with interest from the said date.

2. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , *E. F.* hired from the plaintiff for the term of years, the [house No. , Street], at the annual rent of rupees, payable [monthly].

2. The defendant agreed, in consideration of the letting of the premises to *E. F.*, to guarantee the punctual payment of the rent.

3. The rent for the month of 19 , amounting to rupees, has not been paid.

[*If, by the terms of the agreement, notice is required to be given to the surety, add:*—]

4. On the day of 19 , the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

[*Or*, On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of for rupees.]

2. On the day of 19 , the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [*or*, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 14.

NOT DELIVERING GOODS SOLD.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19], and that the plaintiff should pay therefor rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 15.

WRONGFUL DISMISSAL.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, *or* in the capacity of foreman, *or as the case may be*], and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees (monthly).

2. On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year, whereof the defendant always has had notice.

3. On the day of 19 , the defendant wrongfully discharged the plaintiff, and refused to permit to serve as aforesaid, or to pay him for his services.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 16.

BREACH OF CONTRACT TO SERVE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered so to do].

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards, on the day of 19 , he refused to serve the plaintiff as aforesaid.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 17.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. [*Or state the tenor of the contract.*]

[2. The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner.]

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff took *E. F.* into his employment as a clerk.

2. In consideration thereof, on the day of 19 , the defendant agreed with the plaintiff that if *E. F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[*Or*, 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if *E. F.* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[*Or*, 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the day of 19 and the day of 19 , *E. F.* received money and other property, amounting to the value of rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 19.

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant, by a registered instrument, let to the plaintiff [the house No. , Street], for the term of years, contracting with the plaintiff that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the day of during the said term, *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G. H.* and *I. J.* by such removal.]

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 20.

ON AN AGREEMENT OF INDEMNITY.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant, being partners in trade under the style of *A. B.* and *C. D.*, dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the day of 19 , [a judgment was recovered against the plaintiff and defendant by *E. F.*, in the High Court of Judicature at upon a debt due from the firm to *E. F.*, and on the day of 19 .] the plaintiff paid rupees [in satisfaction of the same].

4. The defendant has not paid the same to the plaintiff.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 21.

PROCURING PROPERTY BY FRAUD.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities].

2. The plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees.

3. The said representations were false [*or, state the particular falsehoods*] and were then known by the defendant to be so.

4. The defendant has not paid for the goods. [*Or, if the goods were not delivered.*] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that *E. F.* was solvent and in good credit, and worth rupees over all his liabilities [*or*, that *E. F.* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit].

2. The plaintiff was thereby induced to sell to *E. F.* [rice] of the value of rupees [on months credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [*or*, to deceive and injure the plaintiff].

4. *E. F.* [did not pay for the said goods at the expiration of the credit aforesaid, *or*] has not paid for the said rice, and the plaintiff has wholly lost the same.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 23.

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called and situate in , and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 24.

CARRYING ON A NOXIOUS MANUFACTURE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called , situate in .

2. Ever since the day of 19 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live-stock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 25.

OBSTRUCTING A RIGHT OF WAY.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of].

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, *or* on foot] at all times of the year.

3. On the day of 19 , defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, *or* on foot, *or* in any manner] along the way [and has ever since wrongfully obstructed the same].

4. (*State special damage if any.*)

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 26.

OBSTRUCTING A HIGHWAY.

(*Title.*)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [*or* into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 27.

DIVERTING A WATER-COURSE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the , in the village of , district of .

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the day of 19 , the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 28.

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the day of 19 , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 29.

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendants were common carriers of passengers by railway between and .

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at [*or* near the station of *or* between the stations of and], a collision occurred on the said railway, caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., *and state the special damage, if any, as*], and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

[*Or thus*:—2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., *as in para. 3.*]

No. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is a shoemaker, carrying on business at . The defendant is a merchant of .

2. On the day of 19 , the plaintiff was walking southward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's, drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was

bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 31.

FOR MALICIOUS PROSECUTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant obtained a warrant of arrest from [a Magistrate of the said city, *or as the case may be*] on a charge of , and the plaintiff was arrested thereon, and imprisoned for [days, *or* hours, and gave bail in the sum of rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him ; *or*, in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E. F.* ; *or* in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 32.

MOVEABLES WRONGFULLY DETAINED.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , plaintiff owned [*or state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or describe the goods*], the estimated value of which is rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit on the day of 19 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

[*As in paras. 4 and 5 of Form No. 1.*]

6. The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had ;

(2) rupees compensation for the detention thereof

The Schedule.

No. 33.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant *C. D.*, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth rupees over all his liabilities].

2. The plaintiff was hereby induced to sell and deliver to *C. D.*, [one hundred boxes of tea], the estimated value of which is rupees.

3. The said representations were false, and were then known by *C. D.* to be so, [*or*, at the time of making the said representations, *C. D.* was insolvent, and knew himself to be so].

4. *C. D.* afterwards transferred the said goods to the defendant *E. F.* without consideration [*or* who had notice of the falsity of the representation].

[*As in paras. 4 and 5 of Form No. 1.*]

7. The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had;

(2) rupees compensation for the detention thereof.

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the day of 19 , the plaintiff paid the defendant rupees as part of the purchase-money.

4. That the said piece of ground contained in fact only [five bighas].

[*As in paras. 4 and 5 of Form No. 1.*]

7. The plaintiff claims—

(1) rupees, with interest from the day of 19 ;

(2) that the said agreement be delivered up and cancelled.

No. 35.

AN INJUNCTION RESTRAINING WASTE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is the absolute owner of [*describe the property*].

2. The defendant is in possession of the same under a lease from the plaintiff.

3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

[*As in paras. 4 and 5 of Form No. 1.*]

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[*Pecuniary compensation may also be claimed.*]

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is; and at all the times hereinafter mentioned was, the absolute owner of [the house No. , Street, Calcutta].

2. The defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street].

3. On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same · and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

4. [In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.]

[*As in paras. 4 and 5 of Form No 1.*]

7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the consent in writing of the Advocate General [*or* of the Collector or other officer appointed in this behalf] to the institution of this suit.

[*As in paras. 4 and 5 of Form No. 1.*]

The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road ;

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

[*As in Form No. 27.*]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 39.

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather which was executed by an eminent painter], and of which no duplicate exists [*or, state any facts showing that the property is of a kind that cannot be replaced by money*].

2. On the day of 19 , he deposited the same for safe keeping with the defendant.

3. On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[*As in paras. 4 and 5 of Form No. 1.*]

8. The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting];

(2) that he be compelled to deliver the same to the plaintiff.

No. 40.

INTERPLEADER.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. Before the date of the claims hereinafter mentioned *G. H.* deposited with the plaintiff [*describe the property*] for [*safe-keeping*].

2. The defendant *C. D.* claims the same [under an alleged assignment thereof to him from *G. H.*].

3. The defendant *E. F.* also claims the same [under an order of *G. H.* transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.

[*As in paras. 4 and 5 of Form No. 1.*]

9. The plaintiff claims—

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto;

(2) that they be required to interplead together concerning their claims to the said property;

[(3) that some person be authorized to receive the said property pending such litigation;]

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. *E. F.*, late of , was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any*].

2. *E. F.* died on or about the day of . By his last will, dated the day of , he appointed *C. D.* his executor [*or* devised his estate in trust, etc., *or* died intestate, *as the case may be*].

3. The will was proved by *C. D.* [*or* letters of administration were granted, etc.].

4. The defendant has possessed himself of the moveable [and immoveable, *or* the proceeds of the immoveable] property of *E. F.*, and has not paid the plaintiff his debt.

[*As in paras. 4 and 5 of Form No. 1.*]

7. The plaintiff claims that an account may be taken of the moveable [and immoveable] property of *E. F.*, deceased, and that the same may be administered under the decree of the Court.

No. 42.

ADMINISTRATION BY SPECIFIC LEGATEE

(*Title.*)

[*Alter Form No. 41 thus*]—

[*Omit paragraph 1 and commence paragraph 2*] *E. F.*, late of , died on or about the day of . By his last will, dated the day of , he appointed *C. D.* his executor, and bequeathed to the plaintiff [*here state the specific legacy*].

For paragraph 4 substitute—

The defendant is in possession of the moveable property of *E. F.*, and, amongst other things, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that, etc.

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

(*Title.*)

[*Alter Form No. 41 thus*]—

[*Omit paragraph 1 and substitute for paragraph 2*] *E. F.*, late of , died on or about the day of . By his last will, dated the day of , he appointed *C. D.* his executor, and bequeathed to the plaintiff a legacy of rupees.

In paragraph 4 substitute "legacy" *for* "debt."

Another Form.

(*Title.*)

E. F., the above-named plaintiff, states as follows:—

1. *A. B.* of *K.* in the died on the day of . By his last will, dated the day of , he appointed the defendant and *M. N.* [who died in the testator's lifetime] his executors, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property; he has sold some part of the immoveable property.

[*As in paras. 4 and 5 of Form No. 1.*]

6. The plaintiff claims—

(1) to have the moveable and immoveable property of *A. B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken;

(2) such further or other relief as the nature of the case may require.

No. 44.

EXECUTION OF TRUSTS.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E. F.* and *G. H.*, the father and mother of the defendant [*or* an instrument of transfer of the estate and effects of *E. F.* for the benefit of *C. D.*, the defendant, and the other creditors of *E. F.*].

2. *A. B.* has taken upon himself the burden of the said trust, and is in possession of [*or* of the proceeds of] the moveable and immoveable property transferred by the said instrument.

3. *C. D.* claims to be entitled to a beneficial interest under the instrument.

[*As in paras. 4 and 5 of Form No. 1.*]

6. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, *or* of part of the said, immoveable property, *or* moveable, *or* the proceeds of the sale of, *or* of part of, the said moveable property, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of *C. D.*, and such other persons so interested as the Court may direct, or that *C. D.* may show good cause to the contrary.

[*N.B.—Where the suit is by a beneficiary, the plaint may be modelled, mutatis mutandis, on the plaint by a legatee.*]

No. 45.

FORECLOSURE OR SALE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage:—

(*a*) (date);

(*b*) (names of mortgagor and mortgagee);

(*c*) (sum secured);

(*d*) (rate of interest);

(*e*) (property subject to mortgage);

(*f*) (amount now due);

(*g*) (*if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims*).

(*If the plaintiff is mortgagee in possession, add*)

3. The plaintiff took possession of the mortgaged property on the day of and is ready to account as mortgagee in possession from that time.

[*As in paras. 4 and 5 of Form No. 1.*]

6. The plaintiff claims :-

(1) payment, or in default [sale *or*] foreclosure [and possession];

[*Where Order 34, rule 6, applies.*]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 46.

REDEMPTION.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.
2. The following are the particulars of the mortgage :—
 (*a*) (date);
 (*b*) (names of mortgagor and mortgagee);
 (*c*) (sum secured);
 (*d*) (rate of interest);
 (*e*) (property subject to mortgage);
 (*f*) (*if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims*).

(*If the defendant is mortgagee in possession, add*)

3. The defendant has taken possession [*or* has received the rents] of the mortgaged property.

[*As in paras. 4 and 5 of Form No. 1.*]

6. The plaintiff claims to redeem the said property and to have the same reconveyed to him [and to have possession thereof].

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement dated the day of and signed by the defendant, he contracted to buy of [*or* sell to] the plaintiff certain immoveable property therein described and referred to, for the sum of rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[*As in paras. 4 and 5 of Form No. 1.*]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [*or* to accept a transfer and possession of the said property] and to pay the costs of the suit.

No. 48.

SPECIFIC PERFORMANCE (No. 2).

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, in writing, and the origina document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement.

2. On the day of 19 , the plaintiff tendered rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the day of 19 , the plaintiff again demanded such transfer [*or* the defendant refused to transfer the same to the plaintiff.]

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

[*As in paras. 4 and 5 of Form No. 1.*]

8. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [*following the terms of the agreement*];

(2) rupees compensation for withholding the same.

No. 49.

PARTNERSHIP.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. He and *C. D.*, the defendant, have been for years [*or* months] past carrying on business together under articles of partnership in writing, [*or* under a deed, *or* under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [*Or* the defendant has committed the following breaches of the partnership articles:—

(1)
(2)
(3)]

[*As in paras. 4 and 5 of Form No. 1.*]

5. The plaintiff claims—

(1) dissolution of the partnership;

(2) that accounts be taken;

(3) that a receiver be appointed.

[*N.B.—In suits for winding-up of any partnership, omit the claim for dissolution; and instead insert a paragraph stating the facts of the partnership having been dissolved.*]

(4) WRITTEN STATEMENTS.

General defences.

Denial. The defendant denies that (*set out facts*).

The defendant does not admit that (*set out facts*).

The defendant admits that but says that

Protest. The defendant denies that he is a partner in the defendant firm of

The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged or at all.

The defendant admits assets but not the plaintiff's claim.

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

Limitation. The suit is barred by article or article of the first schedule to the Indian Limitation Act, 1908.

Jurisdiction. The Court has no jurisdiction to hear the suit on the ground that (*set forth the grounds*).

On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

Insolvency. The defendant has been adjudged an insolvent.

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.

Minority. The defendant was a minor at the time of making the alleged contract.

Payment into Court. The defendant as to the whole claim (*or* as to Rs. part of the money claimed, *or as the case may be*) has paid into Court Rs. and says that this sum is enough to satisfy the plaintiff's claim (*or* the part aforesaid).

Performance remitted. The performance of the promise alleged was remitted on the (*date*).

Rescission. The contract was rescinded by agreement between the plaintiff and defendant.

Res judicata. The plaintiff's claim is barred by the decree in suit (*give the reference*).

Estoppel. The plaintiff is estopped from denying the truth of (*insert statement as to which estoppel is claimed*) because (*here state the facts relied on as creating the estoppel*).

Ground of defence subsequent to institution of suit. Since the institution of the suit, that is to say, on the day of (*set out facts*).

No. 1.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs.

[*or*]

4. } Except as to Rs. , same as {1.
5. } {2.
6. } {3.

7. The defendant [or A. B., the defendant's agent] satisfied the claim by payment before suit to the plaintiff [*or* to C. D., the plaintiff's agent] on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

No. 2.

DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.

2. The defendant made payment to the plaintiff on the day according to the condition of the bond.

3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3.

DEFENCE IN SUITS ON GUARANTEES.

1. The principal satisfied the claim by payment before suit.

2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows:—

	Rs.
1907, January 25th	150
„ February 1st	50
Total .	200

2. As to the whole [*or* as to Rs. , part of the money claimed] the defendant made tender before suit of Rs. , and has paid the same into Court.

No. 5.

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable keepers employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said .

2. The defendant does not admit that the said carriage was turned out of Middleton Street, either negligently, suddenly or without warning, or at a rapid or dangerous pace.

3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6.

DEFENCE IN ALL SUITS FOR WRONGS.

1. Denial of the several acts [*or* matters] complained of

No. 7.

DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.
2. The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows:—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta:—
45 maunds at Rs.2 per maund Rs.0

No. 8.

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT.

1. The plaintiff is not the author [*assignee, etc.*].
2. The book was not registered.
3. The defendant did not infringe.

No. 9.

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 10.

DEFENCES IN SUITS RELATING TO NUISANCES

1. The plaintiff's lights are not ancient [*or* deny his other alleged prescriptive rights].

2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.

3. The defendant denies that he or his servants pollute the water [*or* do what is complained of].

[*If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim,* i.e. *whether by prescription, grant, or what.*]

4. The plaintiff has been guilty of laches of which the following are particulars:—

1870. Plaintiff's mill began to work..
1871. Plaintiff came into possession.
1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated,* e.g. *limitation as to past damage.*]

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE

1. The defendant did not execute the mortgage.

2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*).

3. The suit is barred by article of the first schedule to the Indian Limitation Act, 1908.

4. The following payments have been made, *viz.* :—

	Rs.
(*Insert date.*)	1000
(*Insert date.*)	500

5. The plaintiff took possession on the of , and has received the rents ever since.

6. That plaintiff released the debt on the of .

7. The defendant transferred all his interest to A. B. by a document, dated .

No. 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article of the first schedule to the Indian Limitation Act, 1908.

2. The plaintiff transferred all interest in the property to A. B.

3. The defendant, by a document dated the day of transferred all his interest in the mortgage-debt and property comprised in the mortgage to A. B.

4. The defendant never took possession of the mortgaged property, or received the rents thereof.

(*If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.*)

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.

2. A. B. was not the agent of the defendant (*if alleged by plaintiff*).

3. The plaintiff has not performed the following conditions—(*Conditions*).

4. The defendant did not—(*alleged acts of part performance*).

5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reasons of the following matter—(*State why*).

6. The agreement is uncertain in the following respects—(*State them*).

7. (*or*) The plaintiff has been guilty of delay;

8. (*or*) The plaintiff has been guilty of fraud (*or* misrepresentation).

9. (*or*) The agreement is unfair;

10. (*or*) The agreement was entered into by mistake.

11. The following are particulars of (7), (8), (9), (10) (*or as the case may be*).

12. The agreement was rescinded under Conditions of Sale, No. 11 (*or* by mutual agreement).

(*In cases where damages are claimed and the defendant disputes his liability to damages he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g. the Indian Limitation Act, accord and satisfaction, release, fraud, etc.*)

No. 14.

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. A. B.'s will contained a charge of debts; he died insolvent; he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs. , and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs. .

2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15.

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [*or* of the Hindu Wills Act, 1870].

2. The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant].

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, being [*state the nature of the fraud*].

5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof, [*or* of the contents of the residuary clause in the said will, *as the case may be*].

6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims:—

(1) that the Court will pronounce against the said will and codicil propounded by the plaintiff:

(2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

No. 16.

PARTICULARS. (O. 6, r. 5.)

(*Title of Suit.*)

The following are the particulars of (*here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the of Particulars.

(*Here set out the particulars ordered in paragraphs if necessary.*)

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT. (O. 5, rr. 1, 5.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you for , you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19 , at o'clock in the noon, to answer the claim; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned the suit will be heard and determined in your absence.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

No. 2.

SUMMONS FOR SETTLEMENT OF ISSUES. (O. 5, rr. 1, 5.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person, or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19 , at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

No. 3.

SUMMONS TO APPEAR IN PERSON. (O. 5, r. 3.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person on the day of 19 . , at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 4.

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT. (O. 37, r. 2.)

(*Title.*)

To .

[*Name, description and place of residence.*]

WHEREAS has instituted a suit against you under Order XXXVII. of the Code of Civil Procedure, 1908, for Rs. , balance of principal and interest due to him as the of a of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. and the sum of Rs. for costs.

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 5.

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD BE ADDED AS CO-PLAINTIFF (O. 1, r. 10.)

(*Title.*)

To

[*Name, description and place of residence.*]

WHEREAS has instituted the above suit against for and whereas it appears necessary that you should be added as a plaintiff in the said

suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved.

Take notice that you should on or before day of 19 . signify to this Court whether you consent to be so added.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 6.

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT. (O. 22, r. 4.)

(*Title.*)

To

WHEREAS the plaintiff instituted a suit in this Court on the day of 19 , against the defendant who has since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said deceased, and desiring that you be made the defendant in his stead.

You are hereby summoned to attend in this Court on the day of 19 , at A.M. to defend the said suit, and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT. (O. 5. r. 21.)

(*Title.*)

WHEREAS it is stated that defendant / witness in the above suit is at present residing in : It is ordered that a summons returnable on the day of 19 , be forwarded to the Court of for service on the said defendant / witness with a duplicate of this proceeding.

The court-fee of chargeable in respect to the summons has been realized in this Court in stamps.

Dated 19 .

Judge.

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER. (O. 5, r. 24.)

(*Title.*)

To

The Superintendent of the Jail at

UNDER the provisions of Order V, rule 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is a prisoner in jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDIER. (O. 5, rr. 27, 28.)

(*Title.*)

To

UNDER the provisions of Order V, rule 27 (*or* 28, *as the case may be*), of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 10.

TO ACCOMPANY RETURN OF SUMMONS OF ANOTHER COURT. (O. 5, r. 23.)

(*Title.*)

Read proceeding from the forwarding for service on in Suit No. of 19 of that Court.

Read Serving Officer's endorsement stating that the and proof of the above having been duly taken by me on the oath of , and it is ordered that the be returned to the with a copy of this proceeding.

Judge.

Note.—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE. (O. 5, r. 18.)

(*Title.*)

The Affidavit of son of I $\frac{\text{make oath}}{\text{affirm}}$ and say as follows:—

(1) I am a process-server of this Court.

(2) On the day of 19 I received a $\frac{\text{summons}}{\text{notice}}$ issued by the Court of in Suit No. of 19 , in the said Court, dated the day of 19 for service on

(3) The said was at the time personally known to me, and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the day of 19 , at about o'clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$.

(*a*)

(*b*)

(*a*) Here state whether the person served signed or refused to sign the process, and in whose presence.
(*b*) Signature of process-server.

or,

(3) The said not being personally known to me accompanied me to and pointed out to me a person whom he stated to be the said , and I served the said $\frac{\text{summons}}{\text{notice}}$ on $\frac{\text{him}}{\text{her}}$ on the day of 19 , at about o'clock in the noon at by tendering a copy thereof to $\frac{\text{him}}{\text{her}}$ and requiring $\frac{\text{his}}{\text{her}}$ signature to the original $\frac{\text{summons}}{\text{notice}}$.

(*a*)

(*b*)

(*a*) Here state whether the person served signed or refused to sign the process, and in whose presence.
(*b*) Signature of process-server.

or,

(3) The said and the house in which he ordinarily resides being personally known to me, I went to the said house, in and there on the day of 19 , at about o'clock in the noon, I did not find the said

(*a*)

(*b*)

(*a*) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, rules 15 and 17.

(*b*) Signature of process-server.

or,

(3) One accompanied me to and there pointed out to me which he said was the house in which ordinarily resides. I did not find the said there.

(*a*)

(*b*)

(*a*) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, rules 15 and 17.

(*b*) Signature of process-server.

or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn / Affirmed by the said before me this day of 19 .

Empowered under section 139 of the Code of Civil Procedure to administer the oath to deponents.

No. 12.

NOTICE TO DEFENDANT. (O. 9, r. 6.)

(*Title.*)

To [*Name, description and place of residence.*]

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons;

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 , is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 13.

SUMMONS TO WITNESS. (O. 16, rr. 1, 5.)

(*Title.*)

To

WHEREAS your attendance is required to on behalf of the in the above suit, you are hereby required [personally] to appear before this Court on the day of 19 , at o'clock in the forenoon, and to bring with you [*or* to send to this Court]

A sum of Rs , being your travelling and other expenses and subsistence allowance for one day, is herewith sent If you fail to comply with this order without

lawful excuse, you will be subject to the consequences of non-attendance laid down in rule 12 of Order XVI of the Code of Civil Procedure.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, r. 10.)

(*Title.*)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law: and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons: This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the day of 19 at o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, r. 10.)

(*Title.*)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons: This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the day of . 19 at o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 16

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS. (O. 16, r. 10.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS the witness cited by has not, after the expiration of the period limited in the proclamation issued for his attendance, appeared in Court; You are hereby directed to hold under attachment property belonging to the said witness to the value of and to submit a return, accompanied with an inventory thereof, within days.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 17.

WARRANT OF ARREST OF WITNESS. (O. 16, r. 10.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS has been duly served with a summons but has failed to attend [absconds and keeps out of the way for the purpose of avoiding service of a summons]; You are hereby ordered to arrest and bring the said before the Court.

You are further ordered to return this warrant on or before the day of 19 with an endorsement certifying the day on and the manner in which it has been executed or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 18.

WARRANT OF COMMITTAL. (O. 16, r. 16.)

(*Title*)

To

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the above-named suit has made application to this Court that security be taken for the appearance of to give evidence (or to produce a document), on the day of 19 ; and whereas the Court has called upon the said to furnish such security, which he has failed to do; This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the said day and on such other day or days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 19.

WARRANT OF COMMITTAL. (O. 16, r 18.)

(*Title.*)

To

The Officer in charge of the Jail at

WHEREAS , whose attendance is required before this Court in the above-named case to give evidence (*or* to produce a document), has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (*or* defendant), the said cannot give such evidence (*or* produce such document); and whereas the Court has called upon the said to give security for his appearance on the day of 19 , at which he has failed to do; This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the day of 19 .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

ORDER FOR DELIVERY OF INTERROGATORIES. (O. 11, r. 1.)

In the Court of
Civil suit No. of 19 .

A. B. *Plaintiff,*

against

C. D., E. F., and G. H. *Defendants.*

Upon hearing and upon reading the affidavit of filed the day of 19 ; it is ordered that the be at liberty to deliver to the interrogatories in writing, and that the said do answer the interrogatories as prescribed by Order XI, rule 8, and that the costs of this application be

No. 2.

INTERROGATORIES. (O. 11, r. 4.)

(*Title as in No. 1, supra.*)

Interrogatories on behalf of the above-named [*plaintiff or defendant C. D.*] for the examination of the above-named [*defendants E. F. and G. H. or plaintiff*].

1. Did not, etc.
2. Has not, etc.

etc., etc., etc.

[*The defendant E. F. is required to answer the interrogatories numbered*
[*The defendant G. H. is required to answer the interrogatories numbered*

No. 3.

ANSWER TO INTERROGATORIES. (O. 11, r. 9.)

(*Title as in No. 1, supra.*)

The answer of the above-named defendant E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make an oath and say as follows :—

1. } Enter answers to interrogatories in paragraphs numbered consecutively.
2. }

3. I object to answer the interrogatories numbered on the ground that [*state grounds of objection*].

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 12.)

(*Title as in No. 1, supra.*)

Upon hearing . It is ordered that the do within days from the date of this order, answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit and that the costs of this application be

No 5.

AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 13.)

(*Title as in No. 1, supra.*)

I, the above-named defendant C. D., make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*].

3. I have had, but have not now in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power on [*state when and what has become of them, and in whose possession they now are*].

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION. (O. 11, r. 14.)

(*Title as in No. 1, supra.*)

Upon hearing and upon reading the affidavit of filed the day of 19 ; It is ordered that the do, at all seasonable times, on reasonable notice, produce at , situate at , the following documents, namely, , and that the be at liberty to inspect and peruse the documents so produced, and to make notes of their contents. In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be

No 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, r. 16.)

(*Title as in No. 1, supra*)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [plaint *or* written statement *or* affidavit dated the day of 19].

[*Describe documents required.*]

X. Y., Pleader for the

To Z., Pleader for the

No. 8.

NOTICE TO INSPECT DOCUMENTS. (O. 11, r. 17.)

(*Title as in No. 1, supra.*)

Take notice that you can inspect the documents mentioned in your notice of the day of 19 [*except the documents numbered in that notice*] at [*insert place of inspection*] on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the day of 19 , on the ground that [*state the ground*]:—

No. 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, r. 3.)

(*Title as in No. 1, supra.*)

Take notice that the plaintiff [*or* defendant] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff], his pleader or agent, at on between the hours of ; and the defendant [*or* plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

To E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*].

[*Here describe the documents and specify as to each document whether it is original or a copy.*]

No. 10.

NOTICE TO ADMIT FACTS. (O. 12, r. 5.)

(*Title as in No. 1, supra.*)

Take notice that the plaintiff [*or* defendant] in this suit requires the defendant [*or* plaintiff] to admit for the purposes of this suit only, the several facts respectively hereunder specified; and the defendant [*or* plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

To E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*].

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890.
2. That he died intestate.
3. That N. was his only lawful son.
4. That O. died on the 1st April, 1896.
5. That O. was never married.

No. 11.

ADMISSION OF FACTS PURSUANT TO NOTICE. (O. 12, r. 5.)

(*Title as in No.* 1. *supra.*)

The defendant [*or* plaintiff] in this suit, for the purposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit:

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [*or* plaintiff] on any other occasion or by any one other than the plaintiff [*or* defendant, *or* party requiring the admission].

E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*].

To G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

Facts admitted.	Qualifications or limitations, if any, subject to which they are admitted.
1. That M. died on the 1st January, 1890	1.
2. That he died intestate	2.
3. That N. was his lawful son	3. But not that he was his only lawful son.
4. That O. died	4. But not that he died on the 1st April, 1896.
5. That O. was never married	5.

No. 12.

NOTICE TO PRODUCE (GENERAL FORM). (O. 12, r. 8.)

(*Title as in No.* 1, *supra.*)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly

G. H., *pleader* [or *agent*] *for plaintiff* [or *defendant*].

To E. F., *pleader* [or *agent*] *for defendant* [or *plaintiff*].

PENDIX D.

DECREES.

No. 1.

DECREE IN ORIGINAL SUIT. (O. 20, rr. 6, 7.)

(*Title.*)

Claim for

This suit coming on this day for final disposal before in the presence of for the plaintiff and of for the defendant, it is ordered and decreed that and that the sum of Rs. be paid by the to the on account of the costs of this suit, with interest thereon at the rate of per cent. per annum from this date to date of realization.

GIVEN under my hand and seal of the Court, this day of 19 .

Judge.

Costs of Suit.

Plaintiff.	Rs.	A.	P.	Defendant.	Rs.	A.	P.
1. Stamp for plaint .				Stamp for power . .			
2. Do. for power .				Do. for petition .			
3. Do. for exhibits .				Pleader's fee . .			
4. Pleader's fee on Rs. .				Subsistence for witnesses			
5. Subsistence for witnesses				Service of process .			
6. Commissioner's fee .				Commissioner's fee .			
7. Service of process .							
Total. .				Total . .			

No. 2.

SIMPLE MONEY DECREE. (Section 34.)

(*Title.*)

Claim for

This suit coming on this day for final disposal before in the presence of for the plaintiff and of for the defendant, it is ordered that the do pay to the the sum of Rs. with interest thereon at the rate of per cent. per annum from to the date of realisation of the said sum and do also pay Rs. , the costs of this suit with interest thereon at the rate of per cent. per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Costs of Suit.

Plaintiff.	Rs.	A.	P.	Defendant.	Rs.	A.	P.
1. Stamp for plaint .				Stamp for power . .			
2. Do. for power .				Do. for petition .			
3. Do. for exhibits .				Pleader's fee . .			
4. Pleader's fee on Rs. .				Subsistence for witnesses			
5. Subsistence for witnesses				Service of process .			
6. Commissioner's fee .				Commissioner's fee .			
7. Service of process .							
Total . .				Total . .			

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE. (O. 34, r. 2.)

(*Title.*)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs. ; and it is decreed as follows:—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [Where the plaintiff claims by derived title add *or by those under whom he claims.*] [Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said day of 19 , the defendant shall be debarred from all right to redeem the property.

Schedule.

Description of the mortgaged property.

No. 4.

PRELIMINARY DECREE FOR SALE. (O. 34, r. 4.)

(*Title.*)

This suit coming on this day, etc.; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs. and that such amount shall carry interest at the rate of per cent. per annum until realization; and it is decreed as follows:—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [Where the plaintiff claims by derived title add

or by those under whom he claims.] [Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*]

(2) That if such payment is not made on or before the said day of 19 , the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and that the balance, if any, be paid to the defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

Schedule.

Description of the mortgaged property.

No. 5.

PRELIMINARY DECREE FOR REDEMPTION. (O. 34, r. 7.)

(*Title.*)

This suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the day of 19 , is Rs. ;

and it is decreed as follows:—

(1) That if the plaintiff pays into Court the amount so declared due on or before the said day of 19 , the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him. [Where the defendant claims by derived title add *or by those under whom he claims.*] [Where the defendant is in possession add *and shall put the plaintiff in possession of the property.*]

(2) That if such payment is not made on or before the said day of 19 , the plaintiff shall be debarred from all right to redeem the property. [If the mortgage is simple or usufructuary substitute *the property shall be sold.*]

Schedule.

Description of the mortgaged property.

No. 6.

DECREE FOR FORECLOSURE.—FIRST MORTGAGEE *v.* SECOND MORTGAGEE AND MORTGAGOR.—SUCCESSIVE PERIODS FOR REDEMPTION.

(*Title.*)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 (*a*) is Rs. *x*, and that on the day of 19 (*b*) there will be due to the plaintiff for interest the further sum of Rs. , making in all Rs. *y*; and it is further declared that on the day of 19 (*b*) there will be due to the first defendant on account of principal, interest and costs Rs. *z*;

and it is decreed as follows:—

(1) That if the first defendant pays into Court the said sum of Rs. *x* on or before the said day of 19 (*a*) the plaintiff shall deliver up, etc. (as in Form No. 3).

(2) That in default of the first defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(3) That in case of such foreclosure and if the second defendant pays into Court the said sum of Rs. *y*, on or before the day of 19 , (*b*) the plaintiff shall deliver up, etc. (as in Form No. 3).

(4) That in default of the second defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(5) That in case the first defendant shall redeem the mortgaged property, if the second defendant pays into Court the said sums of Rs. *y* and Rs. *z* on or before the day of 19 *, (*b*) the first defendant shall deliver up, etc. (as in Form No. 3).

(6) That in default of the second defendant paying the said sums on or before the said day he shall be debarred from all right to redeem the property. [Where the second defendant is in possession add *and shall put the first defendant in possession of the property.*]

(*a*) Insert a day within six months from the date of decree.
(*b*) Insert a day within three months from the date mentioned in (*a*).

No. 7.

DECREE FOR SALE.—FIRST MORTGAGEE *v.* SECOND MORTGAGEE AND MORTGAGOR.—ONE PERIOD FOR REDEMPTION.

(*Title.*)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. *x*. and that on the said day there will be due to the first defendant on account of principal, interest and costs Rs. *y*;

and it is decreed as follows:—

(1) That if the defendants or either of them pay into Court the said sum of Rs. *x* on or before the said day of 19 , the plaintiff shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19 , the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court to the credit of this suit, and applied, first, in payment to the plaintiff of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court; secondly, in payment to the first defendant of the said sum of Rs. *y* and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(3) That in case the defendants or either of them shall pay the said sum of Rs. *x* as aforesaid, he or they shall be at liberty to apply to the Court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised.

(4) That if the net proceeds of the sale are insufficient to pay the said sum of Rs. *x* and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 8.

DECREE FOR SALE.—SECOND MORTGAGEE *v.* FIRST MORTGAGEE AND MORTGAGOR.—ONE PERIOD FOR REDEMPTION.

(*Title.*)

[Insert declarations of the amounts due to the plaintiff Rs. *y* and to the first defendant Rs. *x* as in Form No. 7.]

And it is decreed as follows:—

(1) That if the plaintiff or the second defendant pays into Court the said sum of Rs. *x* on or before the said day of 19 , the first defendant shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19 , the first defendant shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property; and in case he shall apply for a sale the mortgaged property or a sufficient part thereof shall be sold free from the incumbrances of the plaintiff and first defendant, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into Court and applied, first, in payment to the first defendant of the said sum of Rs. x and such subsequent interest and costs as may be allowed by the Court: secondly, in payment to the plaintiff of the said sum of Rs. y and such subsequent interest and costs as aforesaid: and that the balance, if any, be paid to the second defendant.

(3) That if the plaintiff shall pay the said sum of Rs. x into Court on or before the day of 19 , the second defendant shall be at liberty to pay into Court the said sum and the sum of Rs. y on or before the day of 19 , and thereupon the plaintiff shall deliver up, etc. (as in Form No. 4).

(4) That if the plaintiff shall pay the said sum as aforesaid but the second defendant shall fail to pay the said sums as aforesaid, the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be applied in payment to the plaintiff of the said sums of Rs. x and Rs. y and such subsequent interest and costs as may be allowed by the Court, and that the balance, if any, be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the said sums, interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 9.

DECREE FOR SALE.—SUB-MORTGAGEE *v.* MORTGAGEE AND MORTGAGOR, THE AMOUNT OF THE ORIGINAL MORTGAGE EXCEEDING THAT OF THE SUB-MORTGAGE.

(*Title.*)

[Insert declarations of the amounts due to the plaintiff Rs. x and to the first defendant Rs. y as in Form No. 7.]

And it is decreed as follows:—

(1) The first defendant and the second defendant shall be at liberty to pay into Court the said sums of Rs. x and Rs. y respectively on or before the day of 19 , and upon either of the said payments being made the plaintiff shall deliver up, etc. (as in Form No. 4), and thereupon the sum of Rs. x shall be paid to the plaintiff.

(2) In the event of payment by the second defendant as aforesaid the first defendant shall also deliver up, etc. (as in Form No. 4), and thereupon the residue (after payment to the plaintiff as aforesaid) shall be paid to the first defendant.

(3) In default of payment by the first and second defendants as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after deducting thereout the expenses of the sale) shall be paid into Court and applied first in payment to the plaintiff of the said sum of Rs. x and such subsequent interest and costs as may be allowed by the Court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the first defendant); secondly, in payment to the first defendant of the excess of Rs. y over Rs. x and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(4) In the event of payment by the first defendant and in default of payment by the second defendant as aforesaid, the first defendant shall be at liberty to apply for the sale of the mortgaged property, and thereupon the same or a sufficient part thereof shall be sold, and the net sale-proceeds shall be applied in payment to the first defendant of the said sum of Rs. y and such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the aforesaid sums with further interest and costs the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

No. 10.

FINAL DECREE FOR FORECLOSURE. (O. 34, r. 3.)

(*Title.*)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plaintiff dated the day of 19 , and after hearing pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been made:

It is hereby decreed as follows:—

That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed. [Where the defendant is in possession add *and shall put the plaintiff in possession of the said property.*]

Schedule.

scription of the mortgaged property.

No. 11.

DECREE AGAINST MORTGAGOR PERSONALLY. (O. 34, r. 6.)

(*Title.*)

Whereas the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19 , and now in Court to the credit of this suit, amount to Rs. *y*, and there is now due to the plaintiff the sum of Rs. *x* mentioned in the said decree together with the further sum of Rs. interest thereon at the rate of 6 per cent. per annum from the day of 19 , to this day, and also the sum of Rs. for his costs of this suit subsequent to the decree, making a balance due to the plaintiff of Rs. *z*; And whereas it appears to this Court that the defendant is personally liable for the said balance

It is hereby decreed as follows:—

(1) That the said sum of Rs. *y* be paid out of Court to the plaintiff.

(2) That the defendant do pay to the plaintiff the said sum of Rs. *z* with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum.

No. 12.

DECREE FOR RECTIFICATION OF INSTRUMENT.

(*Title.*)

It is hereby declared that the , dated the day of 19 , does not truly express the intention of the parties to such

And it is decreed that the said be rectified by .

No. 13.

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(*Title.*)

It is hereby declared that the , dated the day of 19 , and made between and , is void as against the plaintiff and all other the creditors, if any, of the defendant.

No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(*Title.*)

Let the defendant , his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No. 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(*Title.*)

Let the defendant , his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No. 16.

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(*Title.*)

Let the defendant , his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at , the soil of which belongs to the plaintiff, as a carriage-way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

No. 17.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT.

(*Title.*)

It is ordered that the following accounts and inquiries be taken and made; that is to say:—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suits by legatees—

2. That an account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

3. That an inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next-of-kin [*or* one of the next-of-kin] of the intestate.

[After the first paragraph, the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.]

4. An account of the funeral and testamentary expenses.

5. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the * shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F. be receiver in the suit (*or* proceeding), and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the * (and shall give security by bond for the due performance of his duties to the amount of rupees).

10. And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

(*a*) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death;

(*b*) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof;

(*c*) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

11. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G. H. shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the * and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the * shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the * to give the most useful publicity to such inquiries.

14. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of , and that the * do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

15. And, lastly, it is ordered that this suit [*or* proceeding] stand adjourned for making final decree to the day of .

[Such part only of this decree is to be used as is applicable to the particular case.]

No. 18.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE.

(*Title.*)

1. It is ordered that the defendant do, on or before the day of pay into Court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs. for interest, at the rate of Rs. per cent. per annum, from the day of to the day of , amounting together to the sum of Rs. .

* Here insert name of proper officer.

2. Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs. ordered to be paid into Court as aforesaid, as follows :—

(*a*) The costs of the plaintiff to Mr. , his attorney [*or* pleader] *or*, and the costs of the defendant to Mr. , his attorney [*or* pleader].

(*b*) And (*if any debts are due*) with the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate, of the * together with subsequent interest on such of the debts as bear interest, be paid ; and, after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

No. 19.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

(*Title.*)

1. It is declared that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff ;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy ;

3. And it is also ordered that the defendant do, within weeks after the date of the certificate of the * pay to the plaintiff the amount of what the * shall certify to be due for principal and interest ;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

No. 20.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN.

(*Title.*)

1. Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of E. F., the intestate, within one week after the taxation of the said costs by the said * and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows :—

(*a*) Let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay one-third share of the said residue to the plaintiffs A. B., and C. D., his wife, in her right as the sister and one of the next-of-kin of the said E. F., the intestate.

(*b*) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next-of-kin of the said E. F., the intestate.

(*c*) And let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay the remaining one-third share of the said residue to G. H., as the brother and the other next-of-kin of the said E. F., the intestate.

* Here insert name of proper officer.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(*Title.*)

It is declared that the proportionate shares of the parties in the partnership are as follows:—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the * day of , and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.

And it is ordered that be the receiver of the partnership-estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken:—

1. An account of the credits, property and effects now belonging to the said partnership;

2. An account of the debts and liabilities of the said partnership;

3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the * may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of , and that the * do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of .

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(*Title.*)

It is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows:—

1. In payment of the debts due by the partnership set forth in the certificate of the * amounting in the whole to Rs.

2. In payment of the costs of all parties in this suit, amounting to Rs.

[*These costs must be ascertained before the decree is drawn up.*]

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership-assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership-assets.

[*Or*, And that the remainder of the said sum of Rs. be paid to the said plaintiff [*or* defendant] in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.]

4. And that the defendant [*or* plaintiff] do on or before the day of pay to the plaintiff [*or* defendant] the sum of Rs. being the balance of the said sum of Rs. due to him, which will then remain due.

* Here insert name of proper officer.

No. 23.

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS.

(*Title.*)

It is hereby decreed as follows:—

(1) That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.

(2) That the defendant do pay to the plaintiff the sum of Rs. with interest thereon at the rate of per cent. per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.

Or

(2) That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.

(3) That an inquiry was made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree].

Schedule.

APPENDIX E.

EXECUTION.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED. (O. 21, r. 2.)

(*Title.*)

To

WHEREAS in execution of the decree in the above-named suit has applied to this Court that the sum of Rs. recoverable under the decree has been paid / adjusted and should be recorded as certified, this is to give you notice that you are to appear before this Court on the day of 19 , to show cause why the payment / adjustment aforesaid should not be recorded as certified.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 2.

PRECEPT. (Section 46.)

(*Title.*)

UPON hearing the decree-holder it is ordered that this precept be sent to the Court of at under section 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree.

Schedule.

Dated the day of 19 .

Judge.

No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT (O. 21, r. 6.)

(*Title.*)

WHEREAS the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of at for execution of the decree in the above suit by the said Court, alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under Order XXI, rule 6, of the Code of Civil Procedure, 1908, it is

Ordered :

That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the day of 19 .

Judge.

No. 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE. (O. 21, r. 6.)

(*Title.*)

Certified that no (1) satisfaction of the decree of this Court in Suit No. of 19 , a copy which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

Dated the day of 19 .

Judge.

(1) If partial, strike out "no" and state to what extent.

No. 5.

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT. (O. 21, r. 6.)

(*Title.*)

Number of suit and the Court by which the decree was passed.	Names of parties.	Date of application for execution.	Number of the execution case.	Processes issued and dates of service thereof.	Costs of execution.	Amount realized.	How the case is disposed of.	Remarks.
1	2	3	4	5	6	7	8	9
					Rs. A. P.	Rs. A. P.		

Signature of Muharrir in charge. *Signature of Judge.*

No. 6.

APPLICATION FOR EXECUTION OF DECREE. (O. 21, r. 11.)

In the Court of

I , decree-holder, hereby apply for execution of the decree herein below set forth:—

No. of suit.	Names of parties.	Date of decree.	Whether any appeal preferred from decree.	Payment or adjustment made, if any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby, together with particulars of any cross decree.	Amount of costs, if any, awarded.	Against whom to be executed.	Mode in which the assistance of the Court is required.
1	2	3	4	5	6	7	8	9	10
789 of 1897.	A. B.—Plaintiff. . . C. D.—Defendant. . .	October 11th, 1897.	No.	None.	Rs. 72-4 recorded on application, dated the 4th March, 1899.	Rs. 314-8-2 principal [interest at 6 per cent. per annum, from date of decree till payment].	Rs. A. P. As awarded in the decree . . 47 10 4 Subsequently incurred . . 8 2 0 Total . 55 12 4	Against the defendant C. D.	[When attachment and sale of moveable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me. [When attachment and sale of immoveable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by the attachment and sale of defendant's immoveable property specified at the foot of this application and paid to me.

I declare that what is stated herein is true to the best of my knowledge and belief.

Signed , *Decree-holder.*

Dated the day of 19 .

[When attachment and sale of immoveable property is sought.]

Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of value Rs. 40 and bounded as follows:—

East by G's house; west by H's house; south by public road; north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

Signed , *Decree-holder.*

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE. (O. 21, r. 22.)

(*Title.*)

To

WHEREAS has made application to this Court for execution of decree in Suit No. of 19 , on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court on the day of 19 , to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No 8.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, r. 30.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS was ordered by decree of this Court passed on the day of 19 , in Suit No. of 19 , to pay to the plaintiff the sum of Rs. as noted in the margin; and whereas the said sum of Rs. has not been paid: These are to command you to attach the moveable property of the said as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said , and unless the said shall pay to you the said sum of Rs together with Rs. , the costs of this attachment, to hold the same until further orders from this Court.

DECREE.	
Principal . . .	
Interest	
Costs	
Costs of execution . .	
Further interest . .	
Total . .	

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Schedule.

Judge.

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVEABLE PROPERTY ADJUDGED BY DECREE. (O. 21, r. 31.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS was ordered by decree of this Court passed on the day of 19 , in Suit No. of 19 , to deliver to the plaintiff the moveable property (*or* a share in

the moveable property) specified in the schedule hereunto annexed, and whereas the said property (*or* share) has not been delivered;

These are to command you to seize the said moveable property (*or* a share of the said moveable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this day of 19 .

Schedule.

Judge.

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT. (O. 21, r. 34.)

(*Title.*)

To

TAKE notice that on the day of 19 , the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of , whereof a draft is hereunto annexed, of the immoveable property specified hereunder, and that the day of 19 is appointed for the hearing of the said application; and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

Description of Property.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC. (O. 21, r. 35.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of has been decreed to , the plaintiff in this suit: You are hereby directed to put the said in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this day of 19 .

Schedule.

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE. (O. 21, r. 37.)

(*Title.*)

To

WHEREAS has made application to this Court for execution of decree in suit No. of 19 , by arrest and imprisonment of your person, you are hereby required to appear before this Court on the day of 19 , to show cause why you should not be committed to the civil prison in execution of the said decree.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 13.

WARRANT OF ARREST IN EXECUTION. (O. 21, r. 38.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS was adjudged by a decree of the Court in Suit No. of 19 , dated the day of 19 , to pay to the decree-holder the sum of Rs. as noted in the margin, and whereas the said sum of Rs. has not been paid to the said decree-holder in satisfaction of the said decree, these are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs. , together with Rs. for the costs for executing this process, to bring the said defendant before the Court with all convenient speed. You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed

Principal . .	
Interest . .	
Costs . . .	
Execution . .	
Total . .	

GIVEN under my hand and the seal of the Court, this day of , 19 .

Judge.

No. 14

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL. (O. 21, r. 40.)

(*Title.*)

To

The Officer in charge of the Jail at

WHEREAS has been brought before this Court this day of 19 , under a warrant in execution of a decree which was made and pronounced by the said Court on the day of 19 , and by which decree it was ordered that the said should pay ; And whereas the said has not obeyed the decree, nor satisfied the Court that he is entitled to be discharged from custody; You are hereby, in the name of the King-Emperor of India, commanded and required to take and receive the said into the civil prison and keep him imprisoned therein for a period not exceeding or until the said decree shall be fully satisfied, or the said shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908; and the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said during his confinement under this warrant of committal.

GIVEN under my signature and the seal of this Court, this day of 19 .

Judge.

No. 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE. (Sections 58, 59.)

(*Title.*)

To

The Officer in charge of the Jail at

UNDER orders passed this day, you are hereby directed to set free judgment-debtor now in your custody.

Dated

Judge.

No. 16.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF. (O. 21, r. 46.)

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No. of 19 , in favour of for Rs. ; It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court from receiving from the following property in the possession of the said , that is to say, , to which the defendant is entitled, subject to any claim of the said , and the said is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 17.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS. (O. 21, r. 46.)

(*Title.*)

To

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No. of 19 , in favour of , for Rs. : It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, and that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 18.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION. (O. 21, r. 46.)

(*Title.*)

To Defendant, and to , Secretary of Corporation.

WHEREAS has failed to satisfy a decree passed against on the day of 19 , in Suit No. of 19 , in favour of , for Rs. ; It is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of shares in the aforesaid Corporation, namely, or from receiving payment of any dividends thereon; and you, , the Secretary of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY. (O. 21, r. 48.)

(*Title.*)

To

WHEREAS , judgment-debtor in the above-named case, is a (*describe office of judgment-debtor*) receiving his salary (*or* allowances) at your hands; and whereas, , decree-holder in the said case, has applied in this Court for the attachment of the salary (*or* allowances) of the said , to the extent of due to him under the decree; You are hereby required to withhold the said sum of from the salary of the said in monthly instalments of and to remit the said sum (*or* monthly instalments) to this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT. (O. 21, r. 51.)

(*Title.*)

To

The Bailiff of the Court,

WHEREAS an order has been passed by this Court on the day of 19 , for the attachment of ; You are hereby directed to seize the said and bring the same into Court.

GIVEN under my hand and seal of the Court, this day of 19 .

Judge.

No. 21.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT. (O. 21, r. 52.)

(*Title.*)

To

SIR,

The plaintiff having applied, under rule 22 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, etc.*), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,
SIR,
Your most obedient Servant,
Judge.

Dated the day of 19 .

No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT. (O. 21, r. 53.)

(*Title.*)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the day of 19 , by in Suit No. of 19 , in which he was and was has been attached by this

Court on the application of the in the suit specified above. You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor.

I have the honour, etc.,

Judge.

Dated the day of 19 .

No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE. (O. 21, r. 53.)

(*Title.*)

To

WHEREAS an application has been made in this Court by the decree-holder in the above suit for the attachment of a decree obtained by you on the day of 19 , in the Court of in Suit No. of 19 , in which was and was ; It is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 24.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVEABLE PROPERTY. (O. 21, r. 54.)

(*Title.*)

To

Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the day of 19 , in Suit No. of 19 , in favour of , for Rs. ; it is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this day of 19 .

Schedule.

Judge.

No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC., IN THE HANDS OF A THIRD PARTY. (O. 21, r. 56.)

(*Title.*)

To

WHEREAS the following property has been attached in execution of a decree in Suit No. of 19 , passed on the day of 19 , in favour of , for Rs. ; It is ordered that the property so attached, consisting of Rs. in money and Rs. in currency-notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you, the said , to .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 26.

NOTICE TO ATTACHING CREDITOR. (O. 21, r. 58.)

(*Title.*)

To

WHEREAS has made application to this Court for the removal of attachment on placed at your instance in execution of the decree in Suit No. of 19 , this is to give you notice to appear before this Court on , the day of 19 , either in person or by a pleader of the Court duly instructed to support your claim, as attaching creditor.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 27.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, r. 66.)

(*Title.*)

To

The bailiff of the Court.

THESE are to command you to sell by auction after giving days' previous notice, by affixing the same in this Court-house, and after making due proclamation, the property attached under a warrant from this Court, dated the day of 19 , in execution of a decree in favour of in suit No. of 19 , or so much of the said property as shall realize the sum of Rs. , being the of the said decree and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 28.

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION. (O. 21, r. 66.)

(*Title*)

To Judgment-debtor.

WHEREAS in the above-named suit the decree-holder has applied for the sale of ; You are hereby informed that the day of 19 , has been fixed for settling the terms of the proclamation of sale.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 29.

PROCLAMATION OF SALE. (O. 21, r. 66.)

(*Title.*)

Notice is hereby given that, under rule 64 of Order XXI of the Code of Civil Procedure, 1908, an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule, in satisfaction of the claim of the decree-holder in the suit (1) mentioned in the margin, amounting with costs and interest up to date of sale to the sum of

(1) Suit No. of 19 . decided by the of in which was plaintiff and was defendant.

The sale will be by public auction, and the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule

below; and the liabilities and claims attaching to the said property, so far as they hav been ascertained, are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by at the monthly sale commencing at o'clock on the at . In the event, however, of the debt above specified and of the costs of th sale being tendered or paid before the knocking down of any lot, the sale will be stoppec

At the sale the public generally are invited to bid, either personally or by dul authorized agent. No bid by, or on behalf of, the judgment-creditors above-mentionec however, will be accepted, nor will any sale to them be valid without the express per mission of the Court previously given. The following are the further

Conditions of Sale.

1. The particulars specified in the schedule below have been stated to the best c the information of the Court, but the Court will not be answerable for any error, mis statement or omission in this proclamation.

2. The amount by which the biddings are to be increased shall be determined b the officer conducting the sale. In the event of any dispute arising as to the amount bic or as to the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provide always that he is legally qualified to bid, and provided that it shall be in the discretion c the Court or officer holding the sale to decline acceptance of the highest bid when th price offered appears so clearly inadequate as to make it advisable to do so.

4. For reasons recorded, it shall be in the discretion of the officer conducting th sale to adjourn it, subject always to the provisions of rule 69 of Order XXI.

5. In the case of moveable property, the price of each lot shall be paid at the tim of sale or as soon after as the officer holding the sale directs, and in default of paymer the property shall forthwith be again put up and re-sold.

6. In the case of immoveable property, the person declared to be the purchaser sha pay immediately after such declaration a deposit of 25 per cent. on the amount of h purchase-money to the officer conducting the sale, and in default of such deposit th property shall forthwith be put up again and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before th Court closes on the fifteenth day after the sale of the property, exclusive of such day, c if the fifteenth day be a Sunday or other holiday, then on the first office day after th fifteenth day.

8. In default of payment of the balance of purchase-money within the perio allowed, the property shall be re-sold after the issue of a fresh notification of sale. Th deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeite to Government and the defaulting purchaser shall forfeit all claim to the property or t any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Schedule of Property.

Number of lot.	Description of property to be sold, with the name of each owner where there are more judgment-debtors than one.	The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government.	Detail of any incumbrances to which the property is liable.	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value.

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE. (O. 21, r. 66.)

(*Title.*)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the day of 19 has been fixed for the sale of the said property, copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule, to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the day of 19 .

Schedule.

Judge.

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RE-SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT. (O. 21, r. 71.)

(*Title.*)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of purchaser, there was a deficiency in the price of the said property amounting to Rs. and that the expenses attending such re-sale amounted to Rs. , making a total of Rs. . which sum is recoverable from the defaulter.

Dated the day of 19 .

Officer holding the sale.

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN EXECUTION (O. 21, r. 79.)

(*Title.*)

To

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of now in your possession, you are hereby prohibited from delivering possession of the said to any person except the said .

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 33.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO ANY OTHER THAN THE PURCHASER. (O. 21, r. 79.)

(*Title.*)

To and to

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of being debts due from you to you ; It is ordered that you be, and you are hereby, prohibited from receiving, and you from making payment of, the said debt to any person or persons except the said .

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION. (O. 21, r. 79.)

(*Title.*)

To

and , Secretary of Corporation.

WHEREAS has become the purchaser at a public sale in execution of the decree, in the above suit, of certain shares in the above Corporation, that is to say, of standing in the name of you ; It is ordered that you be, and you are hereby prohibited from making any transfer of the said shares to any person except the said , the purchaser aforesaid, or from receiving any dividends thereon; and you Secretary of the said Corporation, from permitting any such transfer or making any such payment to any person except the said , the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 35.

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO MORTGAGE, LEASE OR SELL PROPERTY. (O. 21, r. 83.)

(*Title.*)

WHEREAS in execution of the decree passed in the above suit an order was made on the day of 19 , for the sale of the under-mentioned property of the judgment-debtor , and whereas the Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof:

This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage, lease or sale within a period of from the date of this certificate; provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment-debtor.

GIVEN under my hand and the seal of the Court, this day of 19 .

Description of property.

Judge.

No. 36.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O. 21, rr. 90, 92.)

(*Title.*)

To

WHEREAS the under-mentioned property was sold on the day of 19 , in execution of the decree passed in the above-named suit, and whereas the decree-holder [*or* judgment-debtor] has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [*or* fraud] in publishing [*or* conducting] the sale, namely, that

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this day of 19 .

Description of property.

Judge.

No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O. 21, rr. 91, 92.)

(*Title.*)

To

WHEREAS , the purchaser of the under-mentioned property sold on the day of 19 , in execution of the decree passed in the above-named suit, has applied to this Court to set aside the sale of the said property on the ground that , the judgment-debtor, had no saleable interest therein:

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this day of 19 .

Description of property.

Judge.

No. 38.

CERTIFICATE OF SALE OF LAND. (O. 21, r. 94.)

(*Title.*)

THIS is to certify that has been declared the purchaser at a sale by public auction on the day of 19 , of in execution of decree in this suit, and that the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION. (O. 21, r. 95.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS has become the certified purchaser of at a sale in execution of decree in Suit No. of 19 ; You are hereby ordered to put the said , the certified purchaser, as aforesaid, in possession of the same.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION OF DECREE. (O. 21, r. 97.)

(*Title.*)

To

WHEREAS , the decree-holder in the above suit, has complained to this Court that you have resisted (*or* obstructed) the officer charged with the execution of the warrant for possession.

You are hereby summoned to appear in this Court on the day of 19 , at A.M., to answer the said complaint.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 41.

WARRANT OF COMMITTAL. (O. 21, r. 98.)

(*Title.*)

To

The Officer in charge of the Jail at

WHEREAS the under-mentioned property has been decreed to , the plaintiff in this suit, and whereas the Court is satisfied that without any just cause resisted [*or* obstructed] and is still resisting [*or* obstructing] the said in obtaining possession of the property, and whereas the said has made application to this Court that the said be committed to the civil prison;

You are hereby commanded and required to take and receive the said into the civil prison and to keep him imprisoned therein for the period of days.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND. (Section 72.)

(*Title.*)

To

Collector of

SIR,

In answer to your communication No. , dated , representing that the sale in execution of the decree in this suit of land situate within your district is objectionable, I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you.

I have the honour to be,
SIR,
Your obedient servant,

Judge.

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, r. 1.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS , the plaintiff in the above suit, claims the sum of Rs. , as noted in the margin and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to ;

Principal . . .	
Interest . . .	
Costs	
Total . .	

These are to command you to demand and receive from the said the sum of Rs. as sufficient to satisfy the plaintiff's claim, and unless the said sum of Rs. is forthwith delivered to you by or on behalf of the said , to take the said into custody, and to bring him before this Court, in order that he may show cause why he should not furnish security to the amount of Rs. for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until satisfaction of any decree that may be passed against him in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT. (O. 38, r. 2.)

(*Title.*)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant, has been arrested and brought before the Court;

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security:

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit; and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of 19 .

(*Signed.*)

Witnesses.

1.

2.

No. 3.

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE. (O. 38, r. 3.)

(*Title.*)

To

WHEREAS who became surety on the day of 19 , for your appearance in the above suit, has applied to this Court to be discharged from his obligation:

You are hereby summoned to appear in this Court in person on the day of 19 , at A.M., when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 4.

ORDER FOR COMMITTAL. (O. 38, r. 4.)

(*Title.*)

To

WHEREAS , plaintiff in this suit, has made application to the Court that security be taken for the appearance of , the defendant, to answer any judgment that may be passed against him in the suit; and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do; It is ordered that the said defendant be committed to the civil prison until the decision of the suit; or, if judgment be pronounced against him, until satisfaction of the decree.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 5.

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE. (O. 38, r. 5.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit ; These are to command you to call upon the said defendant on or before the day of 19 , either to furnish security for the sum of Rs. to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why he should not furnish security; and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 6.

SECURITY FOR THE PRODUCTION OF PROPERTY. (O. 38, r. 5.)

(*Title.*)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant, has been directed by the Court to furnish security in the sum of Rs. to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed;

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs. or such sum not exceeding the said sum as the said Court may adjudge.

Schedule.

Witness my hand at this day of 19 .

(*Signed.*)

Witnesses.

1.

2.

No. 7.

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF FAILURE TO FURNISH SECURITY. (O. 38, r. 6.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS , the plaintiff in this suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against him in the suit, and whereas the Court has called upon the said to furnish such security which he has failed to do; These are to command you to attach the property of the said and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge

No. 8.

TEMPORARY INJUNCTIONS. (O. 39, r. 1.)

(*Title.*)

UPON motion made into this Court by , Pleader of [*or* Counsel for] the plaintiff A. B., and upon reading the petition of the said plaintiff in this matter filed [this day] [*or* the plaint filed in this suit on the day of , *or* the written statement of the said plaintiff filed on the day of] and upon hearing the evidence of and in support thereof [*if after notice and defendant not appearing: add*, and also the evidence of as to service of notice of this motion upon the defendant C. D.]. This Court doth order that an injunction be awarded to restrain the defendant C. D., his servants, agents and workmen,

from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [*or* in the written statement, *or* petition, of the plaintiff and evidence at the hearing of this motion mentioned] being No. 9, Oilmongers Street, Hindupur, in the Taluk of , and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court.

Dated this day of 19 .

Judge.

[*Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus*:—] to restrain the defendants and from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [*or* bill of exchange] in question, dated on or about the , etc., mentioned in the plaintiff's plaint [*or* petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[*In Copyright cases*] to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing or vending a book, called , or any part thereof, until the, etc.

[*Where part only of a book is to be restrained*] to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [*or* petition and evidence, etc.] mentioned to have been published by the defendant as hereinafter specified, namely that part of the said book which is entitled and also that part which is entitled [*or* which is contained in page to page both inclusive] until , etc.

[*In Patent cases*] to restrain the defendant C. D., his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plaint [*or* petition, etc., *or* written statement, etc.,] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [or as the case may be] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc.

[*In cases of Trade marks*] to restrain the defendant C. D., his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the plaintiff A. B., in bottles having affixed thereto such labels as in the plaintiff's plaint [*or* petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff A. B., and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A. B., until the, etc.

[*To restrain a partner from in any way interfering in the business*] to restrain the defendant C. D., his servants and agents, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note, or written security in the name of the partnership-firm of B. and D., and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership-firm of B. and D., or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc.

No. 9.

APPOINTMENT OF A RECEIVER. (O. 40, r. 1.)

(*Title.*)

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19 , in favour of ; You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL of the Code of Civil Prodecure, 1908, with full powers under the provisions of that Order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No. 10.

BOND TO BE GIVEN BY RECEIVER. (O. 40, r. 3.)

(*Title.*)

KNOW all men by these presents, that we, and and are jointly and severally bound to of the Court of in Re. to be paid to the said or his successor in office for the time being. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 19 .

Whereas a plaint has been filed in this Court by against for the purpose of [*here insert the object of suit*].

And whereas the said has been appointed, by order of the above-mentioned Court, to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of in the said plaint named :

Now the condition of this obligation is such, that if the above-bounden shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property, of the said at such periods as the Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above-bounden in the presence of

Note.—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL. (O. 41, r. 1.)

(*Title.*)

The above-named appeals to the Court at from the decree of in Suit No. of 19 , dated the day of 19 , and sets forth the following grounds of objection to the decree appealed from, namely :—

No. 2.

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE. (O. 41, r. 5.)

(*Title.*)

To

This security bond on stay of execution of decree executed by witnesseth :—

That , the plaintiff in Suit No. of 19 , having sued , the defendant, in this Court and a decree having been passed on the day of , 19 , in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. , mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court the said defendant shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

Witnessed by

(Signed)

1.
2.

No. 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL. (O. 41, r. 6.)

(*Title.*)

To

This security bond on stay of execution of decree executed by witnesseth:—

That , the plaintiff in Suit No. of 19 , having sued , the defendant, in this Court and a decree having been passed on the day of 19 in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said decree and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the Appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

Witnessed by

(Signed)

1.

2.

No. 4.

SECURITY FOR COSTS OF APPEAL. (O. 41, r. 10.)

(*Title.*)

To

This security bond for costs of appeal executed by witnesseth:—

This appellant has preferred an appeal from the decree in Suit No. of 19 , against the respondent, and has been called upon to furnish security. Accordingly I, of my own free will, stand security for the costs of the appeal, mortgaging the properties specified in the schedule hereunto annexed. I shall not transfer the said properties or any part thereof, and in the event of any default on the part of the appellant I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal. Any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

Witnessed by

1.

2.

(Signed)

No. 5.

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O. 41, r. 13.)

(*Title.*)

To

YOU are hereby directed to take notice that the in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the day of 19 .

You are requested to send with all practicable despatch all material papers in the suit.

Dated the day of 19 .

Judge.

No. 6.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL. (O. 41, r. 14.)

(*Title.*)

APPEAL from the of the Court of dated the day of 19 .

To

Respondent.

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 19 has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

[NOTE.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]

No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED BY THE COURT AS A RESPONDENT. (O. 41, r. 20.)

(*Title.*)

WHEREAS you were a party in suit No. of 19 , in the Court of , and whereas the has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal:

This is to give you notice that this Court has directed you to be made a respondent in the said appeal, and has adjourned the hearing thereof till the day of 19 , at A.M. If no appearance is made on your behalf on the said day and at the said hour, the appeal will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 8.

MEMORANDUM OF CROSS OBJECTION. (O. 41, r. 22.)

(*Title.*)

WHEREAS the has preferred an appeal to the Court at from the decree of in Suit No. of 19 , dated the day of 19 , and whereas notice of the day fixed for hearing the appeal was served on the on the day of 19 , the files this memorandum of cross objection under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from, namely :—

No. 9.

DECREE IN APPEAL. (O. 41, r. 35.)

(*Title.*)

Appeal No. of 19 from the decree of the Court of dated the day of 19 .

Memorandum of Appeal.

Plaintiff.
Defendant.

The above-named appeals to the Court at from the decree of in the above suit, dated the day of 19 , for the following reasons, namely :—

This appeal coming on for hearing on the day of 19 . before , in the presence of for the appellant and of for the respondent, it is ordered—

The costs of this appeal, as detailed below, amounting to Rs. , are to be paid by . The costs of the original suit are to be paid by .

Given under my hand this day of 19 .

Judge.

Costs of Appeal.

Appellant.	Amount.			Respondent.	Amount.		
	Rs.	a.	p.		Rs.	a.	p.
1. Stamp for memorandum of appeal .				Stamp for power . .			
2. Do. for power . .				Do. for petition . .			
3. Services of processes .				Service of processes .			
4. Pleader's fee on Rs. .				Pleader's fee on Rs. .			
Total . .				Total . .			

No. 10.

APPLICATION TO APPEAL IN FORMÂ PAUPERIS. (O. 44, r. 1.)

(*Title.*)

I the above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the moveable and immoveable property belonging to me with the estimated value thereof.

Dated the day of 19 .

(*Signed.*)

Note.—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper.

No. 11.

NOTICE OF APPEAL IN FORMÂ PAUPERIS. (O. 44, r. 1.)

(*Title.*)

WHEREAS the above-named has applied to be allowed to appeal as a pauper from the decree in the above suit dated the day of 19 , and whereas the day of 19 has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore-mentioned date.

Given under my hand and the seal of the Court this day of 19

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED: (O. 45, r. 3.)

(*Title.*)

To

TAKE notice that has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of section 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The day of 19 is fixed for you to show cause why the Court should not grant the certificate asked for.

Given under my hand and the seal of the Court, this day of 19 .

Registrar.

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN COUNCIL. (O. 45, r. 8.)

(*Title.*)

To

WHEREAS , the in the above case, has furnished the security and made the deposit required by Order XLV, rule 7, of the Code of Civil Procedure, 1908:

Take notice that the appeal of the said to His Majesty in Council has been admitted on the day of 19 .

Given under my hand and the seal of the Court, this day of 19 .

Registrar.

No. 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED. (O. 47, r. 4.)

(*Title.*)

To

TAKE notice that has applied to this Court for a review of its decree passed on the day of 19 in the above case. The day of 19 is fixed for you to show cause why the Court should not grant a review of its decree in this case.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

APPENDIX H.

MISCELLANEOUS.

No. 1.

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED. (O. 14, r. 6.)

(*Title.*)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [*or* of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the day of 19 and filed as Exhibit in the said suit, is or is not beyond the statute of limitation (*or state the point at issue whatever it may be*):

We therefore severally bind ourselves that, upon the finding of the Court in the negative [*or* affirmative] of such issue will pay to the said the sum of Rupees (*or* such sum as the Court shall hold to be due thereon) and I, the said will accept the said sum of Rupees (*or* such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [*or*, that upon such finding I, the said will do or abstain from doing, etc., etc.].

Plaintiff.

Defendant.

Witnesses.

1.

2.

Dated the day of 19

No. 2.

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL (SECTION 24.)

In the Court of the District Judge of

No. of 19 .

To

WHEREAS an application dated the day of 19 has been made to this Court by the in Suit No. of 19 now pending in the Court of the at in which is plaintiff and is defendant, for the transfer of the suit for trial to the Court of the at :—

You are hereby informed that the day of 19 has been fixed for the hearing of the application, when you will be heard if you desire to offer any objection to it.

Given under my hand and the seal of the Court, this day of 19

Judge.

No. 3.

NOTICE OF PAYMENT INTO COURT. (O. 24, r. 2.)

(*Title.*)

Take notice that the defendant has paid into Court Rs.
and says that that sum is sufficient to satisfy the plaintiff's claim in full.

X Y, Pleader for the defendant

To Z, Pleader for the plaintiff.

No. 4.

NOTICE TO SHOW CAUSE. (GENERAL FORM.)

(*Title.*)

To

WHEREAS the above-named
has made application to this Court that ;
You are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 ,
at o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 5.

LIST OF DOCUMENTS PRODUCED BY PLAINTIFF / DEFENDANT (O. 13, r. 1)

(*Title.*)

No.	Description of document.	Date, if any, which the document bears.	Signature of party or pleader.
1	2	3	4

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS ABOUT TO LEAVE THE JURISDICTION. (O. 18, r. 16.)

(*Title.*)

To

plaintiff (*or* defendant).

WHEREAS in the above suit application has been made to the Court by that the examination of , a witness required by the said in the said suit, may be taken immediately; and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (*or any other good and sufficient cause, to be stated*):

Take notice that the examination of the said witness will be taken by the Court on the day of 19 .

Dated the day of 19 .

Judge.

No. 7.

COMMISSION TO EXAMINE ABSENT WITNESS. (O. 26, rr. 4, 18.)

(*Title.*)

To

WHEREAS the evidence of is required by the in the above suit; and whereas ; you are requested to take the evidence on interrogatories [or *viva voce*] of such witness and you are hereby appointed Commissioner for that purpose. The evidence will be taken in the presence of the parties or their agents if in attendance, who will be at liberty to question the witness on the points specified; and you are further requested to make return of such evidence as soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 8.

LETTER OF REQUEST. (O. 26, r. 5.)

(*Title.*)

(Heading :—To the President and Judges of, etc., etc., *or as the case may be.*)

WHEREAS a suit is now pending in the in which A. B. is plaintiff and C. D. is defendant; And in the said suit the plaintiff claims (*abstract of claim*);

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say:

E. F., of
G. H., of and
I. J., of

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court;

Now I , as the of the said Court, have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the said Court, you, as the President and Judges of the said , or some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents

of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or *viva voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses to the said Court.

(*Note.*—If the Request is directed to a Foreign Court, the words "through His Majesty's Secretary of State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the penultimate line of this form.)

No. 9.

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS. (O. 26, rr. 9, 11.)

(*Title.*)

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for should be issued; You are hereby appointed Commissioner for the purpose of .

Process to compel the attendance before you of any witnesses, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 10.

COMMISSION TO MAKE A PARTITION. (O. 26, r. 13.)

(*Title.*)

To

WHEREAS it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the day of 19 ; You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorized to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any witness, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, r. 3.)

(*Title.*)

To *Minor Defendant.*
Natural Guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you (1) (1) Here insert the name of guardian, are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court for the appointment of you (1) or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERISM. (O. 33, r. 6.)

(*Title.*)

To

WHEREAS has applied to this Court for permission to institute a suit against *in formâ pauperis* under Order XXXIII of the Code of Civil Procedure, 1908; and whereas the Court sees no reason to reject the application; and whereas the day of 19 has been fixed for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof:

Notice is hereby given to you under rule 6 of Order XXXIII that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said day of 19 .

Given under my hand and the seal of the Court, this day of 19 .

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE. (Section 145.)

(*Title.*)

To

WHEREAS you did on become liable as surety for the performance of any decree which might be passed against the said defendant in the above suit; and whereas a decree was passed on the day of 19 against the said defendant for the payment of , and whereas application has been made for execution of the said decree against you:

Take notice that you are hereby required on or before the day of 19 to show cause why the said decree should not be executed against you, and if no sufficient cause shall be, within the time specified, shown to the satisfaction of the Court, an order for its execution will be forthwith issued in the terms of the said application.

Given under my hand and the seal of the Court, this day of 19 .

No. 14.

REGISTER OF CIVIL SUITS. (O. 4, r. 2.)

COURT of the of at

REGISTER OF CIVIL SUITS in the year 19 .

Date of presentation of plaint.	No. of suit.	PLAINTIFF.			DEFENDANT.			CLAIM.			APPEARANCE.			JUDGMENT.			APPEAL.		EXECUTION.				RETURN OF EXECUTION.			
		Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Particulars.	Amount or value.	When the cause of action accrued.	Day for parties to appear.	Plaintiff.	Defendant.	Date.	For whom.	For what, or amount.	Date of decision of appeal.	Judgment in appeal.	Date of application.	Date of order.	Against whom.	For what, and amount if money.	Amount of costs.	Amount paid into Court.	Arrested.	Minute of other Return than Payment or Arrest, and date of every Return.

NOTE.—Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only, as the case may be, need be entered in the register.

No. 15.

REGISTER OF APPEALS. (O. 41, r. 9.)

COURT (*OR* HIGH COURT) AT

REGISTER OF APPEALS FROM DECREES in the year 19 .

Date of Memorandum.	No. of appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM.				APPEARANCE.			JUDGMENT.		
		Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Of what Court	No. of Original Suit.	Particulars.	Amount or Value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed, or varied.	For what or amount.

THE SECOND SCHEDULE.

ARBITRATION.

Arbitration in Suits.

[s. 506.

Parties to suit may apply for order of reference.

1. (*1*) *Where in any* suit all the parties *interested agree* that any matter in difference between them *shall* be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(*2*) Every such application shall be in writing and shall state the matter sought to be referred.

References.*—Shama Sundram Iyar *v.* Abdul Latif, 4 C. W. N. 92; 27 C. 61 [reference to arbitration on verbal application]; followed in Abdul Hamid *v.* Riaz-ud-din, 30 A. 32 (1907); Beni Madhub Mitter *v.* Priya Nath Mandal, 5 C. W. N. 268 [arbitration award, if binding on person not party to reference]; Chooney Money *v.* Ram Kinkar Dutt, 5 C. W. N. 242; 28 C. 155 [valuators not arbitrators and therefore order of reference not under section]; Ghulam Jilani *v.* Muhammad Ahmad, 6 W. N. 226 [scheme of Code as to arbitration]; Debi Churn Manna *v.* Bipra Prasad Jana, 7 C. W. N. 186 [withdrawal of suit after award]; Fakir Chand Dey *v.* Tin Cowrie Dey, 7 C. W. N. 180 [agreement to refer—not in writing—whether adjustment of suit]; Sheo Das Misser *v* Broja Nandan Pershad, 7 C. W. N. 343 [application by pleader not specially authorized]; Protap Chunder Dey *v.* Toolsey Das Dey, 29 C. 793 [sections applicable to arbitrations in a suit]; Hardeo Sahai *v.* Gauri Shankar, 28 A. 35; Lutawan *v.* Lachya, 36 A. 69 (F.B.) (1913) [authority of guardians of minor to agree to reference]; Parsidh Narain Singh *v.* Ghanshyam Narain Singh, 9 C. W. N. 873 [award on reference not agreed to by all parties]; Inder Subbarami *v.* Kandadai Rajamannar, 26 M. 47 [reference on petition not joined in by all the parties to the suit]; Kadhu Singh *v.* Baljit Singh, 29 A. 423 [application for reference signed by pleader holding defective *vakalat-namah*]; Pitam Mal *v.* Sadiq Ali, 29 A. 229; Ishar Das *v.* Keshab Deo, 32 A. 657 (1910) [meaning of words "all the parties to a suit"]; Ramjeawan Ram *v.* Kali Charan Singh, 29 A. 429 [authority of pleader to agree to reference]; Haji Wedina Casseem *v.*

* The cases here noted are decisions subsequent to the last edition of O'Kinealy's Code and reported up to and including September, 1914.

Luxmibai, 1 Bom. L. R. 617 [Court has no power of its own motion to order reference—absence of written application]; Lal Mohun Pal *v.* Surya Kumar Das, 11 C. W. N. 1152 [reference not concurred in by all parties]; Harakbhai *v.* Jamrabai, 15 Bom. L. R. 340 (1912); 37 B. 639 [this schedule does not contemplate reference to arbitration by parties to a pending suit, outside that suit and without intervention of Court]; Jadu *v.* Kailas, 37 C. 63 (1909) [award upon a private reference]; Sabta Prasad *v.* Dharam Kirti, 35 A. 107 (1912).

Appointment of arbitrator.

2. The arbitrator shall be *appointed* in such manner as may be agreed upon between *the parties*.

Order of reference.

3. (*1*) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the *making* of the award, and *shall* specify such time in the order.

(*2*) *Where* a matter is referred to arbitration, the Court shall not, save *in the manner and to the extent* provided in this schedule, deal with *such matter* in the same suit.

References.—Sita Ram *v.* Bhawani Din Ram, 26 A. 105 [delivery of award within time fixed by Court]; Asad-ul-lah *v.* Muhammad Nur, 27 A. 459 [validity of award made but not reaching the Court within the time limited]; Dutta *v.* Khedu, 33 A. 645 (1911); Lachman Das *v.* Abparkash, 30 A. 169 (1908) [omission to fix date of delivery is fatal to award]; Pachkauri Ram *v.* Nand Rai, 30 A. 505 (1908) [no second reference on same submission].

Where reference is to two or more, order to provide for difference of opinion.

4. (*1*) *Where* the reference *is* to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

(*a*) by the appointment of an umpire;

or

(*b*) by declaring that, if the *majority* of the arbitrators agree, the decision of the majority *shall prevail*; or

(*c*) by empowering the arbitrators to appoint an umpire; or

(*d*) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(*2*) *Where* an umpire is appointed, the Court shall fix such time as it thinks reasonable for the *making* of his award in case he is required to act.

Power of Court to appoint arbitrator in certain cases.

5. (*1*) *In any of the following cases, namely*:—

(*a*) *where* the parties cannot agree *within a reasonable time* with respect *to the appointment of an arbitrator*, or the person *appointed* refuses to accept the *office of arbitrator, or*

(*b*) *where* an arbitrator or umpire—

(*i*) dies, or

(*ii*) refuses or neglects to act or becomes incapable *of* [s. 510.] *acting*, or

(*iii*) leaves British India *in* circumstances showing that he will probably not return at an early date, or

(*c*) where the arbitrators are empowered by the order of [s. 511.] reference to appoint an umpire and fail to do so,

any party may serve *the other party or* the arbitrators, *as the case may be*, with a written notice to appoint an *arbitrator or* umpire.

(*2*) If, within seven *clear* days after such notice has been served or such further time as the Court may in each case allow, *no arbitrator or* no umpire is appointed, *as the case may be*, the Court may, on application *by* the party who *gave* the notice, *and after giving the other party an opportunity of being heard*, appoint an *arbitrator or* umpire *or make an order superseding the arbitration, and in such case shall proceed with the suit.*

References.—Jamna Kunwar *v.* Nasir Ali, 24 A. 412 [arbitrators neglecting to file award]; Mirza Sadik *v.* Musst Kaniz, P. C., 15 C. W. N 1005 (1911); 38 I. A. 181; 14 C. L. J. 313 [not necessary that the arbitrator who refuses must have accepted office before refusing].

Powers of arbitrator or umpire appointed under paragraph 4 or 5.

6. Every arbitrator or umpire appointed under paragraph [s. 512.] 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Summoning witnesses and default.

7. (*1*) The Court shall issue the same processes to the [s. 513.] parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(*2*) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

Extension of time for making award.

8. *Where* the arbitrators *or the umpire* cannot complete [s. 514.] the award within the period specified in the order, the Court may, if it thinks fit, either *allow* further time, and from time to time, *either before or after*

he expiration of the period fixed for the *making* of the award, enlarge *such* period; or *may* make an order superseding the arbitration, and in such case shall proceed with the suit.

References.—Janna Kunwar *v.* Nasir Ali, 24 A. 312 [order for supersession]; Sitaram *v.* Bhawani Din Ram, 26 A. 105 [delivery of award within time fixed]; Asad-ul-lah *v.* Mahammad Nur, 27 A. 459 [here the completion and delivery of the award are not distinguished the one from the other].

Where umpire may arbitrate in lieu of arbitrators.

9. *Where* an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

(*a*) if they have allowed the appointed time to expire without making an award, or

(*b*) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

Award to be signed and filed.

10. *Where* an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

References.—See Nobin Kally Dabee *v.* Ambica Churn Banerjee, 5 C. W. N. 603 [application to set aside award—time from which limitation begins to run]; Asad-ul-lah *v.* Mahommed Nur, 27 A. 459 [meaning of word "made"]; Benode *v.* Pran Chandra, 14 C. L. J. 143 (1898) [award void when arbitrator signs a blank paper on which the decision is to be written by other arbitrators].

Statement of special case by arbitrators or umpire.

11. Upon any reference by an order of the Court, the arbitrator or umpire may, with the *leave* of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and *shall order* such opinion *to* be added to and form part of the award.

References.—Purshotum *v.* Ramgopal, 35 M. 130 (1910). The mere use of the word "award" does not convert a reference to the Court for its opinion upon a difference between arbitrators into an award in the form of a special case. And see Aishabai *v.* Essaji, 38 B. 60 (1913).

Power to modify or correct award.

12. The Court may, by order, modify or correct an award,—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration

and such part can be separated from the other part and does not affect the decision on the matter referred; or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(*c*) *where the award contains a clerical mistake or an error arising from an accidental slip or omission.*

Reference.—Narsingh *v.* Ajodhya, 16 C. W. N. 256 (1911); 15 C. L. J. 110 [latitude of arbitrators].

13. The Court may also make such order as it thinks fit respecting the costs of the arbitration *where* any question arises respecting such costs and the award contains no sufficient provision concerning them. [s. 519.]

Order as to costs of arbitration.

14. The Court may remit the award or any matter referred to arbitration to the re-consideration of the same arbitrator or umpire, upon such terms as it thinks fit,— [s. 520.]

Where award or matter referred to arbitration may be remitted.

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, *unless such matter can be separated without affecting the determination of the matters referred;*

(*b*) where the award is so indefinite as to be incapable of execution;

(*c*) where an objection to the legality of the award is apparent upon the face of it.

References.—Dhanjibhai Gudharbhai *v.* Mathurbhai Ghilabhai, 28 B. 287 [see notes to next clause]; Mustafa Khan *v.* Phulja Bibee, 27 A. 526 [see notes to paras. 20, 21]; Thereevenga Datheengar *v.* Vaidanatha, 29 M. 303 [award determining matters not referred].

15. (*1*) An award remitted under paragraph 14 becomes void on *failure* of the arbitrator or umpire to re-consider it. But no award shall be set aside except on one of the following grounds, namely:— [s. 521.]

Grounds for setting aside award.

(*a*) corruption or misconduct of the arbitrator or umpire;

(*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;

(*c*) the award having been made after the issue of an order by the Court superseding the arbitration and *proceeding with* the suit *or after the expiration of the period allowed by the Court, or being otherwise invalid.*

(*2*) *Where an award becomes void or is set aside under clause* (*1*), *the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.*

References.—Dhanjibhai Gudharbhai *v.* Mathurbhai Ghilabhai, 28 B. 287 [not sufficient merely to allege a ground under this or last clause: it must also be proved]; Kali Charan Sirdar *v.* Sarat Chunder Chowdhury, 7 C. W. N. 545; 30 C. 397 ["misconduct" does not necessarily imply "corruption"; jurisdiction of Small Cause Court]; Damodar Trimbak *v.* Raghunath Hari, 4 Bom. L. R. 267; 26 B. 551 [order setting aside award is not subject to revision]; Ram Narain Roy *v.* Baij Nath Malla, 29 C. 36 [misconduct of arbitrator]; Nida Marthi Mukkanti *v.* Thammana Ramayya, 26 M. 76 [Munsiff acting as arbitrator]; Asad-ul-lah *v.* Muhammad Nur, 27 A. 459 [meaning of word "made"]; Ganga Prasad *v.* Kura, 28 A. 408 [no appeal from order setting aside award]; but see Achuthayya *v.* Thimmayya, 31 M. 345 (1908) (*contra*); Waljie Mathura Das *v.* Ebji Umersey, 29 B. 285 [see next clause]; Nadear Chand *v.* Gobind Chandar, 2 C. L. J. 61 [misconduct]; Behari Lal *v.* Chunni Lal, 29 A. 457 [misconduct]; Aishabai *v.* Essaji, 15 Bom. L. R. 392 (1913) [honest though mistaken admission of a document in evidence by umpire]; Ganesh *v.* Malida, 13 C. L. J. 399 (1911); Shrib Krishna *v.* Satish, 38 C. 522 (1911); Haji Ahmed *v.* Essaji, 14 Bom. L. R. 1007 (1912) [private enquiries by arbitrator]; Amir Begam *v.* Badr-ud-din, P. C., 19 C. L. J. 495 (1914) [misconduct]; Buccleugh *v.* Metropolitan Board of Works, 5 H. L. 418 (1872) [misconduct].

Judgment to be according to award.

16. (*1*) *Where* the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to *pronounce* judgment according to the award.

(*2*) Upon the judgment so *pronounced* a decree shall follow, *and* no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

References.—Shyama Charan Pramanik *v.* Prohlad Durwan, 8 C. W. N. 390 [second appeal lies from decree of Appellate Court made in accordance with an award by an arbitrator to whom the case had been referred by the first Court and whose award the first Court had set aside]; Debandra Nath Chatterjee *v.* Sarbomangala Debi, 8 C. W. N. 916 [no appeal on ground of misconduct]; Ghulam Jelani *v.* Muhammad Husain, 4 Bom. L. R. 161; 29 C. 167; 6 C. W. N. 226 [appeal]; Subbiah Iyer *v.* Subramania Aiiar, 31 M. 470

(1908); Chooney Money *v.* Ram Kinkar Dutt, 28 C. 115; 5 C. W. N. 242 [referees valuators not arbitrators]; Indur Subbarami *v.* Kondadai, 26 M. 47 (1902) [appeal] [not followed in Konakku Nagalinga *v.* Nagalinga Naik, 32 M. 510 (1909)]; Gobardhan Das *v.* Jai Kishore, 22 A. 224 [appeal]; Parsidh Narain Singh *v.* Ghanshyam Narain Singh, 9 C. W. N. 873 [appeal and second appeal lie from decree passed on award on reference not agreed to by all parties]; Waljee Mathura Das *v.* Ebji Umersey, 29 B. 285 [appeal]; Nadiar Chand *v.* Gobind Chandar, 2 C. L. J. 61, 65 [appeal]; Sham Lal *v.* Misri Kunwar, 29 A. 426 [appeal]; distinguished in Behari Lal *v.* Chunni Lal, 29 A. 457 [appeal]; Ramesh Chandra Dhar *v.* Karunamoye Dutt, 33 C. 498 [appeal]; Chairman of Purnea Municipality *v.* Siva Sunkar Ram, 33 C. 899 [appeal]; Janokey Nath Guha *v.* Brojo Lall Guha, 33 C. 757 [see clause 21]; Abdul Tahir *v.* Azmut Bibi, 2 C. L. J. 30 [award, decree made in terms of, by Appellate Court, if appealable]; Chintamoney *v.* Haladhar, 10 C. W. N. 601 (appeal). [See notes to clause 20.] Shib Kristo *v.* Satish, 39 C. 822 (1912); and see Rangoon Botatoung Co. *v.* Collector Rangoon (P.C.), 40 C. 21 (1912) [appeal to Privy Council]; Surja Narain *v.* Bunwari Jha, 18 C. L. J. 35 (1913) [no appeal, though validity of award assailed].

Order of reference on agreements to refer.

Application to file in Court agreement to refer to arbitration.

17. (*1*) *Where* any persons agree in writing that any difference between them, shall be referred to arbitration, the parties to the *agreement*, or any of them, may apply *to any Court having jurisdiction in the matter to which the agreement relates*, that the agreement be filed in Court. [s. 523.]

(*2*) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application *has* been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(*3*) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(*4*) *Where* no sufficient cause *is* shown, the Court *shall order* the agreement to be filed, and shall make an order of reference *to the arbitrator appointed in accordance with the provisions of the agreement*, or, *if there is no such provision and the parties cannot agree, the Court may appoint an* arbitrator.

References.—Perumalla Satya Narayana *v.* Perumalla Venkata Rangayya, 37 M. 112; Wali Muhammad *v.* Bahawal Baksh, 28 P. R. (1914); Jagan Nath *v.*

Nanak Chand, 9 P. R. (1913); Dutta *v.* Khedu, 33 A. 645 (1911); Ghulam Khan *v.* Muhammad Hassan, P. C., 29 C. 167 (1902); Venkatachala Reddi *v.* Rangiah Reddi, 36 M. 353 (1911) [order filing an agreement to arbitrate is a decree and appealable]. [See sect. 104 (*d*).] See also Surya Narayan Rao *v.* Surabaiah, 21 M. L. J. 263 (1911); Thiruvengada Thiengar *v.* Vaidinatha Ayyar, 29 M. 303 (1906) [death of one of parties—application by legal representative]; Tin Coury Dey *v.* Fakir Chand Dey, 30 C. 218 [agreement to refer not in writing—agreement in pending suit]; Sheo Dal *v.* Sheo Shankar Singh, 27 A. 53 [agreement to refer made pending suit—such agreement a bar to continuance of suit.]

Stay of suit where there is an agreement to refer to arbitration.

18. *Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.*

k.] **Provisions applicable to proceedings under paragraph 17.**

19. The foregoing provisions, as far as they are consistent with any agreement filed *under paragraph 17*, shall be applicable to all proceedings under *the* order of reference made by the Court *under that paragraph*, and to the award and to the decree *following* thereon.

Arbitration without the intervention of a Court.

.] **Filing award in matter referred to arbitration without intervention of Court.**

20. (*1*) *Where* any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to *any* Court having jurisdiction over the *subject-*matter *of* the award that the award be filed in Court.

(*2*) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(*3*) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to

show cause, within a time specified, why the award should not be filed.

References.—Mahomed Wahiduddin *v.* Hakiman, 29 C. 278 [objection to validity of reference]; Macnaghten *v.* Rameshwar Sing, 30 C. 831 [valuation not an award]; Seshayya *v.* Chengayya, 24 M. 31 [award relating to property partly outside jurisdiction]; Ghulam Jilani *v.* Muhammad, 6 C. W. N. 226 [scheme of Code; referred to in Kunji Lal *v.* Durga Prasad, 32 A. 484 (1910)]; Narsing Das *v.* Ajodhya Prasad, 31 C. 203 [the words in the former section "the matter to which the award relates" refer to the subject-matter of the arbitration and not the matters actually awarded]; Mohes Chunder *v.* Amar Chand, 19 C. L. J. 260 (1913); Gauri Shankar *v.* Maida Koer, 31 C. 516 [withdrawal of application]; Ponnusami Mudali *v.* Mandi Sandara, 27 M. 255 [appeal, revision]; Kalika Ram *v.* Babu Lal, 26 B. 205 [appeal]; Mustafa Khan *v.* Phuljâ Bibi, 27 A. 526 [no power to amend or remit]; distinguished in Bahadur Singh *v.* Nagipuran, 30 A. 151 (1908); Thiruvengadathiengar *v.* Vaidinatha, 29 M. 305 [order on application is decree and appealable; see next clause]; Chintamoney *v.* Haladhar, 10 C. W. N. 601 [appeal; distinction between cases when application to file award is allowed and when it is refused]; Najm-ud-din Ahmad *v.* Albert Puech, 29 A. 584 [decree on award made without allowing time to file objections—appeal]; Bhajahari Saha *v.* Behary Lal Basak, 33 C. 881 [a valid award is operative though neither party has sought to enforce it]; Tek Lal Singh *v.* Sripati, 19 C. L. J. 123 (1913); Basant Lal *v.* Kanye Lal, 28 A. 21 [order refusing to file award; appeal]; Ganesh Singh *v.* Kashi Singh, 28 A. 621 [jurisdiction of Court to decide as to validity of reference, and see Manilal *v.* Vanmali Das, 29 B. 621]; Abdul Ali *v.* Anwar Ali, 11 C. W. N. 220 [appeal]; Raghavendra *v.* Gururao, 15 Bom. L. R. 362 (1913) [scope of clause]; Ramdhari *v.* Ram Charitter, 38 C. 143 (1910) [rejection of application out of Court]; Narsingh *v.* Ajodhya, 16 C. W. N. 256 (1911); 15 C. L. J. 110 [filing award in part]; Muhammad Ibrahim *v.* Ahmad Said, 32 A. 503 (1910); Nagendra *v.* Harendra, 16 C. W. N. 34 (1911); Dhanpat Rai *v.* Musst Kahan Devi, 30 P. R. 109 (1914); Thiruvengadathiengar *v.* Vaidinatha Ayyar, 29 M. 303 (1905) [award determining matters not referred]. See cases cited under clause 16, *ante*.

Filing and enforcement of such award.

21. (*1*) *Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where* no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 *is proved,* the Court shall order the award to be filed *and shall proceed to pronounce judgment according to the award.* [s. 526.]

(*2*) *Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.*

References.—Protap Chunder Dey *v.* Toolsey Dass Dey, 29 C. 93 [sections of Code applicable to arbitrations in a suit]; Gobardhan Dass *v.* Jai Kishen Das,

22 A. 224 [appeal: undue influence—coercion]; Gridharbhai *v.* Mathurbhai Ghilabhai, 28 B. 287 [proof of allegations against award]; Mustafa Khan *v.* Phulja Bibi, 27 A. 526 [in last clause]; Janokey Nath Guha *v.* Brojo Lal Guha, 33 C. 757 [appeal lies from order directing award to be filed]; Abdul Tahir *v.* Azmut Bibi, 2 C. L. J. 88 [order refusing to file award is a decree]; Chintamoney *v.* Haladhar, 10 C. W. N. 601 [see clause 20]; Abdul Ali *v.* Anwar Ali, 11 C. W. N. 220 [ibid.]; Ganesh *v.* Malida, 13 C. L. J. 399 (1911) [order made under this clause is appealable under sect. 104, cl. (*f*);] Dhanpat Rai *v.* Musst Kahan Devi, 30 P. R. 109 (1914); Bhagat Ram *v.* Pares Ram, 84 P. R. (1907).

Exclusion of certain words in the Specific Relief Act, 1877.

22. *The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply.*

Forms.

23. *The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be used for the respective purposes therein mentioned.*

APPENDIX.

No. 1.

Application for an Order of Reference.

(Title of suit.)

1. This suit is instituted for (*state nature of claim*).

2. The matter in difference between the parties is (*state matter of difference*).

3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.

4. The applicants therefore apply for an order of reference.

A. B.
C. D.

Dated the day of 19 .

Note.—If the parties are agreed as to the arbitrators it should be so stated.

No. 2.

Order of Reference.

(Title of suit.)

Upon reading the application presented on the day of 19 it is ordered that the following matter in difference arising in this suit, namely :—

be referred for determination to X and Y or in case of their not agreeing then to the determination of Z, who is hereby appointed to be umpire; and such arbitrators are to make their award in writing on or before the day of 19 , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 3.

Order for Appointment of New Arbitrator.

(Title of suit.)

Whereas by an order, dated the day of 19 [*state order of reference and death, refusal, etc., of arbitrator*], it is by consent ordered that Z be appointed in the place of X (deceased, or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order; and it is ordered that the award of the said arbitrators be made on or before the day of 19 .

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No 4.

SPECIAL CASE.

(*Title of suit.*)

In the matter of an arbitration between A. B. of and C. D. of the following special case is stated for the opinion of the Court :—

(*Here state the facts concisely in numbered paragraphs.*)

The questions of law for the opinion of the Court are :—

First, whether_____

Secondly, whether_____

X.
Y.

Dated the day of 19 .

No. 5.

AWARD.

(*Title of suit.*)

In the matter of an arbitration between A. B. of and C. D. of :—

WHEREAS in pursuance of an order of reference made by the Court of and dated the day of 19 the following matter in difference between A. B. and C. D., namely,_____

has been referred to us for determination ;

Now we, having duly considered the matter referred to us, do hereby make our award as follows :—

We award—

(1) that_____

(2) that_____

Dated the day of 19 .

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

1. *Where* the execution of a decree has been transferred [s. 321.] *to* the Collector *under section 68, he* may—

Powers of Collector.

(*a*) proceed as the Court would proceed *when the sale of immoveable property is postponed in order to enable the judgment-debtor to raise the amount of the decree;* or

(*b*) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or

(*c*) sell the property ordered to be sold or so much thereof as may be necessary.

This schedule deals with the functions of the Collector as the authority invested with jurisdiction to see that the decree is satisfied. The authority is given for the purpose of enabling him to determine the best mode of satisfying the decree. But his discretion does not extend to any jurisdiction to determine whether the decree has been satisfied or not.(1)

2. *Where* the execution of a decree, not being a decree [s. 322.] ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for *the payment of* money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.

Procedure of Collector *in special cases.*

"**Powers.**"—The Collector, it has been held, is limited to one or other of the courses specifically mentioned in the section.(2)

(1) Bhurchand *v.* Vira, 14 Bom. L. R. 787 (1912); 37 B. 32.

(2) Madhavji Karandikar *v.* Hari Chikne, 7 B. 332 (1883).

Notice to be given to decree-holders and to persons having claims on property.

3. (*1*) In *any such* case *as is referred to* in *paragraph 2*, the Collector shall publish a notice, *allowing a period of sixty days from the date of its publication for compliance and* calling upon—

(*a*) every person holding a decree for *the payment of* money against the judgment-debtor capable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for *the payment of* money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder;

(*b*) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(*2*) Such notice shall be published by being *affixed on a conspicuous part of* the court-house of the Court which made the original order *for sale*, and *in* such other places (if any) as the Collector thinks fit; *and* where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

Amount of decrees *for payment of* money to be ascertained, and immoveable property available for their satisfaction.

4. (*1*) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, and may, from time to time, adjourn such hearing and inquiry.

(*2*) *Where* there *is* no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

(*3*) *Where* any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order *for sale*, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof *is* within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, *who* shall then draw up a statement as above provided in accordance with such decision.

Amount of decrees to be ascertained and property available for their satisfaction.—It was held that the assignees of a decree for money obtained against a person whose property had been taken over by the Collector under sect. 326, Act X. of 1877, whilst such property was under the management of the Collector, were not entitled to be placed on the list of creditors prepared by the Collector under sect. 322B of the last Code. An application to be placed on the said list of creditors should be made to the Collector and not to the District Judge.(1) An appeal from a decision under this section by which a disputed claim is settled, has, in Madras, been treated as a miscellaneous appeal, *i.e.* an appeal from a decree not passed in a regular suit.(2)

[s. 322C.]

5. The Collector may, instead of himself issuing the notices and holding the inquiry required by *paragraphs 3 and 4*, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by *paragraphs 3 and 4* and transmit such statement to the Collector.

***Where* District Court may issue notices and hold inquiry.**

Issue of notice and inquiry by District Court.—Under the Bengal, North-West Provinces and Assam Civil Courts Act, 1887, the High Court has power to authorize Subordinate Judges and Munsiffs to take cognizance of references by Collectors under sect. 322C of the former Code (Act XII. of 1887, sect. 23 (2), (*e*)).

[s. 322D.]

6. The decision by the Court of any dispute arising under *paragraph 4 or paragraph 5* shall, as between the parties thereto, have the force of and be appealable as a decree.

Effect of decision of Court as to dispute.

(1) Murari Das *v.* Collector of Ghazipur, 18 A. 313 (1896).

(2) Srinivasa *v.* Peria, 4 M. 420 (1882); referred to in Narayan *v.* Bhagvant, 10 B. 238 (1886); diss. from Ahmad Khan *v.* Madho, 7 A. 565 (1885).

Effect of decision.—As to the nature of the appeal, and the Court-fee duty payable, see the cases cited in the notes to paragraph 4.

Scheme for liquidation of decrees *for payment of* money.

7. (*1*) *Where* the amount to be recovered and the property available have been determined as provided in *paragraph 4 or paragraph 5*, the Collector may,—

(*a*) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or,

(*b*) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding *the original* order *for sale*)—

(*i*) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property; or

(*ii*) by mortgaging the whole or any part of such property; or

(*iii*) by selling part of such property; or

(*iv*) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or

(*v*) partly by one of such modes, and partly by another or others of such modes.

(*2*) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(*3*) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal

under this *clause*, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(*4*) In proceeding under this *paragraph* the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the *Local Government*.

Liquidation of money decree.—With regard to the rules referred to in last paragraph, see N.W.P. list of Local Rules and Orders, ed. 1894, p. 112; Burmah Rules Manual, ed. 1897, p. 114; Central Provinces List of Local Rules and Orders, ed. 1896, p. 45.(1) In the case of the Central Provinces the notifications are also issued under sect. 320 of the last Code. As for interest to be taken into account, see Burchand *v.* Vira, 14 Bom. L. R. 787 (1912); 37 B. 32. It has been held that the powers here conferred on the Collector and those conferred on the Talukdari Settlement officers by sect. 3 of the Bombay Talukdari Settlement Act are both enabling and are not necessarily contradictory.(2)

Recovery of balance (if any) after letting or management.

8. *Where*, on the expiration of the letting or management under *paragraph 7*, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks *from* the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly. [s. 324.]

Collector to render accounts to Court.

9. (*1*) The Collector shall, from time to time, render to the Court which made the original order *for sale* an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this *Schedule*, and shall hold the balance at the disposal of the Court. [s. 324A

(*2*) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a

(1) O'Kinealy, C. P. C. (2) Purshottam *v.* Harbhanji, 33 B. 443 (1909).

superior holder in respect of such property or part, and, if the Collector so directs, the expenses of *any* witnesses summoned by him.

(*3*) *The* balance shall be applied by the Court—

(*a*) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

(*b*) where the Collector has proceeded under *paragraph 1*, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section *73* direct; or

(*c*) where the Collector has proceeded under *paragraph 2*,—

(*i*) in keeping down the interest on incumbrances on the property;

(*ii*) *where* the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and

(*iii*) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(*4*) No other holder of a decree for *the payment of* money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.

Reference.—Govind *v.* Sakharam, 36 B. 519 (1911); 14 Bom. L. R. 527, [at the disposal of the Court].

Sales how to be conducted.

10. *Where* the Collector sells any property under this *Schedule*, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

(*a*) fix a reasonable reserved price for each lot;

(*b*) adjourn the sale for a reasonable time whenever, *for* reasons *to be* recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;

(*c*) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

[s. 325A.]

Restrictions as to alienation by judgment-debtor or his representative, and prosecution of remedies by decree-holders.

11. (*1*) So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by *paragraphs 1 to 10*, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for *the payment of* money.

(*2*) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under *paragraph 7*.

(*3*) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this *paragraph* in respect of any remedy of which the decree-holder has been temporarily deprived.

Object of section.—As to the object of this section and the exclusion from computation of the time during which the property is under the management of the Collector, see case noted below.(1)

[s. 325B

Provision where property is in several districts.

12. *Where* the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by *paragraphs 1 to 10* shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

[s. 325C

Powers of Collector to compel attendance and production.

13. In exercising the powers conferred on him by *paragraphs 1 to 10* the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

(1) Keshav Lal *v.* Pitamber Das, 19 B. 261, 265, 266 (1894); Magniram *v.* Bakubai, 36 B. 510 (1912); 14 Bom. L. R. 598; and see Muhammad *v.* Muhammad, 33 A. 233 (1910) (meaning of "alienate"); and see also Khushalchand *v.* Nandram, 35 B. 516 (1911) (collector's powers cease with satisfaction of decree).

THE FOURTH SCHEDULE.

(*See Section 155.*)

ENACTMENTS AMENDED.

1.	2.	3.	4.
Year.	No.	Short title.	Amendment.
1870	VII	The Court-fees Act, 1870.	In article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted. From article 11 of Schedule II the words "from an order rejecting a plaint or" shall be omitted. For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely:— "Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."

THE FIFTH SCHEDULE.

(*See Section 156.*)

ENACTMENTS REPEALED.

1.	2.	3.	4.
Year.	No.	Subject or short title.	Extent of repeal.
		Acts of the Governor General in Council.	
1870	VII	The Court-fees Act, 1870.	Section 16, and article 15 of Schedule II.
1882	IV	The Transfer of Property Act, 1882.	Sections 85 to 90 inclusive, 92 to 94 inclusive, 96, 97, 99 and in section 100 the words "and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property."
,,	XIV	The Code of Civil Procedure.	The whole Act.
,,	XV	The Presidency Small Cause Courts Act, 1882.	The last paragraph of section 3.
1888	VI	The Debtors Act, 1888.	Sections 2 to 8.
,,	VII	The Civil Procedure Code Amendment Act, 1888.	So much as is unrepealed, except section 1, section 65 and section 66, sub-sections (*1*), (*3*) and (*4*).
,,	X	The Presidency Small Cause Courts Law Amendment Act, 1888.	So much as is unrepealed.
1890	VIII	The Guardian and Wards Act, 1890.	Section 53.
1891	XII	The Repealing and Amending Act, 1891.	So much as relates to Act XIV of 1882 and Act VII of 1888.
1892	VI	The Indian Limitation Act and Civil Procedure Code Amendment Act, 1892.	In the title and preamble the words "and the Code of Civil Procedure" and sections 2, 3 and 4.
1894	V	The Civil Procedure Code Amendment Act, 1894.	The whole Act.
1895	VII	The Punjab Laws Act Amendment Act, 1895.	Sections 1 and 2.
,,	XIII	The Civil Procedure Code Amendment Act, 1895.	The whole Act.
1900	VI	The Lower Burma Courts Act, 1900.	So much of the schedules as relate to Act XIV of 1882.

J. M. MACPHERSON,
Secretary to the Government of India,

APPENDIX A.

INDIA.

ORDERS, ETC., OF THE GOVERNOR GENERAL,
UNDER THE CODE OF CIVIL PROCEDURE,
CORRECTED UP TO JUNE, 1914.

Subject.	Number and date.	Year and page of India Gazette, Part
Declaration under Section 650A of the Code (Act XIV of 1882) as to service of summons of Mysore Courts by Courts in British India.	No. 232, I. I. Date, 25. 11. 81.	1881, p. 589.
Ditto: of Hyderabad Courts	No. 752, I. B. Date, 17. 3. 99.	1899, p. 153.
Ditto: of Courts in certain Tributary States.	No. 2806, I. B. Date, 10. 7. 08.	1908, p. 610.
	No. 3266, I. B. Date, 12. 8. 08.	1908, p. 774.
Declaration under Section 29 of the Code (Act V of 1908) as to service of summons of certain Courts in the Benares State by Courts in British India.	No. 1340, I. B. Date, 30. 6. 11.	1911, p. 490.
Ditto: of Courts in certain States named.	No. 1844, I. B. Date, 30. 6. 11.	1911, p. 491.
Application of Section 650A of the Code (Act XIV of 1882) to the Court of Political Agent, Sholapur.	No. 3491, I. B. Date, 15. 10. 85.	1885, p. 584
Ditto: to certain Courts named.	No. 2417, I. Date, 31. 5. 87.	1887, p. 256.
	No. 327, E. C. Date, 31. 1. 07.	1907, p. 74.
Ditto: to certain Rajpipla Courts.	No. 4313, I. A. Date, 22. 11. 97.	1897, p. 1061.
Ditto: to certain Courts in Travancore, Cochin, Banganapalle, Padukota, and Sandur.	No. 3095, I. A. Date, 16. 8. 01.	1901, p. 582.
	No. 850, I. A. Date, 28. 2. 02.	1902, p. 171.
Application of Section 650A of the Code (Act XIV of 1882) to certain Courts in Travancore.	No. 4229, I. A. Date, 16. 11. 01.	1901, p. 977.

Subject.	Number and date.	Year and page of India Gazette, Part I.
Application of Section 29 of the Code (Act V of 1908) to Courts in the Straits Settlement and Ceylon.	No. 244. Date, 16. 2. 09	1909, p. 152.
Ditto: to Courts in France, Spain, Belgium, Russia, Germany, and Portugal.	No. 852, C. Date, 3. 2. 13	1913, p. 102.
Ditto: to certain Courts named and service of summons of Courts in British India by such Courts.	No. 663, I. B. Date, 15. 3. 12.	1912, p. 349.
	No. 2444, I. B. Date, 26. 11. 12	1912, p. 1618.
	No. 512, I. B Date, 17. 3. 13.	1913, p. 233.
	No. 688, I. B. Date, 3. 4. 13.	1913, p. 329.
	No. 330, I. B. Date, 4. 3. 14.	1914, p. 324.
Declaration under Section 434 of the Code (Act X of 1877) as to execution of decrees of Courts in Cooch Behar by Courts in British India.	No. 53, F. Date, 7. 3. 79.	1879 p. 149.
Ditto: of Courts in Mysore.	No. 233, I. F. Date, 25. 11. 81.	1881, p. 589.
Declaration under Section 229B of the Code (Act XIV of 1882) as to execution of decrees of Courts in Travancore by Courts in British India.	No. 4035, I. Date, 10. 12. 85.	1885, p 667.
Ditto: of Courts in Cochin.	No. 4036, I. Date, 10. 12. 85.	1885, p. 667.
Ditto: of Chief Court of Padukottai.	No. 4395, I. A. Date, 8. 12. 04.	1904, p. 917.
Ditto: of Civil Courts in Baroda.	No. 2684, I. A. Date, 3. 7. 08.	1908, p. 591.
Declaration under Section 229B of the Code (Act XIV of 1882) of certain Courts in Native States.	No. 2877, I. A. Date, 13. 7. 06.	1906, p. 472.
	No. 3401, I. A. Date, 24. 8. 08.	1908, p. 805.
	No. 4428, I. B. Date, 29. 12. 08.	1909, p. 21.
	No. 659, I. B. Date, 1. 4. 09.	1909, p. 256.
	No. 419, I. B. Date, 15. 2. 12.	1912, p. 136.
	No. 688, I. B. Date, 3. 4. 13.	1913, p. 329.
Declaration under Section 44 of the Code (Act V of 1908) as to execution of decrees of certain Courts in Benares State by Courts in British India.	No. 1341, I. B. Date, 30. 6. 11.	1911, p. 490

Subject.	Number and date.	Year and page of India Gazette, Part I
Notification under Section 45 of the Code (Act V of 1908) as to execution of decrees of Courts in British India by Courts in territories named.	No. 2053, I. B. Date, 22. 9. 11.	1911, p. 782.
	No. 1147, I. B. Date, 23. 5. 12.	1912, p. 591.
	No. 513, I. B. Date, 17. 3. 13.	1913, p. 234.
	No. 688, I. B. Date, 3. 4. 13.	1913, p. 329.
Ditto: by Courts named.	No. 790, I. B. Date, 9. 4. 13	1913, p. 390.
Application of Section 45 of the Code (Act V of 1908) to the Court of the Political Officer in Sikkim.	No. 789, I. B. Date, 9. 4. 13.	1913, p. 390.
Ditto: to certain Courts specified and service of summons of Courts in British India by such Courts.	No. 786, I. B. Date, 9. 4. 13.	1913, p. 386.
	No. 787, I. B. Date, 9. 4. 13.	1913, p. 388.
	No. 3287, I. B. Date, 3. 10. 13.	1913, p. 905.
	No. 788, I. B. Date, 9. 4. 13.	1913, p. 390.
Declaration under Section 60 of the Code (Act V of 1908) of exemption from attachment or sale of stipends and gratuities of certain family pension funds.	No. 1. Date, 1. 1. 09.	1909, p. 5.
Delegation under Section 433 (4) of the Code (Act XIV of 1882) of functions conferred on the Governor General in Council by Sub-Sections (1), (2), and (3) thereof.	No. 1503, I. Date, 8. 5. 96.	1896, p. 322.
Ditto: under Section 86 (4) of the Code (Act V of 1908) of functions conferred by Sub-Sections (1), (2), and (3) thereof.	No. 749, I. B. Date, 27. 3. 12.	1912, p. 389.
Declaration under O. V, r. 26 (b) of the Code (Act V of 1908) as to service of summons of Courts in British India by Courts in the Kashmir State.	No. 2302, I. B. Date, 29. 11. 10.	1910, p. 1163.
Ditto: by Courts in certain States named.	No. 1345, I. B. Date, 30. 6. 11.	1911, p. 492.
Ditto: by certain Courts of the Hyderabad State.	No. 1037, I. B. Date, 9. 5. 12.	1912, p. 540.
Ditto: by certain Courts of the Benares State.	No. 929, I. B. Date, 3. 4. 13.	1913, p. 426.

Subject.	Number and date.	Year and page of India Gazette, Part I.
Direction under O. XXI, r. 48 (1) of the Code (Act V of 1908) as to service of notice of attachment of salary or allowance of persons employed in the Indian Telegraph Department and in the Post Office of India.	No. 3374–95. Date, 5. 5. 10.	1910. p. 365.
Ditto: of persons employed in the High Court, Calcutta, in the Home Department of the Government of India and in offices subordinate to that Department.	No. 1662. Date, 29. 11. 10.	1910, p. 1159.
Ditto: of persons employed in the Finance Department of the Government of India and in offices subordinate thereto.	No. 1153, A. Date, 24. 2. 11. No. 657, A. Date, 15. 10. 12.	1911, p. 126. 1912, p. 1150.
Ditto: of officers employed under the order of the Military Secretary to H. E. the Viceroy.	No. 792. Date, 25. 5. 11.	1911, p. 361.
Ditto: of persons employed in the offices of Government Examiners of Railway Accounts.	No. 657, A. Date, 15. 10. 12.	1912, p. 1150.
Ditto: of persons employed in the offices of the Accountant General, Behar and Orissa, and the Comptroller, Assam.	No. 619. A. Date, 17. 6. 13.	1913, p. 647.

APPENDIX B.

BENGAL.

ORDERS, ETC., OF THE BENGAL GOVERNMENT AND THE HIGH COURT, CALCUTTA, UNDER THE CODE OF CIVIL PROCEDURE, CORRECTED UP TO JUNE, 1914.

Subject.	Number and date.	Year and page of Calcutta Gazette, Part 1.
Declaration under Section 55 (2) of the Code (Act V of 1908) that no employee of the Telegraph Department shall be liable to arrest in execution of a decree unless seven days' notice has been given.	No. 1503, J. D. Date, 14. 7. 10.	1910, p. 989.
Rule under Section 327 of the Code (Act XIV of 1882) for regulating the sale of land in execution of decrees (Sambalpur District).	No. 3880. Date, 5. 10. 96.	Central Provinces Revenue Manual, 1907, Vol. III., Circular No. 1V.-9, p. 76.
Declaration under Section 320 of the Code (Act X of 1877) that execution of decrees in certain cases shall be transferred to the Deputy Commissioner, Sambalpur District.	No. 4577. Date, 26. 11. 77.	Ditto.
Rules under Section 320 of the Code (Act XIV of 1882) for carrying out the provision of that Section.	No. 3158. Date, 27. 5. 04.	Ditto. pp. 77 to 84.
General rules under Section 122 of the Code (Act V of 1908) as to procedure.		See Rules of the High Court, Calcutta, Appellate Side, 1910.
Amendments in the above rules.	No., nil. Date, 27. 1. 11.	1911, pp. 120, 298.
Rules under Sections 122 and 128 (b) of the Code (Act V of 1908) relating to the Judicial business of Civil Courts subordinate to the High Court, etc.		See High Court Rules and Orders, Appellate Side, Civil, 1910, Vol. I.
Revised rule 26 for the Rules under Sections 122 and 128 (b) of the Code (Act V of 1908) relating to the Judicial business of Civil Courts subordinate to the High Court, etc.	No., nil. Date, 21. 2. 11.	1911, p. 318.

Subject.	Number and date.	Year and page of Calcutta Gazette, Part I.
Declaration under Section 645 of the Code (Act XIV of 1882) that Uriya is the Court language in the Sambalpur District.	No. 10967. Date, 10. 12. 02.	Central Provinces Gazette, 1902, Part III., p. 503.
Notification under Section 185A (1) of the Code (Act XIV of 1882) as to Judges who shall take down evidence with their own hands in the English language.	No., nil. Date, 26. 11. 92.	1892, p. 1063.
	No. 1174, J. D. Date, 7. 6. 07.	1907, p. 1012.
	No. 4338. Date, 21. 12. 08.	1908, p. 2065.
Ditto: under Section 138 (1) of the Code (Act V of 1908) as to Ditto.	No. 76, J. Date, 9, 1. 13.	1913, p. 68.
Empowering District Judges to appoint Commissioners to take affidavits (*vide* Section 139 (c) of the Code (Act V of 1908)).	No. 2000, J. D. Date, 16. 7. 09.	1909, p. 1003.
Direction under O. XXI, r. 48 (1) of the Code (Act V of 1908) as to service of notice of order attaching the salary or allowances of public officers and of servants of local authorities.	No. 2947, J. Date, 6. 10. 11.	1911, p. 1405
Rules under O. XXVI, r. 9, prov. of the Code (Act V of 1908) as to the persons to whom Commissions shall be issued.	No. 2004, J. Date, 16. 7. 09.	1909, p. 1003
	No. 3157, J. Date, 25. 11. 09.	1909, p. 1729.
	No. 1336, J. Date, 1. 5. 11.	1911, p. 668.
Rules under O. XXVI, r. 9, prov. of the Code (Act V of 1908) as to the persons by whom local investigations are to be held.	No. 2001, J. Date, 16. 7. 09.	1909, p. 1003.
	No. 2742, J. Date, 7. 10. 09.	1909, p. 1390.
Rules of practice for the Original Side of the High Court (*vide* Section 129 of the Code (Act V of 1908)).	No., nil. Date, 14. 2. 14.	1914, Part II, p. 305.

ANNULMENTS, ALTERATIONS AND ADDITIONS TO THE RULES IN THE FIRST SCHEDULE OF THE CODE MADE BY THE HIGH COURT, CALCUTTA.

THE CALCUTTA GAZETTE, 1910, PART I., P. 1344.

HIGH COURT NOTICE.

Notification.

The following Rule having been framed by the High Court of Judicature at Fort William in Bengal in the exercise of the power vested in it by section 122 of the Code

5 C

of Civil Procedure, 1908 (Act V of 1908), and sanctioned by the Governor-General in Council under section 126 of the same Code, is published for general information.

By order of the High Court,

R. L. Ross,
Registrar.

High Court, English Dept. (Civil), the 21st September, 1910.

RULE No. * OF 1910.

In the **form** of "Decree in Appeal," **No. 9** of **Appendix G** to the First Schedule of the Code of Civil Procedure, 1908 (Act V of 1908), *cancel* the words from "Memorandum of Appeal" to "the following reasons, namely :—"

* There is no number given in the Gazette.

APPENDIX C.

MADRAS.

ORDERS, ETC., OF THE MADRAS GOVERNMENT AND THE HIGH COURT, UNDER THE CODE OF CIVIL PROCEDURE,

CORRECTED UP TO DECEMBER, 1914.

Subject.	Number and date.	Year and page of Fort St. George Gazette, Part II.
General rules of procedure under Part X of the Code (Act V of 1908).		See the Rules of the High Court, Madras, Appellate Side, 1902, and The Civil Rules of Practice, Madras, 1905.
Substituting new rule for rule No. 531 of the Rules of the High Court, Madras, A. S., 1902.	No. 1422. Date, 16. 12. 09.	1909, p. 1791.
Adding new rule 16A to the above rules.	Ditto.	Ditto.
Substituting new rule for rule No. 277 of the Civil Rules of Practice, Madras, 1905.	Ditto.	Ditto.
Amending Rule 192 (1) of above Civil Rules.	Date, 3. 3. 11.	1911, p. 471.
Amending Rule 53 of above Civil Rules.	Date, 18. 7. 12.	1912, p. 1142.
Amending Rule 149 of above Civil Rules.	Date, 6. 12. 13.	1913, p. 2072.
Amending Rules 13 and 99 of above Civil Rules.	Date, 24. 3. 14.	1914, p. 679.
Adding new rules 100B and 100C to the Rules of the High Court, Madras, A. S., 1902.	Date, 13. 3. 11.	1911, p. 536.
Ditto: to the Schedule of rates in Rule 102 of Ditto.	Ditto.	Ditto.

Subject.	Number and date.	Year and page of Fort St. George Gazette, Part II.
Directions under Section 138 (1) of the Code (Act V of 1908) as to Judges who shall take down evidence with their own hands in the English language.	Date, 3. 6. 14.	1914, p. 1117.
	Date, 6. 11. 14.	1914, p. 2038.
	Date, 9. 11. 14.	Ditto.
	Date, 10. 11. 14.	Ditto.

ANNULMENTS, ALTERATIONS AND ADDITIONS TO THE RULES IN THE FIRST SCHEDULE OF THE CODE MADE BY THE HIGH COURT, MADRAS.

FORT ST. GEORGE GAZETTE.

1910, PART II., P. 876.

Notification dated 19th May, 1910.

Under the provisions of section 127 of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council, the following **amendment** has been made **to clause 4** of **Rule 3** of **Order XXXII** of Schedule I to the Code of Civil Procedure, 1908 :—

Omit the words "to the minor and" occurring after the words "except upon notice."

A. DAVIES,
Deputy Registrar.

High Court of Judicature, Madras,
19th May, 1910.

FORT ST. GEORGE GAZETTE.

1910, PART II., P. 1825.

Notification.

Under the provisions of Part X of the Code of Civil Proc
the previous sanction of His Excellency the Governor in Council, the High Court has made the following **rule**, which is **to be inserted as sub-rule (1-A) of Rule 7 of Order XXXII** of Schedule I of the said Code, and framed the following **form**, which is **to be added to Appendix D** to the said Schedule **as Form No. 24**, viz. :—

Rule.—"(1-A).—Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of a minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this Schedule."

Form.—"No. 24.—Decree sanctioning a compromise of a suit on behalf of a minor or lunatic."

(*Title.*)

This suit coming on this day for final disposal in the presence of, etc., and C. D., the defendant, a minor by E. F., his guardian *ad litem*, applying that this suit may be

compromised in the terms of an agreement in writing dated the day of and made between A. B., the plaintiff, of the one part, and the said C. D. by the said guardian *ad litem* of the other part (or, on the terms hereafter set forth), and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto: It is ordered as follows:—

(*Set out the terms of the compromise.*)

FOOTNOTE.—This rule and form supersede Rule No. 119 and Form No. 35 of the Civil Rules of Practice, 1905, and Rule No. 33A of the Rules of the High Court, Madras, Appellate Side.

H. D. C. REILLY,
Registrar.

High Court of Judicature, Madras,
30th November, 1910.

FORT ST. GEORGE GAZETTE.

1911, PART II., P. 666.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council the High Court has made the following **addition to Rule 4** of **Order III** of Schedule I of the said Code, viz.:—

"(4) Notwithstanding the termination of all proceedings in the suit so far as regards the client, the appointment of a pleader shall, unless otherwise provided therein or determined by the death of the client or the pleader or by revocation in accordance with the provisions of clause (2) of this rule, be deemed to authorise him to appear or to make any application or to do any act in connection with getting copies of documents and obtaining return of documents produced or filed in the suit or refund of moneys paid into Court in the suit."

H. D. C. REILLY,
Registrar.

High Court of Judicature, Madras,
3rd April, 1911.

FORT ST. GEORGE GAZETTE.

1911, PART II., P. 692.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council the High Court has made the following **addition to Rule 12** of **Order XX** of Schedule I of the said Code, viz.:—

"(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry; and in every case the Court of first instance shall, on the application of the decree-holder, inquire and pass the final decree."

H. D. C. REILLY,
Registrar.

High Court of Judicature, Madras,
12th April, 1911.

FORT ST. GEORGE GAZETTE.

1911, PART II., PP. 1695 TO 1702.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and all other powers hereunto enabling and with the previous sanction of His Excellency the Governor in Council. the High Court has made the following amendments and additions to the First Schedule of the said Code, viz. :—

(1) *In* **Order IV, Rule 2,** *number the present Rule* 2 (1) *and* **add as Rule 2 (2)**—

"Registers in accordance with Forms No. 14, 15, 16, 17, and 18 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits and cases specified therein."

(2) *In* **Order XXI, Rule 17, add as Rule 17 (5)**—

"Registers in accordance with Forms Nos. 19, 20, and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein."

(3) *In* **Order XLI, Rule 9, for Rule 9 (2) substitute**—

"Registers in accordance with Forms Nos. 22, 23, 24, and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein.

(4) *In* **Appendix H delete** *Forms* **Nos. 14 and 15 and add** *the* **following as** *Forms* **Nos. 14 to 25 :—**

Form No. 14.

REGISTER OF ORDINARY SUITS INSTITUTED.

Court
Year

Instructions.

If the suit has been received by transfer, or instituted under Order XXXVII, Schedule I, C.C.P., a note should be made to that effect at the head of the page.

2. If a suit is remanded under Rule 23, Order XLI, or restored to file under Rule 9 or Rule 13, Order IX, Schedule I, C.C.P., note under item 2 the date of restoration to file.

3. Under the head "*Particulars of Claim*" enter particulars required by *Clauses* (*g*) and (*h*) of Rule I, Order VII, Schedule I, C.C.P., and also the *value* of the suit as required by clause (*i*) of that order and with special reference to Judicial Statements Nos. VII and VIII and H.C. Circulars Nos. 1054 of 1870 and 2253 of 1894. Entries under heads 3, 4, and 5 should be full, for embodiment in the decree, as required by Rule 6, Order XX, Schedule I, C.C.P.

4. Note carefully the new heads 8 and 10 and fresh additions to heads 9 and 12.

5. The Certified Copies of Judgment and Decree in Second Appeal sent to the Lower Appellate Court should be forwarded by it to the Court of First Instance which will return them to the former Court after recording the necessary entries under head 9 of this Register.

6. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P., and also of any withdrawal of the claim or a portion of the claim against any of the defendants.

7. Any amendments or alterations made during the progress of the suit in the value of particulars of the claim or as to the date or place of cause of action should appear under head 5.

1. Ordinary Suit No. of 191 .

2. Date of { Presentation. / Filing.

3. Plaintiff—Name, description, and place of abode.
4. Defendant—Name, description, and place of abode.
5. Particulars of Claim—*Claim for*
 Cause of action arose at on
6. Date for *Defendant's first appearance.*
 Vakil for {Plaintiff. / Defendant.
7. Date of Judgment and result.
8. Number of application for review (or re-hearing) with result and date.
 Fresh Judgment, if any, with date.
9. First Appeal No. of 191 . Result with date.
 Second Appeal No. of 191 . Result with date.
10. Note of any orders passed under Rule 11, Order XX, Rule 2, etc., Order XXI, Schedule I, C.C.P.

11. *Execution*—

Number.	Date of Application.	Order and date.	Against whom.	For what, and amount, if for money.	Amount of costs.

12. *Return of Execution*—

Amount paid into Court.	Persons arrested.	Minute of other return than payment or arrest, and date of every return, *including entry of order in appeal with date.*

Form No. 15.

REGISTER OF SMALL CAUSE SUITS INSTITUTED.

Court
Year

Instructions.

If the suit has been received by transfer or remanded or restored to file, a note should be made to that effect at the head of the page.

2. Under the head "5. *Particulars of Claim*" enter particulars required by *Clauses* (*g*) and (*h*) of Rule 1, Order VII, Schedule I, C.C.P., and also the *value* of the suit as required by Clause (1) of that order. Entries under heads 3, 4, and 5 should be full, for embodiment in decrees, as required by Rule 6, Order XX, Schedule I, C.C.P.

3. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P.

4. Any amendments or alterations made during the progress of the suit in the

value or particulars of the Claim or as to the date or place of cause of action should appear under head 5.

1. Small Cause Suit No. of 191 .
2. Date of {Presentation. / Filing.
3. Plaintiff—Name, description, and place of abode.
4. Defendant—Name, description, and place of abode.
5. Particulars of Claim—*Claim for*
 Cause of action arose at on
6. Date for *Defendant's first appearance.*
 Vakil for {Plaintiff. / Defendant.
7. Judgment, date, and result.
8. Number of application for review (or re-hearing) with result and date.

 Fresh Judgment, if any, with date.

9. Revision Case No. of 191 , with result and date.
10. Note of proceedings, if any, taken under Rule 11, Order XX, Rule 2, etc., Order XXI, Schedule 1, C.C.P.
11. *Execution*—

Number.	Date of Application.	Order and date.	Against whom.	For what, and amount, if for money.	Amount of costs.	

12. *Return of Execution*—

Amount paid into Court.	Person arrested.	Minute of other return than payment or arrest, and date of every return.

Form No. 16.

REGISTER OF SUITS DISPOSED OF.

Court
Year

Instructions.

1. Separate registers must be kept for ordinary and small cause suits.
2. If the presiding officer of the Court is invested with extended small cause powers, the remarks column should show whether the value of the suit is between Rs.50 and Rs.100 or between Rs.100 and Rs.200.
3. The date to be entered in column 3 will always be the latest date. In the case of suits restored to file, the date of original institution should be entered.
4. When a suit is, after contest, compromised or withdrawn, a note of the fact should

be made in the column of remarks. It should also be stated whether the decree is appealable, and if so, to what Court.

Serial number.	Number of the suit disposed of.	Date of institution or of receipt of order of transfer.	Date of disposal.	Transferred to another Court.	Disposed of.											Actual number of days intervening between institution and disposal.		Amount decreed.	Remarks.
					Without trial.	Without contest.		With contest.											
						Compromised.	Decreed on confession.	*Ex parte.*		Decreed on reference to arbitration.	Decreed on oath.	Decreed after trial.				Uncontested (columns 7 to 10).	Contested (columns 11 to 16).		
								Decreed.	Dismissed.	In whole or part for plaintiff.	For defendant.	For plaintiff.	For defendant.	In whole or part for plaintiff.	For defendant.				
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				7	9	10	11	12	13	14	15	16	17	18	19	23	25	30	Corresponding columns of Statement No. IX, Part I (*a*).

Form No. 17.

REGISTER OF CIVIL MISCELLANEOUS CASES RECEIVED (ON THE SIDE).

Court
Year

Instructions.

1. In this register must be entered all cases ordered by H.C. Circular No. 557 of 1888 to be shown as Miscellaneous Applications for purposes of Judicial Statement No. IX, Part 2, as well as cases of Contempt of Court (*vide* H.C. Circular No. 2928 of 1892).

2. In the matter of references under the Land Acquisition Act, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference, in column 5 the name of the claimant, and in column 6 whether the reference is under Section 18, 29, or 30 of the Act.

3. In the matter of references under section 16 of Madras Regulation III of 1802, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference and the name of the deceased, in column 5 the name of the claimant, if any, in column 6 the words "Section 16, Madras Regulation III of 1802," and in the last column the number and date of reference, if any, made to Government and its result.

Number of miscellaneous cases.	Date of presentation.	Number of connected case, if any.	Name of petitioner, if any, and of his Vakil.	Name of defendant and of his Vakil.	Purport of case and section of law.	Final order with date.	Number of appeal with result and date.
1	2	3	4	5	6	7	8

Form No. 18.

REGISTER OF MISCELLANEOUS CASES DISPOSED OF.

Court
Year

Instructions.

1. This register will show all miscellaneous cases of every kind, whether instituted on the application of parties or of the Court's own motion, including cases of Contempt of Court (H.C. Circulars Nos. 557 of 1888 and 2928 of 1892).

2. The date to be entered in column 3 will always be the latest date. In the case of petitions restored to file, the date of original institutions should be entered and the date of restoration noted in the column of remarks.

Serial number.	Number of the miscellaneous case disposed of.	Date of institution, or of receipt of the order of transfer.	Disposed of.														Actual number of days intervening between institution and disposal.		Remarks.
			Date of disposal.	Transferred or registered as suit.	Without contest.				With contest.							Party committed for contempt of Court.			
					Without trial.	Compromised.	Ordered on confession.	*Ex parte.* Ordered.	Dismissed.	Ordered on reference to arbitration. In whole or in part for petitioner.	For respondent.	On oath. In whole or in part for petitioner.	On oath. For respondent.	After trial. In whole or in part for petitioner.	After trial. For respondent.		Uncontested (columns 7 to 10).	Contested (columns 11 to 16).	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	Corresponding columns of Statement No. IX, Part II (a)
				7	9	10	11	12	13	14	15	16	17	18	19	Remarks.	23	25	

Form No. 19.

REGISTER OF EXECUTION PETITIONS RECEIVED (ON THE SIDE).

Court
Year

Instructions.

Applications for transmission of decrees for execution beyond the jurisdiction of the Courts passing them should not be entered in this Register, but must be entered in the Register of Miscellaneous Cases Received (Form No. 17).

Number of Execution Petition.	Date of presentation.	Number of connected suit and of last previous application.	Name of decree-holder and of his pleader.	Name of judgment-debtor and of his pleader.	Items of decree or order to be executed, with date of any proceedings from which time runs for this application.	Mode of assistance, and section of code or law, prescribing it.	Order, with reasons, for closing of proceedings under this application, and date.	Number of appeal with result and date.
1	2	3	4	5	6	7	8	9

Form No. 20.

REGISTER OF DECREES OF OTHER COURTS RECEIVED FOR EXECUTION UNDER SECTIONS 38 AND 39, C.C.P.

Court
Year

Date of receipt.	Serial number.	Name of the decreeing Court.	Number of suit on the file of that Court.	Number of connected execution or miscellaneous application, if any, presented in this Court.	Lower Court to which sent for execution.	Nature and date of communication to the decreeing Court (*vide* Section 41, C.C.P.).	Amount of postage, if any, received.			Remarks.
							Rs.	A.	P.	
1	2	3	4	5	6	7	8			9

Form No. 21.

REGISTER OF EXECUTION PETITIONS DISPOSED OF.

Court
Year

Instructions.

1. The date to be entered in column 4 will always be the latest date. In the case of petitions restored to file, the date of original institution should be entered, and the date of restoration noted in the column of remarks.

2. Note in the remarks column the number of judgment-debtors imprisoned in each case, the value of decree under which judgment-debtor was imprisoned and date when sent to jail and date of release, for the purposes of columns 34 to 37 of Statement No. XI.

Serial number.	1		
Number of the execution petition disposed of.	2		
Number of connected case.	3		
Date of institution or of receipt of the order of transfer.	4		
Date when proceedings were finally closed.	5		
Withdrawn, rejected, or not prosecuted.	6	6	
Transferred.	7	7	
Applications on which proceedings were finally closed. — Satisfaction obtained. — In full.	8	8	
Applications on which proceedings were finally closed. — Satisfaction obtained. — In part.	9	9	
Applications on which proceedings were finally closed. — Satisfaction obtained. — Execution wholly infructuous.	10	10	
Amount. — Involved in execution applications disposed of.	11	15	Rs.
Amount. — Realized.	12	16	Rs.
How the decree was executed. — Judgment-debtor. — Imprisoned.	13	17	
How the decree was executed. — Judgment-debtor. — Arrested but released.	14	18	
How the decree was executed. — Moveable property. — Sold.	15	19	
How the decree was executed. — Moveable property. — Attached but released (Rule 55 or 60, Order XXI).	16	20	
How the decree was executed. — Immoveable property. — Sold.	17	21	
How the decree was executed. — Immoveable property. — Attached but released (Rule 55 or 60, Order XXI).	18	22	
How the decree was executed. — Immoveable property. — Otherwise dealt with (Section 72; or Rule 83, Order XXI, Schedule I; or Schedule III).	19	23	
How the decree was executed. — Possession given of. — Moveables (Rule 31, Order XXI).	20	24	
How the decree was executed. — Possession given of. — Immoveables (Rules 35 and 36, Order XXI).	21	25	
How the decree was executed. — Specific performance enforced.	22	26	
How the decree was executed. — Partition effected (Section 54, C.C.P.).	23	27	
How the decree was executed. — Execution otherwise effected.	24	28	
How the decree was executed. — Actual number of days intervening between institution and disposal.	25	13	
Remarks. (If the petition is only for part satisfaction of the decree, note the fact.)		Corresponding columns of Statement No. XI, Part I.	

Form No. 22.

REGISTER OF APPEALS RECEIVED.

Court
Year

Instructions.

Appeals from orders which have the force of decrees should be shown in this register and not in the Register of Miscellaneous Appeals Received (Form No. 24) in which appeals from other orders should be entered, *vide* H.C. Circular No. 3400, dated 22nd December, 1893, and Section 2 (2) and Rule 5, Order XXXVI, Schedule I, C.C.P.

2. Under item " 5. Particulars of suit and decree appealed from " enter also nature and value of appeal, with special reference to the information required by Annual Statement No. X, parts 3 and 4, and H.C. Circulars Nos. 1054 of 1870 and 2253 of 1894. In cases of appeals against orders having the force of decrees, substitute the word " *Order* " for " *Decree* " and add after date the words " *passed under C.C.P. on M.P. No. of* 1 ."

3. If the appeal has been received by transfer, a note should be made to that effect at the head of the page.

4. If an appeal is remanded under Rule 23, Order XLI, Schedule I, C.C.P., note under head 2 the date of restoration to file.

5. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P.

1. Appeal No. of 191 .
2. Date of {Presentation. / Filing.
3. Appellant—Name, description, and place of abode.
4. Respondent—Name, description, and place of abode.
5. Particulars of suit and decree appealed against. *Decree of the Court of , dated* 191 , *in original Suit No. of* 191 .

	Value of relief.		
Particulars of relief.	*Claimed.*	*Decreed.*	*Appealed against.*
	Rs. A. P.	Rs. A. P.	Rs. A. P.

6. Hearing, if any, under Rule 11, Order XLI, Schedule I, C.C.P., and result with date.
7. Date for *Respondent's first appearance.*
 Vakil for {Appellant. / Respondent.
8. Judgment, result, and date.
9. Objections, under Rule 22, Order XLI, Schedule I, C.C.P., if any, filed by whom, and value.
10. Number of application for review (re-hearing) with result and date.
 Fresh Judgment, if any, with date.
11. Second Appeal No. of 191 . Result with date.

Form No. 23.

REGISTER OF APPEALS DISPOSED OF.

Court
Year

Instructions.

1. There must be three separate registers of appeals disposed of, viz. (1) for money or moveables, (2) under the Madras Estates Land Act, 1908, and (3) for title and other appeals.

2. The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institution should be entered.

Serial number.	Number of the appeal disposed of.	Date of institution or of the receipt of the order of transfer.	Date of disposal.	Disposed of.											Actual number of days intervening between institution and decree.		Objections under Rule 22, Order XLI.	Remarks.	
				Transferred to another Court.	Dismissed under Rule 11, Order XLI.	Dismissed for default or otherwise not prosecuted.	Without contest.				With contest.								
							Decree confirmed.	Decree modified.	Decree reversed.	Remanded.	On oath, or by arbitration or compromise.	After trial.				Uncontested (columns 8 to 11).	Contested (columns 13 to 16).		
												Decree confirmed.	Decree modified.	Decree reversed.	Remanded.				
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	(If appeals are decided on oath, or by arbitration or compromise, note whether the decree appealed against was confirmed, modified or reversed.)
				8	10	11	12	13	14	15	16	17	18	19	20	24	26	31	Corresponding columns of Statement No. X, Part I (*a*).

Form. No. 24.

REGISTER OF MISCELLANEOUS APPEALS RECEIVED.

Court
Year

Instructions.

Appeals from orders which have the force of decrees *should not be shown* in this register. Appeals from other appealable orders only should find place in this register.

2. If necessary, give value of appeal under head 5.

3. A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C.C.P.

1. Miscellaneous Appeal No. of 191 .
2. Date of {
3. Appellant—Name, description, and place of abode.
4. Respondent—Name, description, and place of abode.
5. Particulars of order appealed against. *Order of the Court of dated* 191 , *passed on M.P. No.* of 191 , *in original Suit No.* of 191 .
 Appeal under of
6. Hearing, if any, under Rule 11, Order XLI, Schedule I, C.C.P., and result with date.
7. *Date for Respondent's first appearance.*
 Vakil for {Appellant. Respondent.
8. **Judgment—Result and date.**

9. Objections under Rule 22, Order XLI, Schedule I, C.C.P., if any, filed by whom.
10. Number of application for review (or re-hearing) with result and date. *Fresh Judgment, if any, with date.*

m No. 25.

REGISTER OF MISCELLANEOUS APPEALS DISPOSED OF.

Court
Year

Instructions.

The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institution should be entered.

Serial number	Number of the miscellaneous appeal disposed of.	Date of institution, or of the receipt of the order of transfer.	Date of disposal.	Transferred to another Court.	Disposed of.														Remarks.
					Dismissed under Rule 11, Order XLI.	Dismissed for default or otherwise not prosecuted.	Without contest.				With contest.					Actual number of days intervening between institution and disposal.		Objections under Rule 22, Order XLI.	
							Order confirmed.	Order modified.	Order reversed.	Remanded.	On oath, or by arbitration or compromise.	After trial.				Uncontested (columns 8 to 11).	Contested (columns 13 to 16).		
												Order confirmed.	Order modified.	Order reversed.	Remanded.				
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
				7	9	10	11	12	13	14	15	16	17	18	19	23	25	30	Corresponding columns of Statement No. X, Part II(*a*).

H. D. C. REILLY,
Registrar.

High Court of Judicature, Madras,
30th October, 1911.

FORT ST. GEORGE GAZETTE,

1912, PART II., P. 154.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council, the High Court has made

the following **amendment of Form No. 15** of **Appendix E** to the First Schedule of the said Code, viz. :—

For the word "Dated" substitute the words "Given under my hand and the seal of the Court, this day of ."

H. D. C. REILLY,
Registrar.

High Court of Judicature, Madras,
19th January, 1912.

FORT ST. GEORGE GAZETTE,

1912, PART II., P. 194.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council the High Court has made the following **amendments and additions to Order V** of the First Schedule of the said Code, viz. :—

(1) In **Rule 27** after the words "send it" insert the words "by registered post prepaid for acknowledgment."

(2) In **Rule 28** after the words "shall send" insert the words "by registered post prepaid for acknowledgment."

(3) **Insert as Rule 29A**—

"Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval forces or His Majesty's Indian Marine Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons."

H. D. C. REILLY,
Registrar.

High Court, Madras,
29th January, 1912.

FORT ST. GEORGE GAZETTE,

1913, PART II., PP. 13 AND 14.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council the High Court has made the following **amendment and addition** to Schedule I of the said Code, viz. :—

(1) **For rule 43** *of* **Order XXI** *of the said Schedule* **substitute** *the following rules, viz.* :—

"**43.** (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof,

provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

provided also that, when the property attached consists of live-stock, agricultural implements, or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the

judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached.

(*a*) In the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15A of Appendix E to this schedule with one or more sufficient sureties for its production when called for, or

(*b*) In the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rule 55 or rule 57 or rule 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings." And (2) **add** the following **form to Appendix E** to the said schedule, viz. :—

"**No. 15A.**

Bond for safe custody of moveable property attached and left in charge of person interested and sureties.

(ORDER XXI, RULE 43.)

In the Court of at .
Civil Suit No. of
A.B. of
against
C.D. of .

Know all men by these presents that we, I.J. of etc., and K.L. of etc., and M.N. of etc., are jointly and severally bound to the Judge of the Court of In Rupees to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 191 .

And whereas the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the day of 191 , in execution of a decree in favour of in suit No. of 191 on the file of and the said property has been left in the charge of the said I.J.,

Now the condition of this obligation is that, if the above bounden I.J. shall duly account for and produce when required before the said Court all and every the property

aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void: otherwise it shall remain in full force.

I.J.
K.L.
M.N.

Signed and delivered by the above bounden in the presence of

H. D. C. REILLY,
Registrar.

High Court of Judicature, Madras,
6th January, 1913.

FORT ST. GEORGE GAZETTE,

1914, PART II., P. 679.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council, the High Court has made the following **amendments to rule 13** of **Order IX** of the first schedule of the said Code, viz.:—

(1) Re-number rule 13 as rule 13 (1).

(2) **Add** the following as sub-rule (2) to rule 13:—

"(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

C. G. MACKAY,
Registrar.

High Court of Judicature, Madras,
24th March, 1914.

FORT ST. GEORGE GAZETTE,

1914, PART II., P. 1115.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council, the High Court has made the following amendments to rules 3 and 4 of Order XXXII and Form No. 11 of Appendix H to the first schedule of the said Code, viz.:—

1. **For rules 3 and 4 of Order XXXII** of Schedule I of the Code of Civil Procedure, 1908, **substitute**:—

3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. The affidavit shall further state the name of the person or persons on whom notice has to be served under the provisions of sub-rule (5).

(4) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The applications shall be by separate petitions.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that

behalf, or, where there is no guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in Form No. 11 set forth in Appendix H hereto.

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed as guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in Form No. 11A set forth in Appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be the guardian, and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require.

(5) When a guardian for the suit of a minor defendant is appointed, and it is made to appear to the Court that the guardian is not in possession of any, or sufficient funds for the conduct of the suit on behalf of the defendant, and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance monies to the guardian for the purpose of his defence and all monies so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the monies so received by him.

II. For **Form No. 11** of **Appendix H** to the Code of Civil Procedure **the following** form **is substituted**:—

Form No. 11.

Notice to guardian appointed or declared or to father or other natural guardian, or to the person in charge of the minor.

(ORDER XXXII, RULE 3 (5).)

(*Title.*)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor.

Whereas an application has been presented on the part of the

in the above suit for the appointment of a guardian for the suit for the said minor, you are hereby required to take notice that, unless within days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as his/her guardian for the purposes of the said suit, the Court will proceed to appoint some other person to act as guardian of the said minor for the purposes of the said

Given under my hand and the seal of the Court, this day of 191 .

Form No. 11A.

Notice to proposed guardian.

(ORDER XXXII, RULE 4 (3).)

(*Title.*)

To

residing at

Take notice that the above-named petitioner has made an application to this Court to appoint you guardian for the suit of minor defendant in No. of 191 , and that the said application will be heard on the day of next.

Given under my hand and the seal of the Court, this day of 191 .

III. In **Order XXXII** after Rule 14 **add** the following **as Rule 14A** :—

14A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a *quasi*-judicial act within the meaning of Section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal.

IV. In **Order XXII** after Rule 11 **add** the following **as Rule 11A** :—

11A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a *quasi*-judicial act within the meaning of Section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal.

S. G. HENSMAN,
Second Asstt. Registrar.

High Court of Judicature, Madras,
29th May, 1914.

FORT ST. GEORGE GAZETTE,

1914, PART II., P. 1814.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council, the High Court has made the following **additions** to the Orders in the Schedule I of the said Code :—

After Order XXVI, read the following **Order XXVIA.**

Order XXVIA (1) The Court may in any suit issue a Commission to such persons, as it thinks fit, to translate accounts and other documents which are not in the language of the Court.

(2) The report of the Commissioner shall be evidence in the suit and shall form part of the record.

(3) Before issuing any Commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the Commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the Commission is issued.

C. G. MACKAY,
Registrar.

High Court of Judicature, Madras,
2nd October, 1914.

FORT ST. GEORGE GAZETTE,

1914, PART II., P. 2038.

Notification.

Under the provisions of Section 122 of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council, the High Court has made the following amendment of and addition to Schedule I of the said Code, viz. :—

The existing Rule 1 of **Order XX** is renumbered as sub-rule (1) and the **following** is added **as sub-rule (2) :—**

(2) The Judgment may be pronounced by dictation to a short-hand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court.

For Rule 3, Order XX the **following** rule **is substituted :—**

(3) The Judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by Section 152 or on review.

C. G. MACKAY,
Registrar.

High Court of Judicature, Madras,
9th November, 1914.

APPENDIX D.

BOMBAY.

ORDERS, ETC., OF THE BOMBAY GOVERNMENT AND THE HIGH COURT, BOMBAY, UNDER THE CODE OF CIVIL PROCEDURE, CORRECTED UP TO 1ST DECEMBER, 1914.

Subject.	Number and date.	Year and page of the Bombay Govt. Gazette, Part I.
Appointing, with reference to Section corresponding to Section 55 (1) of the Code (Act V of 1908), the Surat Civil Jail for the Courts in the Broach District.	No. 4897, Jud. Date, 25. 9. 05.	1905, p. 1320.
Notification under Section 55 (2) of the Code (Act V of 1908).		1910, p. 1012.
Declaration under Section corresponding to Section 68 of the Code (Act V of 1908) as to the execution of decrees in certain cases.	No. 3600, Jud. Date, 24. 5. 80.	1880, p. 519.
	No. 1771, Jud. Date, 16. 3. 81.	1881, p. 140.
	No. 4520, Jud. Date, 24. 7. 82.	1882, p. 557.
	No. 762, Jud. Date, 9. 2. 92.	1892, p. 120.
	No. 2053, Jud. Date, 12. 4. 92.	1892, p. 348.
	No. 8039, Jud. Date, 27. 11. 00.	1900, p. 2429.
	No. 5248, Jud. Date, 20. 9. 07, amending the above Nos. 3600, 762, and 8039.	1907, p. 1627.
	No. 5249, Jud. Date, 20. 9. 07.	1907, p. 1627.
Rules under Section corresponding to Section 70 of the Code (Act V of 1908) for transmission of certain decrees from Court to Collector and for their execution.	No. 499, Jud. Date, 24. 1. 80.	1880, p. 96.
Ditto: new rule for Rule 2 of the above rules.	No. 1338, Jud. Date, 22. 2. 02.	1902, p. 321.
Ditto: modifying Rule 9 and substituting new rules for Rules 7 and 11 of the above rules.	No. 3132, Jud. Date, 8. 5. 83.	1883, p. 358.
Ditto: modifying Rule 11.	No. 1139A, Jud. Date, 16. 2. 80.	1880, p. 214.

Subject.	Number and date.	Year and page of the Bombay Govt. Gazette, Part I.
Rules under Section corresponding to Section 70 of the Code (Act V of 1908) for transmission of certain decrees from Court to Collector and for their execution. Amending Rule 11.	No. 6437, Jud. Date, 17. 9. 83.	1883, p. 695.
Ditto: New Rule 12A.	No. 3280, Jud. Date, 11. 5. 85.	1885, p. 631.
Ditto: cancelling para. 2 of Rule 12A.	No. 2890, Jud. Date, 29. 5. 90.	1890, p. 510.
Ditto: cancelling the last para. of Rule 12A.	No. 3341A, Jud. Date, 18. 5. 95.	1895, p. 613.
Ditto: New Rules 16 and 17.	No. 92, Jud. Date, 8. 1. 90.	1890, p. 38.
Appointment under Section corresponding to Section 85 of the Code (Act V of 1908).	No. 6789, Political. Date, 10. 10. 89.	1889, p. 873. 1913, p. 542.
Ditto: under Section corresponding to Section 93 of the Code (Act V of 1908).	No. 6216A, Jud. Date, 20. 11. 06. No. 61, Jud. Date, 7. 1. 07.	1906, p. 1710. 1907, p. 36.
General Rules, etc., under Section corresponding to Section 122 of the Code (Act V of 1908).		Rules and Orders compiled and issued under the authority of the Bombay High Court.
Exemption from personal appearance in Court under Section 133 of the Code (Act V of 1908).		1912, p. 1220; and 1913, p. 233.

ANNULMENTS, ALTERATIONS AND ADDITIONS TO THE RULES IN THE FIRST SCHEDULE OF THE CODE MADE BY THE HIGH COURT, BOMBAY.

THE BOMBAY GOVERNMENT GAZETTE,

1910, PART I., PP. 1496 AND 1497.

Miscellaneous Notifications, Appointments, etc., by His Majesty's High Court of Judicature (Appellate Side).

No. 2080.—The following rules have been made by the High Court of Judicature at Bombay, in exercise of the powers conferred by Section 122 of the Code of Civil Procedure, Act V of 1908, and have received the sanction of His Excellency the Governor in Council and are published for general information:—

RULE 1.

The following **proviso be added to Rule 22 in Order V:**

"Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits

where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *primâ facie* proof of service. In all other cases the Court shall hold such inquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

RULE II.

The following be **added as rule 4** in **Order XLIX** :—

"Under Section 128, paragraph 2, clause (i), of the Civil Procedure Code of 1908, the following power is delegated to the Registrar of the High Court, Appellate Side, Bombay :

'Where on a memorandum of appeal presented within the time prescribed for the same, the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court-fees and may admit the appeal to the register even though the subsequent payment of Court-fee may have been made after the time prescribed for presentation of the appeal.'"

RULE III.

Clause (a) of **rule 2, Order III, be amended** to read as follows :—

"Persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application, or act is made or done, authorising them to make and do such appearances, applications, and acts on behalf of such parties."

RULE IV.

Form No. 10 in **Appendix B,** Schedule I, of the Civil Procedure Code of 1908, **be amended** to read as follows :

"To accompany Returns of Summons of another Court (Order V, r. 23).

(*Title.*)

Read proceeding from the forwarding for service on in Suit No. of 19 of that Court.

Read Serving Officer's endorsement stating that the and proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with this proceeding.

I hereby declare that the said summons on has been duly served.

Judge.

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner."

By order of the High Court,

P. E. PERCIVAL,

Registrar.

Bombay, 9th September, 1910.

APPENDIX E.

ALLAHABAD.

U.P. GOVERNMENT'S ORDERS, ETC.,
UNDER THE CODE OF CIVIL PROCEDURE,
CORRECTED UP TO DECEMBER, 1914.

Subject.	Number and date.	Year, part and page of the U.P. Gazette.
Notification under Section 55 (2) of the Code (Act V of 1908) as to persons who shall not be liable to arrest in execution of decrees.	No. 654/VII–217. Date, 6. 6. 10.	1910, Part I, p. 550.
Rules under Sections 68 and 70 of the Code (Act V of 1908) for transferring to Collector execution of certain decrees and rules of procedure therefor.	No. 1887/I–238. Date, 7, 10. 11. No. 1353/I–238. Date, 12. 7. 12. No. 2538/I–196. Date, 20. 11. 13.	1911, Part I, p. 1005. 1912, Part I, p. 649. 1913, Part I, p. 1293.
Sanctioning exercise of powers under Section 93 of the Code (Act V of 1908).	No. 1622/VII–447. Date, 6. 12. 12.	1912, Part I, p. 1249.
Exempting personal appearance in Court under Section 133 (1) of the Code (Act V of 1908).	No. 1/VII–233. Date, 1. 1. 09. No. 918/VII–83. Date, 8. 9. 09. No. 707/VII–215. Date, 25. 5. 11. No. 1429/VII–521. Date, 16. 11. 14.	1909, Part I, p. 3. 1909, Part I, p. 774. 1911, Part I, p. 474. 1914, Part I, p. 1626.
Empowering certain Courts to appoint Commissioners to take affidavits, *vide* Section 139 (c) of the Code (Act V of 1908).	No. 3869. Date, 7. 12. 10.	1910, Part II, p. 2077.
Notification appointing Munsarims of Civil Courts in the Province of Agra to receive applications for execution under O. XXI, r. 10, of the Code (Act V of 1908).	No. 2207. Date, 29. 6. 11.	1911. Part II, p. 1073.
Direction under O. XXI, r. 48 (1) of the Code (Act V of 1908) as to service of notice of order attaching the salary or allowance of public officers.	No. 1058/VII–197. Date, 12. 8. 11.	1911, Part I, p. 777.

ANNULMENTS, ALTERATIONS AND ADDITIONS TO THE RULES IN THE FIRST SCHEDULE OF THE CODE MADE BY THE HIGH COURT, ALLAHABAD.

THE U.P. GAZETTE,

1913, PART II., P. 323.

Notification No. 712-35 (*a*) /5. *Dated the* 27*th February*, 1913.

In continuation of the Court's notification No. 285-35 (*a*) dated the 23rd January, 1913, and under Section 122 of the Civil Procedure Code, Act V of 1908, the following **addition** is made **to** the **rules framed by this Court** under the provisions of the said section :—

To **Order XXI, rule 126,** add—

"Provided that, when the amount does not exceed Rs.5, it may be paid to the Sahna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with."

N.B.—In the above-mentioned notification No. 285-35 (*a*) the above addition was published for information and objection of persons interested.

N.B.—The above-mentioned **"Rules framed by this Court"** are contained in a book published by the High Court, Allahabad, and reproduced at p. 759, *post.*

Notification No. 4824/35 (*a*)-II. *Dated Allahabad, the* 24*th November*, 1914.

In continuation of this Court's notification No. 3577/35 (*a*) dated the 8th August, 1914, the High Court under Section 122 of the Code of Civil Procedure, 1908, and with the previous sanction of the Local Government has framed the following forms for those at present in use :—

(1) **substitute** the following **for Form No. 5** (H.C.J. Form, Part XXII, No. 71) in **Appendix H** of the said Code.

No. 5.

List of documents produced by $\frac{\text{plaintiff}}{\text{defendant}}$ (order 13, Rule 1).

In the Court of , at District.

Suit No. of 19 .

Plaintiff.

Versus

Defendant.

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant).

This list was filed by this day of 19 .

1	2	3			4
Serial number.	Description and date, if any, of the document.	What became of the document.			Remarks.
		If brought on the record the exhibit mark put on the document.	If rejected, date of return to party, and signature of party or pleader to whom the document was returned.	If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter II, the date of enclosure in the envelope.	

Signature of party or pleader producing the list.

(2) **Substitute** the following for the form already in use (H.C.J. Form, Part IV, No. 26) under Order XVIII, rule 13, and Order XX, rules 4, 6, and 7.

"Evidence, judgment, and decree (Order XVIII, rule 13, and Order XX, rules 4, 6, and 7)."

Suit No. 19 .

Present

Judge of Small Cause Court.

Date of institution.	Name of plaintiff.	Name of defendant.	Amount of claim.		
			Rs	A.	P.

Decision.

Date.	In whose favour.	Against whom.	Amount decreed.			Costs awarded.			By whom payable.
			Rs.	A.	P.	Rs	A.	P.	

Orders before first hearing

Claim Reply

Issue

(On reverse of form.)

Evidence for plaintiff. Evidence for defendant

Finding

By order of the Court,
G. R. MURRAY, I.C.S.,
Registrar.

N.B.—In the above-mentioned notification No. 3577/35 (*a*) the above substituted forms were published for information and objection of persons interested.

Book of Rules framed by the High Court of Judicature, North-Western Provinces, under Section 122 of the Code of Civil Procedure; Act No. V of 1908.

These rules have been framed under Part X of the Code of Civil Procedure, Act No. V of 1908, *and form part of the First Schedule of the said Act.*

COMPARATIVE TABLE

of Reference to Rules of the 4th of April, 1894.

Rules of the 4th of April, 1894.	Where to be found.	Remarks.
11	Order XXVII, rule 9	
22	Order V, rule 31	
28, Para. 2	Note to order V, rule 27	
45 (3)	Order XIII, rule 13	
45 Note	Order XIII, rule 12	
52	Order XVI, rule 22	
61	Order XIX, rule 4	

COMPARATIVE TABLE (*continued*).

Rules of the 4th of April, 1894.	Where to be found.	Remarks.
62	Order XIX, rule 5	
63	Order XIX, rule 6	
64	Order XIX, rule 7	
65	Order XIX, rule 8	
66	Order XIX, rule 9	
67	Order XIX, rule 10	
68	Order XIX, rule 11	
69	Order XIX, rule 12	
70	Order XIX, rule 13	
71	Order XIX, rule 14	
72	Order XIX, rule 15	
77 (1)	Order XX, rule 21 (1)	
77 (2)	Order XX, rule 21 (2)	
77 (3)	Order XX, rule 21 (3)	
77 (4)	Order XX, rule 21 (4)	
77 (5)	Order XX, rule 21 (5)	
83, Para. 2	Order XXI, rule 104	
89	Order XXI, rule 105	
93, Para. 1	Order XXI, rule 106	
93, Para. 2	Order XXI, rule 108	
93, Para. 3	Order XXI, rule 109	
94, Para. 3	Order XXI, rule 110	
96	Order XXI, rule 111	
97	Order XXI, rule 112	
102	Order XXI, rule 113	
110	Order XXI, rule 114	
110A	Order XXI, rule 115	
111	Form No. 43, Appendix E	
119	Form No. 16, Appendix H	
130	Form No. 11, Appendix F	
131	Form No. 12, Appendix F	
138	Order XLIII, rule 3	
Appendix A (1)	Order XXI, rules 116 to 130	
Form No. 4.	Form No. 20, Appendix B	

NOTE TO ORDER V, RULE 27.

[88, para. 2.] A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these provinces is given in appendix (2) of the General Rules (Civil) of 1911.

[See pages 8–31.]

Order V.

[28] **31.** An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court.

Order XIII.

45, Note.] **12.** Every document not written in the court vernacular or in English, which is produced (*a*) with a plaint or (*b*) at the first hearing or (*c*) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the court vernacular. If any such document is written in the court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

[45(3)] **13.** When a document included in the list, prescribed by rule 1, has been admitted in evidence, the court shall, in addition to making the endorsement prescribed in

ule 4 (1), mark such document with serial figures in the case of documents admitted as vidence for a plaintiff, and with serial letters in the case of documents admitted as vidence for a defendant, and shall initial every such serial number or letter. When here are two or more parties defendants, the documents of the first party defendant nay be marked A1, B1, C1, &c., AA1, BB1, &c., and those of the second A2, B2, C2, tc., AA2, BB2, &c. When a number of documents of the same nature is admitted, s for example a series of receipts for rent, the whole series shall bear one figure or apital letter or letters and a small figure or small letter shall be added to distinguish ach paper of the series.

Order XVI.

22. (1) Save as provided in this rule and in rule 2, the court shall allow travelling [52] nd other expenses on the following scale :—

(*a*) In the case of witnesses of the class of cultivators, labourers, and menials, six annas a day ;

(*b*) in the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct ; and

(*c*) in the case of witnesses of superior rank, including officers of Government in receipt of a salary of not less than Rs.200 a month, from three to five rupees a day.

(2) If a witness demand any sum in excess of what has been paid to him, such um shall be allowed if he satisfy the court that he has actually and necessarily incurred he additional expense.

ILLUSTRATION.

A post office employé summoned to give evidence is entitled to demand from the arty, on whose behalf or at whose instance he is summoned, the travelling and other xpenses allowed to witnesses of the class or rank to which he belongs, and in addition he sum for which he is liable as payment to the substitute officiating during his absence rom duty. The sum so payable in respect of the substitute will be certified by the fficial superior of the witness on a slip, which the witness will present to the court from vhich the summons issued.

(3) If a witness be detained for a longer period than one day the expenses of is detention shall be allowed at such rate, not usually exceeding that payable under lause (1) of this rule, as may seem to the court to be reasonable and proper.

Provided that the court may, for reasons stated in writing, allow expenses on a igher scale than that hereinbefore prescribed.

Order XIX.

4. Affidavits shall be entitled In the court of at (naming [61] uch court). If the affidavit be in support of, or in opposition to, an application respect- ng any case in the court, it shall also be entitled in such case. If there be no such case t shall be entitled *In the matter of the petition of*.

5. Affidavits shall be divided into paragraphs, and every paragraph shall be [62] umbered consecutively and, as nearly as may be, shall be confined to a distinct portion f the subject.

6. Every person making any affidavit shall be described therein in such manner [63] s shall serve to identify him clearly ; and where necessary for this purpose, it shall ontain the full name, the name of his father, of his caste or religious persuasion, his ank or degree in life, his profession, calling, occupation or trade, and the true place of is residence.

7. Unless it be otherwise provided, an affidavit may be made by any person having [64] ognizance of the facts deposed to. Two or more persons may join in an affidavit ; ach shall depose separately to those facts which are within his own knowledge, and such acts shall be stated in separate paragraphs.

2. When the declarant in any affidavit speaks to any fact within his own [65]

knowledge, he must do so directly and positively, using the words "I affirm" or "I make oath and say."

[66] **9.** Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and, if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any court of justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

[67] **10.** When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

[68] **11.** Every person making an affidavit for use in a civil court shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

[69] **12.** No verification of a petition and no affidavit purporting to have been made by a *pardah-nashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

[70] **13.** The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

[71] **14.** The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made, and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

[72] **15.** If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made, and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made.

Order XX.

[77(1)] **21.** (1) Every decree and order as defined in section 2, other than a decree or order of a court of small causes or of a court in the exercise of the jurisdiction of a court of small causes, shall be drawn up in the court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree

or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, [77(2)] the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the court, before the Judge then presiding. •

(3) If no objection has been filed on or before the date specified in the notice, [77(3)] or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction [77(4)] or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating [77(5)] the date on which the decree was signed.

•

Order XXI.

104. When the certificate prescribed by section 41 is received by the court which [83, para. 2.] sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room.

105. Every attachment of moveable property under rule 43, of Negotiable Instru- [89] ments under rule 51, and of immoveable property under rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed; in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

106. When the property which it is sought to bring to sale is immoveable property [93, para. 1.] within the definition of the same contained in the law for the time being in force relating to the registration of documents, and the decree is not sent to the Collector for execution under section 68, the court, before ordering a sale shall call upon the Sub-Registrar within whose sub-district such property is situate to search his registers and report as to what incumbrances, if any, it appears from the registers to be liable.

***107.** Where an application is made for the sale of land or of any interest in land, the court shall before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887/I—238-10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question.

On the day so fixed, or on any date to which the enquiry may have been adjourned, the court may take such evidence, by affidavit or otherwise, as it may deem necessary; and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the court shall determine whether such land, or any, and what part of it, is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

108. When the property which it is sought to bring to sale is revenue paying or [93, para. 2.] revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under section 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

* This rule will not come into force till the 1st January, 1912.

[93, para. 3.] **109.** The reports of the Sub-Registrar and Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the court and the declaration of the result of the enquiry.

No fees are payable in respect of search and report by the Sub-Registrar and Collector.

[94, para. 3.] **110.** The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The court may in its discretion adjourn the inquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the inquiry.

[96] **111.** If after proclamation of the intended sale has been made any matter is brought to the notice of the court which it considers material for purchasers to know, the court shall cause the same to be notified to intending purchasers when the property is put up for sale.

[97] **112.** The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the costs of the execution, unless the court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

[102] **113.** When permission has been given to a decree-holder to bid for property, the court ordering the sale shall inform the officer appointed to conduct the sale whether there are any persons, in addition to the decree-holder, entitled to share in the sale proceeds.

[110] **114.** Whenever any civil court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military Cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place; and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

[110A] **115.** Whenever guns or other arms in respect of which licences have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees by order of a civil court, the court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

[Appendix A (1)] **116.** When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the court may direct be not paid into court, the court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

[Appendix A (1)] **117.** Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some land-holder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the court.

[Appendix A (1)] **118.** If the custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register:—

(*a*) the number and description of the animals;

(*b*) the day and hour on and at which they were committed to his custody;

(*c*) the name of the attaching officer or his subordinate by whom they were committed to his custody; and shall give such attaching officer or subordinate a copy of the entry.

[Appendix A (1)] **119.** For every animal committed to the custody of the pound-keeper as afore-

said, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under section 12 of Act No. 1 of 1871.

And the sums so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under section 12 of the said Cattle Trespass Act.

120. The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under section 5 of the same Act. In any case, for special reasons to be recorded in writing, the court may require payment to be made for maintenance at higher rates than those prescribed. [Appendix A (1)]

121. The charges herein authorised for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and hereafter for such further period as the court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer. [Appendix A (1)]

122. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the court, or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in rule 118. [Appendix A (1)]

123. For the safe custody of moveable property other than live-stock while under attachment, the attaching officer shall, subject to approval by the court, make such arrangements as may be most convenient and economical. [Appendix A (1)]

124. With the permission of the court the attaching officer may place one or more persons in special charge of such property. [Appendix A (1)]

125. The fee for the services of each such person shall be payable in the manner prescribed in rule 116. It shall not be less than two annas, and shall ordinarily not be more than three and a half annas per diem. The court may at its discretion allow a higher fee; but if it do so, it shall state in writing its reasons for allowing an exceptional rate. [Appendix A (1)]

126. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him; and on the presentation of such certificate to the court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge. [Appendix A (1)]

Provided that, where the amount does not exceed Rs.5, it may be paid to the Sahna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

127. When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be. [Appendix A (1)]

128. Fees paid into court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments. [Appendix A (1)]

129. When any sum levied under rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book. [Appendix A (1)]

130. The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the [Appendix A (1)]

attaching officer shall report his default to the court, and the court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

Order XXVII.

[11] **9.** In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8 (1), the defence of a suit against an officer of the Government, he shall, in lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the following form :

TITLE OF THE SUIT, ETC.

I, A. B., Government Pleader, appear on behalf of the Secretary of State for India in Council (*or* the Government of the United Provinces, *or* as the case may be) Respondent (*or* &c.), in the suit :

or, on behalf of the Government [which, under Order 27, rule 8 (1) of Act No. V of 1908, has undertaken the defence of the suit], respondent (*or*, &c.), in the suit.

Order XLIII.

[138] **3.** In every appeal under rule 1, in every miscellaneous case, and *in every suit dismissed for default*, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid.

FORMS.

APPENDIX B.

No. 20.

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS.

No. OF SUIT.

Names of parties
In the Court of the
Date fixed for hearing

[Form No. 4.]

1	2	3	4		5		6
Number of witnesses to be summoned.	Name and full address of each person to be summoned.	Rank or occupation.	Distance of residence from Court.		Cash paid for—		Name and address of person to whom unexpended travelling expenses and diet money should be returned.
			Rail.	Road.	Travelling expenses.	Diet expenses.	

APPENDIX E.

No. 43.

The security to be furnished under section 55 (4) shall be, as nearly as may be, by a bond in the following form :— [111]

In the Court of at
Suit No. of 19
against
A. B. of ... Plaintiff,
C. D. of ... Defendant.

WHEREAS in execution of the decree in the suit aforesaid, the said C. D. has been arrested under a warrant and brought before the court of ; and whereas the said C. D. has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No. III of 1907, to be declared an insolvent, and the said court has ordered that the said C. D. shall be released from custody if the said C. D. furnish good and sufficient security in the sum of Rs. that he will appear when called upon, and that he will within one month from this date apply under section 5 of Act No. III of 1907, to be declared an insolvent ; Therefore I, E. F., inhabitant of , have voluntarily become security, and do hereby bind myself, my heirs and executors to as Judge of the said court and his successors in office that the said C. D. will appear at any time when called upon by the said court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said court, on its order, the sum of Rs.

Witness my hand at this day of 19 .
(Sd.) E. F.,
Witnesses : *Surety.*

APPENDIX F.

No. 11.

The security to be furnished under Order XXXVIII, rule 9, shall be, as nearly as may be, by a bond in the following form :— [130]

In the Court of at
Suit No. of 19 .
... Plaintiff,
... Defendant.

Amount of suit, Rupees

WHEREAS in the suit above specified the plaintiff aforesaid, has applied to the said court that the said defendant, , may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant, , may be attached ;

And whereas, on the failure of the said defendant, , to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant, , has been attached by order of the said court :

Therefore I , inhabitant of , have voluntarily become security and hereby bind myself, my heirs and executors, to as Judge of the said court, and his successors in office, that the said defendant, , shall produce and place at the disposal of the said court, when required, the property hereinbelow specified, namely (*here give description of property or refer to an annexed schedule*), or the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to as Judge of the said court and his successors in office on its order, such sum to the extent of rupees (*here enter*

a sufficient sum to cover the amount of suit with costs and the costs of the attachment) as the said court may adjudge against the said defendant.

Witness my hand at this day of 19 .

(Signed)

Witnesses : *Surety.*

No. 12.

[181] The security to be furnished under Order XXXIX, rule 2 (2), shall be, as far as may be, by a bond in the following form :-

In the Court of at

Suit No. of 19 .

... Plaintiff,

... Defendant.

WHEREAS, in the suit above specified, instituted by the said plaintiff, , to restrain the said defendant, , from (*here state the breach of contract or other injury*), the said court has, on the application of the said plaintiff, , granted an injunction to restrain the said defendant from the repetition (*or the continuance*) of the said breach of contract (*or wrongful act complained of*), and required security from the said defendant against such repetition (*or continuance*) :

Therefore I, , inhabitant of , have voluntarily become security and do hereby bind myself, my heirs and executors, to as Judge of the said court and his successors in office that the said defendant, , shall abstain from the repetition (*or continuance*) of the breach of contract aforesaid (*or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right*), and in default of his so abstaining, I bind myself, my heirs and executors to pay into court, on the order of the court, such sum to the extent of rupees , as the court shall adjudge against the said defendant.

Witness my hand at this day of 19 .

(Signed)

Witnesses : *Surety.*

APPENDIX H.

No. 4.

Notice to show cause. (*General Form.*)

IN THE COURT OF
AT DISTRICT

CIVIL SUIT No. OF 19

Miscellaneous No. *of* 19

resident of

versus

resident of

To

WHEREAS the above-named has made application to this court that ; you are hereby warned to appear in this court in person or by a pleader duly instructed on the day of 19 , at o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*, and it will be presumed that you consent to be appointed guardian for the suit.

Given under my hand and the seal of the court, this day of 19 .

Judge.

APPENDIX H.

No. 11.

Notice to minor defendant and guardian.

IN THE COURT OF AT DISTRICT

SUIT No. OF 19 .

resident of
plaintiff,

versus

resident of
defendant.

Minor, defendant,
Natural Guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you (1) , are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this court for the appointment of you (1) or of some friend of you, the minor, to act as guardian for the suit, the court will proceed to appoint you or some other person to act as guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of the court, this day of 19 .

Judge.

APPENDIX H.

No. 16.

The security to be furnished under Order XXV, rule 1, shall be, as nearly as may be, by bond in the following form: — [110]

In the Court of at

Suit No. of 19 .

... Plaintiff,
... Defendant.

WHEREAS a suit has been instituted in the said court by the said plaintiff to recover from the said defendant the sum of rupees and the said plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immoveable property within British India independent of the property in the suit:

Therefore, I, inhabitant of , have voluntarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said court and to his successors in office that the said plaintiff , his heirs and executors, shall, whenever called on by the said court, pay all costs that may have been or may be incurred by the said defendant, , in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said court on its order.

Witness my hand at this day of 19 .

(Signed)
Surety.

Witnesses:

APPENDIX T.

PUNJAB.

ANNULMENTS, ALTERATIONS AND ADDITIONS TO THE RULES IN THE FIRST SCHEDULE OF THE CODE MADE BY THE HIGH COURT, PUNJAB.

The Punjab Government's Orders, etc.

Under the Code of Civil Procedure corrected up to December, 1914.

Subject.	Number and date.	Year and page of the Punjab Gazette.
Rules under Section 128 (b) of the Code (Act V of 1908) for the maintenances and custody of live stock, etc.	**No. 5 G.** Date, 1. 1. 09. No. 2212 G. Date, 12. 5. 09.	1909, Part III, p. 1. 1909, Part III, p. 571.
Extension of the Code (Act V of 1908) to the Scheduled districts in the Punjab.	No. 1 A. Date, 1. 1. 09.	1909, Part I, p. 12.
Cancelling 11 former Notifications under the Codes of 1877 and 1882.	No. 1 B. Date, 1. 1. 09.	Ditto.
Appointment with reference to Section 2 (7) of the Code (Act V of 1908).	No. 1 C. Date, 1. 1. 09.	Ditto.
Rules under Section 70 (1) (c) of the Code (Act V of 1908) as to appeals from certain orders.	No. 1 D. Date, 1. 1. 09.	Ditto.
Sanctioning exercise of powers under Section 93 of the Code (Act V of 1901).	No. 1 E. Date, 1. 1. 09.	1909, Part I, p. 13.
Exempting personal appearance in Court under Section 133 of the Code (Act V of 1901).	No. 1 F. Date, 1. 1. 09.	Ditto.
Empowering District Judges to appoint Commissioners to take affidavits, *vide* Section 139 (c) of the Code (Act V of 1908).	No. 1 G. Date, 1. 1. 09.	Ditto.
Under O. XXVII,* r. 2, authorising persons to act for Government.	No. 1 H. Date, 1. 1. 09.	Ditto.

* In the Gazette it is O. XXVI, which is apparently wrong.

CHIEF COURT, PUNJAB.

THE PUNJAB GAZETTE,

1909, PART III, P. 2.

Notification No. 6 G, dated 1. 1. 09.

In accordance with the provisions of Section 23 of Act X, 1897, the General Clauses Act, the following **draft rules** made under section 122 of the Code of Civil Procedure, 1908, by the Hon'ble the Chief Court of the Punjab to regulate its own procedure and the procedure of the civil courts subject to its superintendence, are published for the information of persons likely to be affected thereby. Notice is hereby given that the draft rules will be taken into consideration by the Hon'ble Judges of the Chief Court on or after the 31st day of January, 1909. Any objections or suggestions which may be made to the draft rules should reach the Registrar of the Chief Court by that date.

After rule 7 of Order II, insert:—

"8. (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaint for the remaining causes of action and for making up the Court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court-fees Act."

To rule 10 of Order V, the following proviso should be added:—

"Provided that in any case if the plaintiff so wishes, the Court may attempt to serve the summons in the first instances by registered post instead of in the mode of service laid down in this rule; and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this Order."

In the **second paragraph** of **rule 2** of **Order VII,** after the words "and the defendant" insert "or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate"; after the words "the amount" insert "or value."

Order IX, rule 9 (1):—To rule 9 (1) the following **proviso** should be **added:**—

"Provided that the plaintiff should not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default."

Order XXI, rule 29:— **After rule 29 of Order XXI** the **following** rule should **be inserted:**—

"**29A.** When a suit under rule 63 of this Order is pending, the Court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing court, which shall thereupon stay execution until the suit is decided."

In **Order XXI, rule 75,** after the word "stored" shall be added the words "or can be sold to greater advantage in an unripe state, such as green wheat or gram."

Order XXX, rule 1.—To rule 1 of Order XXX the following **explanation shall be added:**—

Explanation.—"This rule applies to a joint Hindu family trading partnership."

Order XXXII, rule 1.—To rule 1 the **following** paragraph shall **be added:**—

"Such person may be ordered to pay any costs in the suit as if he were the plaintiff."

* Amended and confirmed by Notification No. 2212 G, dated 12. 5. 09.

* In the Gazette it is 63. That is apparently wrong.

1st Schedule, **Order V, rule 18, form 11.—For the 3rd and 4th parts of (3) in the form read:—**

(3) The said and his house in which he ordinarily resides being
personally known to me / pointed out to me by

I went to said house in and there on the day of 19 .
at o'clock in the fore/after noon, I did not find the said

I enquired from {(a) (b)} neighbours.

I was told that had gone to and would not be back till

(Signature of process-server.)

By order, &c.,
A. L. DANSON,
Registrar.

THE PUNJAB GAZETTE,

1909, PART III, P. 571.

Notification No. 2212 G, dated 12. 5. 09:—

The draft rules made under section 122 of the Code of Civil Procedure, 1908, and published with this Court's notification No. 6 G, dated the 1st of January, 1909, have, subject to the under-mentioned amendment, been confirmed by the Local Government, and are published for general information:—

AMENDMENT.

In notification No. 6 G, dated the 1st of January, 1909, for "In Order XX, rule 75 (2), etc.," read "In Order XXI, rule 75, etc."

By order, &c.,
A. L. DANSON,
Registrar.

APPENDIX G.

BURMA.

ANNULMENTS, ALTERATIONS AND ADDITIONS TO THE RULES IN THE FIRST SCHEDULE OF THE CODE MADE BY THE HIGH COURT, BURMA.

Burma Government Notification, etc.,

Under the Code of Civil Procedure corrected up to December, 1914.

Subject.	Number and date.	Year and page of Burma Gazette, Part I.
Cancellation of notification issued under the old Code.	No. 31. Date, 23. 2. 1910.	1910, p. 163.
Under Section 2 (7) of the Code (Act V of 1908), appointment of Officers to perform functions imposed on the Government pleader under O. XXXIII, rr. 6 and 9 of the said Code.	No. 32. Date, 23. 2. 1910.	Ditto.
Under Section 55 (1) of the said Code for the detention of persons ordered to be detained by Court.	No. 33. Date, 23. 2. 1910. No. 43. Date, 6. 3. 1912.	Ditto. 1912, p. 155.
Under Section 55 (2) of the said Code directing notice to be given before arrest of certain employees.	No. 60. Date, 20. 4. 1910. No. 14. Date, 17. 1. 1912. No. 94. Date, 12. 6. 1913.	1910, p. 347. 1912, p. 24. 1913, p. 357.
Under Section 57 of the said Code fixing scale of subsistence allowance.	No. 35. Date, 23. 2. 1910.	1910, p. 166.
Under Section 61 of the said Code declaring partial exemption of certain agricultural produce from attachment or sale in execution.	No. 116. Date, 4. 8. 1913.	1913, p. 485.
Under Section 93 of the said Code appointing Government Advocate to exercise Advocate General's powers under Section 91 and 92 of the said Code.	No. 36. Date, 23. 2. 1910.	1910, p. 166.
Exemption from personal appearance in Court under Section 133 (1) of the said Code.	No. 37. Date, 23. 2. 1910.	1910, p. 166.

Subject.	Number and date.	Year and page of Burma Gazette, Part I.
Under Section 137 (2) of the said Code declaring what the language of certain Courts shall be.	No. 38. Date, 23. 2. 1910.	Ditto.
	No. 128. Date, 15. 8. 1910.	1910, p. 764.
Under Section 138 (1) of the said Code directing in what cases evidence shall be taken down with the Judge's own hand in the English language.	No. 39. Date, 23. 2. 1910.	1910, p. 166.
With reference to Section 139 (c) of the said Code empowering District Courts to appoint Commissioners to take affidavits.	No. 40. Date, 23. 2. 1910.	1910, p. 166.
Directions under O. XXI, r. 48 (1) of the said Code as to service of notices of order attaching the salary or allowances of certain officers.	No. 77. Date, 10. 6. 11.	1911, p 394.
Rules under O. XXVI, r. 9 (prov.) of the said Code as to the persons to whom commissions shall be issued.	No. 38. Date, 17. 3. 1913.	1913, p. 148.
With reference to O. XXVII, rr. 1 and 4, of the said Code appointing the Government Advocate to be the recognized agent of the Government for certain purposes.	No. 41. Date, 23. 2. 1910.	1910, p. 166.

THE BURMA GAZETTE,

March 19th, 1910, PART IV, p. 291.

The 15th March, 1910.

No. 3 (General).—Under the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the previous sanction of the Local Government, the Chief Court of Lower Burma directs that the following **alterations** shall be made in the First Schedule, Appendices E and F:—

(1) In the heading of **Form No. 5 of Appendix E,** *for* the words and figures "Order 21, Rule 6," the word and figures "section 41" shall be *substituted*.

(2) In **Appendix F** the **last two forms** shall be numbered respectively 9 and 10 instead of 6 and 7.

R. C. S. KEITH,
Registrar.

Dated Rangoon, the 17th March, 1910.

No. 4 (General).—In exercise of the powers conferred by section 122, Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that **for sub-rule 1 of Rule 18, Order XXVI,** First Schedule to the Code of Civil Procedure, 1908, the **following** shall be **substituted:**—

"When a commission is issued under this order, the parties to the suit shall appear before the Commissioner in person or by the agents or pleaders, unless otherwise directed by the Court, within fifteen days."

The 30th March, 1910.

No. 7 (General).—In exercise of the powers conferred by section 122, Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that for **Rule 13, Order XXI,** First Schedule to the Code of Civil Procedure, 1908, the **following** shall be **substituted :—**

(1) When application is made for execution of a decree relating to immoveable property included within the Cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *Kwin* or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immoveable property, must also be furnished so far as they are not given in the plan. In the case of other immoveable property a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied :—

1. If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area, *Kwin* number, latest holding number (if different kinds of holding, *e.g.* rice land and garden holdings, are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding, year of *Kwin* map from which the holding number is taken), and revenue last assessed upon the land, must be given.

2. In the case of other agricultural land, the area and village-tract within which it falls, distance and direction from nearest town or village and boundaries should be specified.

3. In the case of land in large towns the area, block or quarter name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot, particulars regarding that part), the holding number in the latest town survey map, if any, and year of the map, the rent or revenue last assessed on the land, must be given.

4. In the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number, the quarter or block name or number, the number of the building in the street or, if it has no number, the lot number, must be given.

5. In the case of immoveable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given.

6. The purpose to which land or buildings are put, the material and age of buildings, all incumbrances and Municipal taxes should be stated.

7. The judgment-debtor's share or interest in the property should be specified.

(2) The cost of the certified extract shall be reckoned in the costs of the application.

R. C. S. KEITH,
Registrar.

THE BURMA GAZETTE,

July 16th, 1910, PART IV, P. 769.

The 12th July, 1910.

No. 14 (General).—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the **words** "or such forms as may be prescribed by the Chief Court, Lower Burma" shall be **inserted** after the word "Appendices" **in Rule 3** of Order **XLVIII** in the First Schedule to the Code.

W. B. BRANDER,
Offg. Registrar.

THE BURMA GAZETTE,

September 17th, 1910, PART IV, P. 991.

Dated Rangoon, the 12th September, 1910.

No. 17 (General).—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, the Chief Court of Lower Burma directs that the following alterations and additions which are specified in Part I of this Notification shall be made in the Orders and Rules contained in the First Schedule of the said Code.

[See List of Chief Court Notifications.]

PART I.

In **Order V,** the **following** shall **be inserted as Rule 21A:—**

"21A. When any summons is sent for service by a Court to any Court situated beyond the Limits of Burma, it shall, unless it is written in English, be accompanied by a translation in English or in the language of the locality in which it is to be served."

In Order V, the following shall be *added* as Rule 23A:—

[Substituted by No. 15 General of 19. 8. 11.]

To **Order XIII, Rule 1,** the **following** shall **be added** as sub-rule (3):—

"(3) The Chief Court of Lower Burma directs that such lists shall be prepared in Form $\frac{\text{Judicial}}{\text{General 25}}$ which will be given free of charge to parties wishing to tender documents in evidence."

To **Order XIII, Rule 4,** the **following** shall **be added** as sub-rules (3), (4) and (5):—

"(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted, thus, A, B, C, etc., and the documents admitted on behalf of the defendant with figures, thus, 1, 2, 3, etc.

"(4) When a number of documents of the same nature are admitted, as, for example, a series of receipts for rent, the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series.

"(5) Every document on admission shall be entered in a list in Form $\frac{\text{Judicial}}{\text{General 27}}$ prepared by the Bench Clerk and signed by the Judge."

To **Order XIII, Rule 5, sub-rule (3), the following** shall **be added:—**

"A note of the return should be made in the list in Form $\frac{\text{Judicial}}{\text{General 27}}$."

To **Order XIII, Rule 7, sub-rule (2), the following** shall **be added:—**

"Who shall give a receipt for them in column 6 of the list in Form $\frac{\text{Judicial}}{\text{General 25}}$."

In **Order XIII, Rule 10, sub-rule (3)** shall **be re-numbered** as (5) and the **following** shall **be inserted** as sub-rules (3) and (4):—

"(3) If the Court thinks fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required. No summons to produce any record shall be issued to any Record-keeper, Chief Clerk, or Official of any Court.

"(4) Whenever a Judge sends for the record of another suit or case, or other official papers, and uses any part of such record or papers as evidence in a trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record, and shall further direct at the expense of which party such copy shall be made."

In **Order XIII,** the **following** shall **be inserted as** Rules **10A** and **10B:—**

"10A. Exhibits, with their accompanying lists shall not be filed with the record until after the termination of the trial.

"10B. If any exhibit included in the index of contents of the trial record is withdrawn after judgment, the fact should be noted in the column of remarks of the index, and it should be stated whether a copy has been substituted or not."

In **Order XVI, Rule 2,** the **following** shall **be substituted for sub-rule (3):—**

"(3) Subject to the provisions of sub-rule (2), travelling and other expenses of

* Amended by No. 24 General of 23. 10. 11.

witnesses, in Courts subordinate to the Chief Court other than the Court of Small Causes of Rangoon shall be payable on the following scale :—

"(a) *Ordinary labouring class of Natives.*—The actual railway or steam-boat fare to and from the Court by the lowest class, so far as these can be ascertained, or, where the journey cannot be performed by rail or steam-boat, actual travelling expenses up to a limit of Rs.2 a day by boat and of four annas a mile by road, and an allowance for each day's absence from home, including one day in attendance at Court, of six annas to those who are residents of places either than the place where the Court is held, and of four annas to those who are residents of the place where the Court is held.

"(b) *Petty village officers.*—Double the above rates of daily allowance, same rates as above for railway or steam-boat fare or actual travelling expenses by boat or road up to the limit of Rs.2 a day by boat and of four annas a mile by road.

"(c) *Persons of higher ranks of life, such as Clerks, Trades-people, Ywathugyis and Circle Thugyies.*—Second-class railway or steam-boat fare to and from the Court or, where the journey cannot be performed by rail or steam-boat, actual travelling expenses up to a limit of Rs.4 a day by boat and of six annas a mile by road, and an allowance not to exceed, except in special cases, Rs.3 for each day's absence from home to Europeans or Eurasians and Rs.1 to Natives.

"NOTE.—A non-official who does not pay income-tax, even though he may describe himself as a clerk or a tradesman, is not entitled to be treated as falling under class (c).

"(d) *Persons of superior rank.*—The actual sum likely to be spent in travelling to and from the Court, with an allowance, according to circumstances, not to exceed, except in very special cases, Rs.5 for each day's absence from home to European or Eurasians and Rs.2 to Native gentlemen.

"(e) *Witnesses following any profession, such as Medicine or Law.*—A special allowance to circumstances.

"NOTE.—When the journey has to be performed partly by rail or steam-boat and partly by road or boat, the fare shall be paid in respect of the former and the mileage or boat-allowance in respect of the latter part of the journey. Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court, should be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fare."

To **Order XVI, Rule 9,** the **following** shall **be added :—**

"Where the person summoned is a public officer or servant of the Railway Company sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during his temporary absence from his post."

In **Order XVIII,** the **following** shall **be inserted as** Rule **6A :—**

"**6A.** Where there are no interpreters paid by Government, and it is found necessary to employ an interpreter in a Civil case, he shall be paid such fee, ordinarily not exceeding Rs.2 *per diem*, as the Court may fix. The fee shall be advanced by the party at whose instance the interpreter is required, and shall be treated as costs in the case. All payments of interpreters' fees shall be made through the Court and duly entered in Bailiff's Register II."

To **Order XIX,** the **following** shall **be added as Rules 4 to 12 :—**

"4. The officer administering the oath to the declarant of an affidavit should first make the declarant take the oath or affirmation. Then he should make the declarant repeat the whole of the statement written in the affidavits coming from him. Then the declarant should sign the affidavit, and lastly the officer administering the oath should sign and date it.

"5. Every affidavit to be used in a Court of Justice should be entitled 'In the Court of at ,' naming the Court. If there is a case in Court, the affidavit in support of or in opposition to an application respecting it, must also be entitled 'In the case of .'

"If there is no case in Court, the affidavit should be entitled 'In the matter of the petition of .'

"6. Every affidavit containing any statement of facts shall be divided into

paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

"7. Every person, other than a plaintiff or defendant in a suit in which the application is made, making an affidavit shall be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his profession or trade, and the place of his residence.

"8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words 'I affirm' (or 'Make oath') 'and say.'

"9. When the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant must use the expression, 'I am informed' (and if such be the case, should add) 'and verily believe it to be true,' or he may state the source from which he received such information. When the statement rests on fact disclosed in documents or copies of documents procured from any Court of Justice or other source, the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents.

"10. Every person making an affidavit, if not personally known to the Commissioner, shall be identified to the Commissioner by some person known to him, and the Commissioner shall specify at the foot of the petition, or of the affidavit (as the case may be), the name and description of him by whom the identification is made, as well as the time and place of the identification and of the making of the affidavit.

"11. If any person making an affidavit is ignorant of the language in which it is written, or appears to the Commissioner to be illiterate or not to fully understand the contents of the affidavit, the Commissioner shall cause the affidavit to be read and explained to him in purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained as herein provided, the Commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained, and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the Commissioner shall state in his certificate the name of the interpreter, and the fact that he was sworn to interpret truly.

"12. In administering oaths and affirmations to declarants the Commissioner shall be guided by the provisions of the Indian Oaths Act, 1873."

To **Order XX**, the **following** shall **be added as Rules 21, 22 and 23** :—

"21. As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final and the interest of any party of the suit in any land included in the survey has been affected thereby, the Court of first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate. A copy of the certificate in every such case should also be sent to the Sub-Registrar within whose sub-district the land is situate.

"22. The certificate shall be in Form (Civil) 96, and shall be signed by the presiding officer of the Court.

"23. Copies of all certificates sent to Superintendents of Land Records and Sub-Registrars under these rules shall be kept in a separate annual file."

In **Order XXI**, the **following** shall **be inserted as** Rule **10A** :—

"10A. If no application is made by the decree-holder within six months of the date of the receipt of the papers, the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by section 31."

In **Order XXI**, the **following** shall **be inserted as** Rule **38A** :—

"38A. The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be, and shall not be charged to the judgment-creditor."

In **Order XXI, Rule 39**, the **following** shall **be inserted as sub-rule (2A)** :—

"(2A). When a civil prisoner is kept in confinement at the instance of more than one decree-holder he shall only receive the same allowance for his subsistence as if he were detained in confinement upon the application of one decree-holder. Each decree-holder shall, however, pay the full allowance for subsistence, and when the debtor is released,

the balance shall be divided ratcably among the decree-holders, and paid to them"

In **Order XXI,** the **following** shall **be inserted as** Rules **45A, 45B, 46A, and 57A** respectively:—

[45A and 45B substituted by Notification No. 11 (General) of 15. 10. 12 (see p. 1541, *post.*)]

"46A. When a debt alleged to be due by a third party to a judgment-debtor has been attached under Rule 46 and has not been paid into Court under sub-rule (3) of that rule, the Court may, on the application of the decree-holder, issue a notice to such third party in Form Civil 74. A copy of such notice shall also, if possible, be served on the judgment-debtor. When at the hearing of such notice the third party shows no cause, and admits the debt to be due, the Court may intimate to him that he should pay into Court the amount admitted by him to be due, or so much thereof as may be sufficient to satisfy the decree, and that if he fails to do so, he may be subjected to a suit.

"57A. A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court."

In **Order XXI** the **following** shall **be substituted for Rule 65**:-

"65 (1) Sales shall be conducted by the Bailiff or Deputy Bailiff, but the duty may be entrusted to a process-server when the property is moveable property not exceeding Rs.50 in value, and when, in the opinion of the Court, for reasons recorded in the diary of the press, the Bailiff or Deputy Bailiff cannot personally conduct the sale.

"(2) Subject to the terms of the proviso to Rule 43 and of Rule 74, some one day in each week shall be set apart and regularly observed for holding sales in execution of decree; and some well-known place in the vicinity of the Court-house or the public bazaar shall be selected for the purpose.

"(3) Subject as aforesaid, and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment-debtor, all property, whether moveable or immoveable, attached in execution of decree shall be sold at the time and place selected.

"The day to be set apart, and the place selected for holding the sales, and any changes therein, shall be reported for the information of the Chief Court.

"(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorized commission:—

When the proceeds of sale do not exceed Rs.500—5 per cent.

Where they exceed Rs.500 and do not exceed Rs.5000—5 per cent. on the first Rs.500 and 2 per cent. on the remainder.

Where they exceed Rs.5000—at the above rate on the first Rs.5000 and one per cent. on the remainder.

[*The 14th March*, 1914.

No. 3 (General).—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the following **addition** shall be made **to Rule 65** of **Order XXI** of the First Schedule:—

The following shall be added to sub-rule 4:—

"The calculation of the commission shall be on the whole amount realized in pursuance of one application for execution."]

"(5) Subject to the provisions of sub-rule (13) of Rule 45B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of sale shall be deducted from the sale-proceeds.

"NOTE.—As regards the travelling allowance of Bailiffs going out to sell property on the spot, see Article 1039 and item 29 of Appendix 20, Civil Service Regulations.

"(6) When a sale of immoveable property is set aside under the provisions of Rule 92 (1) below, no commission shall be paid to the Bailiff for selling the property.

"(7) No officer of a subordinate Court shall receive any larger commission or fee in respect of any sale of property (mortgaged or otherwise) held in execution or pursuance of any decree or order of the Court directing or authorizing such sale than that allowed by sub-rule (4) above.

"(8) The gross proceeds of sales shall be entered in Register II and in Bailiff's Register I and shall be paid into the Treasury."

In **Order XXI** the **following** shall **be inserted as Rule 81A and** *added* as **Rule 104** respectively :—

"81A. Whenever guns or other arms in respect of which licences have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act."

"104. If, in execution of a decree, any interest in land which has been surveyed is sold the names and addresses of the purchaser or purchasers, and the interest thereby acquired, shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under Rule 92 (*i*)."

To **Order XXVI** the **following** shall **be added as Rules 19 to 26** respectively :—

"FEES TO COMMISSIONERS FOR LOCAL INVESTIGATION, AND COMMISSIONERS OF PARTITION OR TO TAKE ACCOUNTS, OR FOR THE EXAMINATION OF WITNESSES.

"19. [As amended by Notification No. 24 (General) of 23. 10. 11.] Civil Courts in issuing commissions will be guided by the provisions of Rule 15, and subject to the provisions of Rule 23, will exercise their own judgment in fixing a reasonable sum for the expenses of the commission.

"20. Under Government of India Resolution in the Home Department (Judicial No. 101101, dated the 21st July, 1875), Judicial Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces.

"21. It is to be understood that no part of the fee sent for the execution of a commission is to be accepted, either personally or on behalf of Government. The execution of a commission is an official act which Judicial Officers are bound to perform when called upon, and is not work undertaken for a private body.

"22. In all cases the unexpended balance, which remains after all charges have been deducted, should be returned to the Court issuing the commission.

"23. The following fees are to be allowed to Commissioners of partition or to take accounts, or for the examination of witnesses, namely :—

Commissioners' fees for every effective meeting shall not exceed three gold mohurs for the first two hours and one gold mohur for each succeeding hour.

"FEES TO COMMISSIONERS FOR ADMINISTERING ON OATH OR SOLEMN AFFIRMATION TO A DECLARANT OF AN AFFIDAVIT.

"24. When under the orders of a Court in the Town of Rangoon, of a Divisional Court, or of a District Court, an oath or solemn affirmation is administered to a declarant of an affidavit at his request elsewhere than at the Court, a fee of Rs.16 shall be paid by the said declarant :

"Provided that—

(*a*) the administration of the oath or of solemn affirmation elsewhere than in Court shall be authorized by the Court by order in writing;

(*b*) if more than one affidavit is taken at the same time and place, the fee shall be Rs.8 for each affidavit after the first ;

(*c*) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs.80 ;

(*d*) in pauper suits and appeals, when the affidavit of a pauper is taken, no fee shall be charged.

"25. Affidavits taken under Rule 24 shall be taken out of Court hours. The fees shall be retained by the Commissioner for administering the oath or solemn affirmation

"26. No fee shall be charged for the administration of an oath under the order of any Court other than those specified in Rule 24."

In **Order XXXVII, Rule 2,** the **following** shall be *inserted* **as sub-rule (1A) :—**

"(1A). The sum which shall ordinarily be entered in the form of summons as the sum which the plaintiff will be allowed for costs in the decree, shall be ascertained and fixed by adding up the amounts of the following :—

Court-fees on plaint and petitions—the full value of the stamps necessary.

Process fees—the full value of the stamps necessary.

Advocate's or pleader's fee (where an advocate or pleader has presented the plaint)—

If an advocate or pleader of the first grade—Rs.17.

If a pleader of the second grade—Rs.10.

If a pleader of the third grade—Rs.5."

In **Order XXXVII, Rule 2, sub-rule** (2), the **following** shall **be inserted** after the words "pursuance thereof" :—

"or of his applying for such leave within ten days from the service of the summons on him and on proof that the summons was duly served on him more than ten days before."

To **Order XLI, Rule 1,** the **following** shall **be added as sub-rule** (3) :—

"(3) The appellant shall present, along with the petition of appeal, as many copies on plain paper of the grounds of appeal as there are respondents."

In **Appendix E** the **following** shall **be inserted** as Form 15A :—

"FORM 15A.

Form of Certificate of the Payment of Fees for the Custody of Attached Property.

IN THE COURT OF .

Civil Case No. of 19 .

TO THE BAILIFF.

Reference: The warrant of attachment of in the possession of issued for execution on the at 19 .

Certified that a further sum of Rs. has been paid in stamps for custody fees under Rule 2, Article 3 (*b*), of the Process-fee rules in respect of the above-mentioned attachment.

Dated. *Court Clerk.*"

THE BURMA GAZETTE,

DECEMBER 3RD, 1910, PART IV, PP. 1250–1251.

The 25th November, 1910.

No. 22 (General).—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the following **amendments** shall be made **in Order XXXIV** of the First Schedule to the Code.

(1) **The following** shall be **substituted for Rule 2 :—**

In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree either—

(*a*) declaring the amount due to the plaintiff for principal and interest on the mortgage at the date of the decree and for his costs of the suit (if any) awarded to him, or

(*b*) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on a day within three months of the date of such decree to be fixed by the Court, and for his costs of the suit as aforesaid,

and directing—

(*c*) that if the defendant pays into Court the amount declared by the decree to be due or the amount found due on the account ordered on or before a date

six months from the date of the decree, or, in the case of an account being ordered, six months from the date of declaring in Court the amount found due, together with interest on the amounts payable at the rate of 6 per cent. per annum from the date of the decree, or from the date up to which the account has been taken, until payment, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required by the defendant, re-transfer to him, free from mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but

(*d*) that, if payment of such amounts is not made on or before the day fixed for payment, the defendant shall be debarred from all right to redeem the property.

(2) The words "for payment" shall be inserted after the word "fixed" **in Rule 3 (1).**

(3) The words "for payment" shall be inserted after the word "fixed" **in Rule 5 (1).**

(4) The **following** shall be **substituted for Rule 7 :—**

In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree, either—

(*a*) declaring the amount due to the defendant for principal and interest on the mortgage at the date of the decree, and for his costs of the suit (if any) awarded to him, or

(*b*) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage on a day within three months of the date of such decree to be fixed by the Court, and for his costs of the suit as aforesaid, and directing—

(*c*) that if the plaintiff pays into Court the amount declared by the decree to be due or the amount found due on the account ordered, on or before a date six months from the date of the decree, or in the case of an account being ordered, six months from the date of declaring in Court the amount found due, together with interest on the amounts payable at the rate of 6 per cent. per annum from the date of the decree or from the date up to which the account has been taken until payment, the defendant shall deliver up to the plaintiff or to such person as he appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required by the plaintiff, re-transfer to him free from mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property, but

(*d*) that, if payment of such amounts is not made on or before the day fixed for payment, the plaintiff shall be debarred from all right to redeem the property.

(5) The words "for payment" shall be inserted after the word "fixed" in **Rule 8 (1).**

THE BURMA GAZETTE,

PART IV.

The 18th August, 1911.

No. 14 (General.)—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the **following addition** shall be made to **Order XXI** of the First Schedule :—

In Rule 66 the following shall be added at the end of sub-rule (2).

Provided that no such notice shall be necessary in the case of moveable property not exceeding Rs.250 in value.

The 19th August, 1911.

No. 15 (General).—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the following **alterations** shall be made **to Order V** of the First Schedule :—

1. The heading "(applicable to Burma only)" **of Rule 23a** shall be deleted.

2. The **following** shall be **substituted for Rule 23a :—**

23a. (1) Before retransmitting a summons received from another Court for service, the Court shall either take down the deposition of the peon serving the summons as to the time when, and the manner in which the summons was served; or cause the peon to make an affidavit before the Bailiff if the Bailiff has been empowered to administer oaths; and shall transmit the same, together with the summons, to the Court whence the summons originally issued.

(2) In the case of process received from India and Upper Burma if the person on whom the summons is to be served is not personally known to the process-server an affidavit or deposition by the person who pointed out to the process-server the said person or his ordinary residence or place of business shall also be attached to the summons.

(3) When a process is forwarded for service by one Court in Lower Burma to another Court in Lower Burma and when the person on whom the process is to be served is not personally known to the process-server the case, in connection with which the process was issued, shall not be heard *ex parte* without an affidavit or deposition of some person who pointed out to the process-server the person to be served or his ordinary residence.

The onus shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process-server the person on whom the process is to be served or his ordinary residence or place of business.

(4) When the summons has been returned by the process-server under Rule 17, a declaration of due service or of failure to serve shall be recorded in Form (Civil) 46, and sent with the summons to the Court by which it was issued.

The 4th April, 1912.

No. 6 (General).—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the **following amendments** shall be made **in Order XXXIV** of the First Schedule to the Code :—

The **following** shall be **substituted for Rule 2 :—**

In a suit for foreclosure if the plaintiff succeeds the Court shall either—

(1) Pass a preliminary decree declaring the amount which will be due to the plaintiff on the mortgage for principal and interest (at the mortgage rate) six months from the date of the decree and for his costs of the suit (if any) awarded to him and directing—

(A) that if the defendant within the said period pays into Court the said amount the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required by the defendant, re-transfer to him free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims and shall also if necessary put the defendant in possession of the property, but

(B) that if such payment is not made within the said period the defendant shall be debarred from all right to redeem the property, or

(2) Order that an account be taken of the amount due on the mortgage for principal and interest; and after the taking of the said account, pass a preliminary decree as above.

The following shall be substituted for sub-rule (1) of Rule 3: Where the defendant pays into Court the amount declared due as aforesaid, within the said period,

together with such subsequent costs as are mentioned in Rule 10, the Court shall pass a decree—

(*a*) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,—

(*b*) ordering him to re-transfer the mortgaged property as directed in the said decree, and, also, if necessary,—

(*c*) ordering him to put the defendant in possession of the property.

The **following** shall be **substituted for sub-rule (1) of Rule 4 :—**

In a suit for sale, if the plaintiff succeeds, the Court shall act as prescribed in Rule 2, except that instead of the direction contained in clause B thereof, there shall be the following direction :—

That if such payment is not made within the said period the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is due to the plaintiff as aforesaid together with subsequent interest on the said amount at the rate of six per cent. per annum from the last day of the said period up to the actual date of realization by the plaintiff and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

The **following** shall be **substituted for sub-rule (1) of Rule 5 :—**

Where the defendant pays into Court the amount due as aforesaid within the said period together with such subsequent costs as are mentioned in Rule 10 the Court shall pass a decree—

(*a*) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,—

(*b*) ordering him to re-transfer the mortgaged property as directed in the said decree, and, also, if necessary,—

(*c*) ordering him to put the defendant in possession of the property.

The **following** shall be **substituted for Rule 7 :—**

In a suit for redemption, if the plaintiff succeeds, the Court shall either—

(1) Pass a preliminary decree declaring the amount which will be due to the defendant on the mortgage for principal and interest at the mortgage rate six months from the date of the decree and for his costs of the suit (if any) awarded to him and directing—

(A) that if the plaintiff within the said period pays into Court the said amount the defendant shall deliver up to the plaintiff or to such person as he appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims and shall, if necessary, put the plaintiff in possession of the property, but

(B) that if such payment is not made within the said period the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold, or

(2) Order that an account be taken of the amount due to the defendant on the mortgage for principal and interest and, after the taking of the said account, pass a preliminary decree as above.

The **following** shall be **substituted for sub-rule (1) of Rule 8 :—**

Where the plaintiff pays into Court the amount due as aforesaid within the said period together with such subsequent costs as are mentioned in Rule 10, the Court shall pass a decree—

(*a*) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,—

(*b*) ordering him to retransfer the mortgaged property as directed in the said decree, and, also, if necessary,—

(*c*) ordering him to put the plaintiff in possession of the property.

THE BURMA GAZETTE,

OCTOBER 19TH, 1912, PART IV, P. 1121.

The 15th October, 1912.

No. 11 (General).—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the **following alterations** shall be made in **Order XXI** and in Appendix E of the First Schedule of the said Code :—

For Rule 45A substitute the following :—

"45A (1) Before issuing a warrant for the attachment of moveable property which it will be necessary to place in charge of one or more peons, permanent or temporary, the Court shall satisfy itself that the attaching decree-holder has produced a receipt in Form 15A, Appendix E, from the Bailiff that he has paid in cash as process-fees under Rules 17 (1) (*b*) (2) of the Process-Fees Rules not less than Rs. 10, for each person whom the Bailiff considers should be employed.

(2) In sending the warrant for execution to the Bailiff the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record, the Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property, the process-server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced.

(3) At the time of the attachment of the property the Bailiff shall give the attaching decree-holder a notice in Form (Civil) 78A, stating the date on which the fees paid under sub-rule (1) will be exhausted, and warning him that the property will not be kept under attachment after that date unless further fees are paid before that date. The payment of any such further amount shall immediately be certified to the Court Clerk by the Bailiff in Form 15A of Appendix E.

If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs.

(4) The payment of fees under sub-rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff's Register No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment (Form 15A) file it in the record and make an entry to that effect in the diary.

(5) Temporary peons employed for the custody of attached property shall be remunerated at the rate provided for in Rule 15 of the rules regarding process-serving establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process-fees actually paid under the foregoing sub-rules.

Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilized, the fees paid shall be credited direct into the Treasury to "Process-servers' Fees" ("XVI-A, Law and Justice"—"Courts of Law"—"Court Fees realized in cash").

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge.

Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case, of the unexpended balance of such deposits and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiff's Register I, the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a repayment of deposit and shall then disburse the amount due to

the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When an attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons that the total amount of the fees actually paid under sub-rules 1 and 3 exceeds the total amount that is chargeable for peons including the amount of the last payment, he shall direct that the excess be refunded to the payer.

(9) The Judge shall in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record, to make such refund.

If a sufficient portion of the amount paid by the decree-holder to pay such refund is in the hands of the Bailiff that officer shall make the refund in the ordinary way prescribed in his Register II for re-payments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed treasury form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the Judge must satisfy himself that the amount is available for refund by examining Bailiff's Register I and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or sub-treasury."

For Rule 45B substitute the following :—

"45B (1) In addition to the fees payable before a warrant issues for the attachment of moveable property under Rule 45A, the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

Explanation.—The costs in question might be, for example, (*a*) Rent of building in which to store attached furniture, (*b*) Cost of conveying the attached property from the place of attachment to Court or to a secure place of custody, (*c*) Cost of feeding and tending live-stock, (*d*) Cost of proceeding to the place of attachment to sell perishable property.

(2) If the attaching decree-holder fails to comply with the Bailiff's requisition, the warrant shall not be issued.

(3) Sums thus deposited shall be entered in the Bailiff's Registers I and II and any re-payments thereof shall be made according to existing orders.

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted.

(5) The officer actually attaching the property shall, unless the Court otherwise directs, give the debtor, or, in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court.

Where the attached property consists of cattle these may be employed, so far as is consistent with Rule 43, in agricultural operations.

(6) If no such suitable place be provided, or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop, when Rule 45 applies. Whenever live-stock is placed at the place where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer.

(7) Whenever property is attached, the officer shall forthwith report to the Court, and shall, with his report forward an accurate list of the property seized.

(8) If the debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in Rule 68, the officer shall receive the written consent and forward it without delay to the Court for its orders.

(9) When property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Bailiff, he may, subject to the approval of the Court, make such

arrangement for its safe custody under his own supervision as may be most convenient and economical.

(10) If there be a Government pound in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly there kept, in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it the officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court.

(12) If the decree-holder shall withdraw an attachment, or if it shall cease under sub-rule (2) or (4), the Bailiff's officer shall inform the debtor or, in his absence, an adult member of his family that the property is at his disposal.

(13) If any portion of the deposit made under sub-rule (1) or (4) remains unexpended it shall be refunded to the decree-holder in the manner prescribed for such refunds in sub-rule 9 of Rule 45A. Any difference between the cost of attachment of moveable property (other than costs referred to in Rule 45A) and the sums deposited by the attaching decree-holder shall, unless the difference is due to the fault of the Bailiff, be recovered from the sale proceeds, of the attached property, if any, and if there are no sale proceeds from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency, the amount shall be paid by Government.

Appendix E.—*For* Form 15A *substitute* the following:—

No. 15A.

FORM OF CERTIFICATE OF THE PAYMENT OF FEES FOR THE CUSTODY OF ATTACHED PROPERTY.

In the Court of

Civil Case No. of 19 .

To

The COURT CLERK.

REFERENCE.—The warrant of attachment of in the possession of issued for execution on the at 19 .

Certified that a further sum of Rs. has been paid in cash for custody fees under Rule 17 (1) (*b*) (2) of the Process-Fees Rules in respect of the above-mentioned attachment.

Dated *Bailiff.*

THE BURMA GAZETTE,

FEBRUARY 4TH, 1911, PART IV, P. 91.

The 31st January, 1911.

No. 2 (General).—With reference to section 128 (2) (*i*) of the Code of Civil Procedure, 1908, the following rules for the delegation to the Deputy Registrar of the Court of judicial, quasi-judicial and non-judicial duties made by the Chief Court of Lower Burma and sanctioned by the Local Government are published for general information:—

The rules shall be inserted in the First Schedule to the Code as "Order LII—Delegation of judicial, etc., duties."

From the date in which the rules come into force, all existing rules regulating the procedure of the Chief Court in its Original Jurisdiction to a contrary effect are, so far as they are contrary, superseded.

1. All *ex parte* and consent applications, and (unless the parties concerned or their Advocates or Pleaders require the matter to be placed before a Judge) all contested applications of the description or relating to the matters hereunder mentioned shall be made to a Deputy-Registrar: Provided that:—

(i) When a Deputy Registrar shall refuse any uncontested application under this

rule, the matter shall, at the request of the applicant or his Advocate or Pleader, be referred to the Judge.

(ii) A Deputy Registrar may refer to the Judge any matter which he considers to be a fit and proper one to be so referred by reason of its importance or difficulty or novelty or by reason of the order to be made thereon being appealable or for any other cause :—

(1) Applications for admission of plaints.
(2) Applications for leave to verify plaints, petitions, and written statements.
(3) Applications for special leave of the Court to file plaint when such leave is necessary.
(4) Applications under Order 1, Rule 8 (1), for leave to sue or defend on behalf of, or for the benefit of, all in the same interest.
(5) Applications for leave under Order II, sub-rule 3 of Rule 2.
(6) Applications under Order II, Rule 4, to join causes of action in a suit for the recovery of immoveable property.
(7) Applications relating to the conduct or frame of suits previous to the hearing unless the suit is in one of the lists of causes for the day.
(8) Applications for the admission or appointment of a next friend or guardian-*ad-litem* of a minor or new next friends or guardians-*ad-litem*.
(9) Applications for fresh summons or notice and for short date summonses and notices.
(10) Applications for orders for substituted service of summons, notice, or order.
(11) Applications for transmission of process for service to another Court, etc.
(12) Applications against a party in default to compel filing of written statement or affidavit of documents, including applications to dismiss suit or application for want of prosecution or to strike out defence or to transfer to the undefended list of causes.
(13) Applications for transfer of suits from the lists of contested suits to any other list.
(14) Applications arising from the death, marriage, or insolvency of parties to suits or petitions or from the assignment, creation, or devolution of any interest, estate, or title, *pendente lite*.
(15) Applications to amend plaint, petition, or subsequent proceedings where the amendment asked for is purely formal. All amendments whether made by order of a Judge or under this rule shall be attested by a Deputy-Registrar.
(16) Applications for further and better statement of particulars under Order VI, Rule 5.
(17) Applications for leave to file further written statements.
(18) Applications for orders for discovery and for orders concerning the admission, production, and inspection of documents.
(19) Applications for leave to deliver interrogatories.
(20) Applications for order for execution of a decree or order for arrest, attachment, sale or otherwise, with power to order issue of notice under Order XXI, Rules 16, 22 or 37, or where notice is otherwise necessary or considered desirable.
(21) Applications for order for the transmission of a decree with the prescribed certificates, etc., with power to issue notice under Order XXI, Rule 16 $\frac{\text{and}}{\text{or}}$ Rule 22.
(22) Applications for the execution of a document or for the endorsement of a negotiable instrument under Order XXI, Rule 34.
(23) Applications for examination of judgment-debtor as to his property under Order XXI, Rule 41.
(24) Applications falling under section 52 of the Code.
(25) Applications for leave under Order XXI, Rule 50, sub-rule (2).
(26) Applications for the issue of proclamations of sale under Order XXI, Rule 66, and for directions as to the publication thereof under Rule 67.
(27) Applications for confirmation of sale and certificate of sale to purchaser of immoveable property.

(28) Applications for possession under Order XXI, Rules 95 and 96.

(29) Applications for special costs in connection with the attachment $\frac{\text{and}}{\text{or}}$ sale of immoveable property.

(30) Applications for special directions to the Bailiff as to the service or execution of any process of the Court.

(31) Applications for order for withdrawal of attachment or for return of a warrant.

(32) Applications for order for payment of money realized in execution or otherwise deposited in Court, including applications to share in assets realized under section 73, unless the case is in one of the cause lists for the day.

(33) Applications for commissions to examine witnesses under Order XXVI, Rule 1, unless the suit is in one of the lists of causes for the day, and applications for *de bene esse* examination.

(34) Applications for extension of time under Order XXVII, Rule 7, or by a party in default for further time to file written statement or affidavit of documents, and generally all applications for further time not otherwise provided for.

(35) Applications for statement of names and disclosure of partners' addresses and residence under Order XXX, Rules 1 and 2.

(36) Applications for leave to issue execution under Order XXX, Rule 9.

(37) Applications for leave to sue or defend in *forma pauperis*, and investigation as to the pauperism of petitioner for leave to sue or defend a suit or to appeal as a pauper.

(38) Applications by receivers and others relating to the management and disposal of property.

(39) Applications for orders of reference to arbitration unless the suit is in one of the lists of causes for the day.

(40) Applications for orders requiring a party to a suit or matter to produce and leave with the Chief Clerk any document not in the English language in his possession for the purpose of being officially translated.

(41) Applications for return of exhibits, both documentary and non-documentary.

(42) Applications for order for the production of records or documents in the Chief Court, or accounts filed in such records, before any other Court or officer of such Court.

(43) Applications for an order for the issue of a proceeding to another Court for the production of a record of such Court or of notice or subpœna to a public officer for the production of a public record or register.

(44) Applications for inspection or copy of a will.

(45) Applications for orders of production of prisoners and others under the Prisoners Act, 1900.

(46) All matters affecting procedure arising out of applications under the Indian Succession Act, 1865, the Probate and Administration Act, 1881, the Court-fees Act, 1870, the Indian Companies Act, 1882, the Indian Trustees Act, 1866, the Trustees and Mortgagees' Powers Act, 1866, the Indian Trusts Act, 1882, the Indian Arbitration Act, 1899, the Powers of Attorney Act, 1882, the Bankers' Books Evidence Act, 1891, the Guardians and Wards Act, 1890, and generally in the matter of any Act unless otherwise provided in the Act itself or by the rules thereunder or by these rules.

2. Any party desiring to have any question which has been decided by a Deputy Registrar, whether disputed or not, referred to a Judge may apply therefor to the Court within eight days from the issuing of the order complained of or within such further period as the Judge for sufficient cause may allow.

3. Unless the Court or a Judge otherwise orders (or a Deputy Registrar otherwise directs) the costs of all orders passed by and of all proceedings before a Deputy-Registrar shall be costs in the cause.

THE BURMA GAZETTE,

OCTOBER 21ST, 1911, PART IV, P. 922.

CHIEF COURT OF LOWER BURMA.

NOTIFICATION.

Dated Rangoon, the 19th October, 1911.

No. 19 (GENERAL).—With reference to section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court, Lower Burma, makes the **following rules** for the regulation of matters connected with its own procedure in the exercise of its Original Civil Jurisdiction:—

The rules shall **be inserted** in the First Schedule to the Code **as "Order LIII** —Original Side Rules of Procedure."

The rules contained in the First Schedule to the Code of Civil Procedure, 1908, shall, so far as they are inconsistent with or contrary to the Rules herewith published and, so far as the practice and procedure of the Original Side of the Chief Court of Lower Burma only are concerned, be deemed to have been altered or superseded by the rules secondly above-mentioned.

ORDER LIII.

Original Side Rules of Procedure.

Preliminary.

1. In these rules unless there is something repugnant in the subject or context:—

(1) The word "Judge" means any Judge of the Chief Court;

(2) The words "plaintiff" and "defendant" respectively include petitioner and respondent in miscellaneous proceedings.

2. In the absence of a Deputy Registrar an Assistant Registrar shall exercise all the functions of a Deputy Registrar under these rules.

3. Except upon close holidays the offices of the Court shall be open to the public for business from 10.30 a.m. until 4.30 p.m. on all week days except Saturdays, and on Saturdays from 10.30 a.m. until 2 p.m.

4. For the more convenient despatch of the business of the Court, unless notice to the contrary be previously given, the Judge or one of the Judges on the Original Side will ordinarily sit in Chambers on Court days from 10.30 to 11 a.m. to dispose of any matter referred by a Deputy Registrar under the provisions of Rules 1 and 2 of the rules delegating under the Code of Civil Procedure, 1908, Judicial, Quasi-Judicial and non-Judicial duties to Deputy Registrars (Order LII), and the Deputy Registrars or a Deputy Registrar will every day on which the offices of the Court are open sit to dispose of the applications specified in Rule 1 abovementioned. In the event of the absence of both the Deputy Registrars, such applications if of an urgent nature, may be made to the sitting Judge in Chambers.

Institution of Proceedings.

5. Plaints, written statements, petitions, and affidavits shall be either printed, typewritten or written in a clear and legible hand in the English language on durable white foolscap paper, on one side only of the paper and so as to leave a clear margin one inch and a half wide on the left side.

The matter shall be divided into paragraphs numbered consecutively, and each paragraph shall contain as nearly as may be a separate allegation. Dates and figures shall be filled in before presentation. When native dates are given, the corresponding English dates shall always be added.

Material corrections or alterations shall be authenticated by the initials of the person verifying a plaint or written statement, or signing a petition, or making an affidavit.

Every affidavit which has to be interpreted to the declarant shall be interpreted to him by an officer of the Court, who shall note on the affidavit the fact that he has done so and the date.

6. The first two paragraphs of the preceding rule apply to copies of documents intended to be served upon other parties to a suit or proceeding Press copies shall not be accepted.

7. Plaints, written statements, petitions, and affidavits presented to the Court in its original civil jurisdiction shall be intituled "In the Chief Court of Lower Burma, Original Civil Jurisdiction." A space shall be left for the description and number of the suit or proceeding.

8. No correspondence relating to suits or proceedings before the Court can be attended to, but any person having business in the Court or its office shall transact the same in person or by a duly authorized agent, advocate or pleader.

9. Except in plaints and in petitions initiating miscellaneous proceedings, the names, descriptions and places of residence of the plaintiffs and defendants, other than the first plaintiff, defendant, petitioner or respondent, need not be set out, but the words "and another" or "and others," whichever may be applicable, shall be added after the name of the first plaintiff or defendant.

10. In every document relating to a suit or proceeding already instituted, the number of the suit or proceeding shall be entered before the document is presented.

11. A party, advocate or pleader presenting a written statement, affidavit, or petition, except in matters as of course, shall send a copy or copies thereof to the other party or parties to the suit or proceeding or their advocate or pleader within 24 hours from the time of presentation of the document.

12. In every petition the section or sections of the Act (if any) under which the applicant claims the order asked for by him shall be stated.

13. The Registrar, Deputy Registrars, Assistant Registrars and the Senior Interpreters attached to the Chief Court for Burmese, Hindustani, Gujarati, Chinese, Tamil and Telugu are empowered to administer the oath to deponents of affidavits to be filed in the Chief Court. The senior Interpreters shall exercise the power conferred by this rule only within the precincts of the Court.

14. If the document does not comply with Rules 5, 6, 7, 9, 10, 11 and 12, or if it is defective in grammar, form, or otherwise it shall be returned to the person presenting it.

15. Plaints, written statements and affidavits shall be presented to a Deputy Registrar. Petitions shall ordinarily be presented to a Deputy Registrar, but when immediate orders upon an urgent application are desired the petition may be presented to the Judge, upon his taking his seat on the Bench in the forenoon.

16. Upon receipt of a document bearing a court-fee label a Deputy Registrar shall examine the correctness of the court-fee and if, in his opinion, it is insufficient he shall inform the advocate or party tendering the same and return the document to him if the advocate or party is willing to pay such court-fee as in the opinion of the Deputy Registrar is necessary. He shall at the same time fix a time under Order VII, Rule 11, or section 141 of the Code within which such additional Court-fee shall be paid. If the advocate or party contends that the court-fee on the document is correct, the Deputy Registrar shall submit the document to the Judge for orders. As soon as a document has been properly stamped, the stamp shall be forthwith cancelled in the manner prescribed by section 30 of the Court-fees Act, 1870, and the cancelled portion shall be destroyed.

17. A Deputy Registrar shall enter upon a diary form to be used in every suit and distinct miscellaneous proceeding, the date on which the plaint or petition initiating a proceeding was presented and the name of the person presenting the same.

He shall also note any remarks he may have to offer regarding the same, and regarding the admissibility of a plaint, with reference to the provisions of the Code and of these rules, and any other remarks upon matters to which he may think it desirable to call the attention of the Judge.

He shall then submit the plaint or petition to the Judge for orders, unless he is empowered to deal with it himself.

18. If the Judge entertains no doubt as to the admissibility of a plaint or as to granting the prayer of a petition *ex-parte*, he shall pass orders admitting or granting the same without hearing the party in person, or his advocate or pleader. Otherwise the case shall ordinarily be placed upon the daily cause list on as early a date as other business will admit of for argument as to admission, or granting of the prayer of the petition.

19. Except in cases in which a party is entitled to the order asked for in a petition as

a matter of right and of course, notice shall ordinarily be issued to the other party interested to show cause why the order asked for should not be granted. If a party making an application desires that the order he asks for be made without notice to any other party interested, reasons for making the order without such notice should be set out in his petition.

20. When application is made for the Court's permission to a plaint or application being verified by some person other than a plaintiff or person on whose behalf the application is made, the application must be accompanied by an affidavit by the person proposing to verify, showing clearly his connection with the facts alleged in the plaint or application.

21. If an agent desires to institute or defend a suit or proceeding on behalf of his principal, he shall at the time of presenting the plaint or filing his written statement produce any original power of attorney which he may hold, if it is not already filed in the Court.

A Deputy Registrar shall examine the power of attorney and if it contains the necessary powers shall make an entry to that effect at the foot of the application for leave to verify or the affidavit filed in support thereof under Rule 20 and return the power of attorney; provided always that any plaintiff or defendant shall, on receiving notice requiring him to do so, forthwith produce and leave such power of attorney at the Office of the Deputy Registrar for inspection by the opposite party or his advocate.

22. When an original document is produced by a plaintiff under Order VII, Rule 14 of the Code upon presentation of a plaint, a Deputy Registrar shall put thereon his initials, and a note of the date of presentation. If the document is not in the English language, a duly authenticated translation by a licensed translator of the Court must be produced with it. Provided that a Deputy Registrar may receive the plaint without a translation of the document if urgency translation fees are deposited at the same time.

23. If a copy is delivered to be filed with the plaint in lieu of the original, the Chief Clerk shall compare the copy with the original, and if found correct shall endorse on the copy "Compared with the original and found correct" and shall initial the same.

24. When a plaint or document initiating a proceeding has been admitted and registered, its number in the register shall forthwith be entered on the face of it, and on a facing cover to be attached to it.

25. Applications by petition made in any previously instituted suit or proceeding shall not be registered as distinct proceedings, but shall bear the number of the suit or proceeding in which they are made. This, however, shall not apply to applications for execution of decree, or claims preferred to, or objections to the attachment of, any property under Order XXI, Rule 58 of the Code, or to any cases in which the applicant is not already a party to a previously instituted suit or proceeding, except an application to be made a party to such suit or proceeding.

26. Upon delivery by the plaintiff of the proper court-fee stamps for the process-fee for service of summons, a Deputy Registrar shall fix a day for the defendant's appearance, and shall cause a summons to be prepared.

27. Process-fees for the issue of summons, notice or other process, costs of advertisements and copies of plaints, petitions, affidavits, etc., for service on defendants or respondents, if not tendered on presentation of the plaint or petition, shall be filed in the office or deposited within ten days of the date of the order on which such summons, notice, process or advertisement is to be issued. In default of that being done, the plaint or application shall be included in the list of a Deputy Registrar to be struck off if process fees, costs, etc., are not paid. An endorsement on the plaint or petition to the effect that it has been struck off shall be signed by a Deputy Registrar. The plaintiff or petitioner or his advocate or pleader presenting the plaint or petition or an application for issue of process is expected to ascertain and shall be presumed to know the date of the order directing the issue of the process.

28. When a petitioner for Letters of Administration or probate or the person appointed a guardian of the person $\frac{\text{and}}{\text{or}}$ property of a minor on giving security fails to complete the security required to be furnished by him within three months unless the time for furnishing security has been extended from the date of the order requiring the security to be given the petition for letters or probate or the appointment of such guardian as aforesaid as the case may be, may be taken off the file provided that notice has

given by its inclusion in one of the Deputy Registrar's lists. An endorsement to the effect that it has been taken off the file shall be signed by a Deputy Registrar under and by virtue of this rule and without further order. The applicant or his advocate or pleader is expected to ascertain and shall be presumed to know the date of the order requiring security to be furnished.

29. A plaint or petition taken off the file under Rules 27 and 28 may be restored to the file, as of the date on which it was originally filed, on the application of the plaintiff or petitioner and on sufficient grounds being shown to the satisfaction of the Court, or the Sitting Judge in Chambers.

30. When a plaint or petition is so taken off the file, the plaintiff shall be at liberty, subject to the Law of Limitation, to present a fresh plaint or petition for the same matter.

31. Copies of decrees of other Courts transmitted to the Chief Court for execution under section 39, shall, if the decree-holder fails to apply for execution within six months after the receipt of the copy of the decree by the Chief Court, be returned with an endorsement to that effect signed by a Deputy Registrar and a certificate of non-satisfaction.

32. When an attaching creditor fails to bring the attached property to sale for a period of three months after the date of the attachment, his application shall be liable to be dismissed and the attachment to be removed after notice to him by a Deputy Registrar, provided that the matter shall at the request of the applicant or his advocate or pleader be referred to the Judge in Chambers.

33. Ordinarily and unless the Judge otherwise directs the summons shall be for final disposal of the suit.

34. A plaintiff who desires that a summons for settlement of issues shall issue, or that a summons shall be in Form 4 of Appendix B to the Code, shall intimate such desire in writing on the plaint.

35. Ordinarily the summons shall require the defendant to appear on the fourth or some subsequent Monday after the date of issue of the summons, and shall inform him that if he wishes to defend the suit he must present a written statement of his case to the Deputy Registrar at least seven days before the day fixed for his appearance, and that in default of his so doing, the suit may be decided without hearing him.

36. The length of time to be allowed for the defendant's appearance after service of the summons shall be fixed by a Deputy Registrar according to the circumstances of each case, allowing sufficient time for the preparation of a written statement by the defendant.

37. A notice to a party to show cause against an application shall require him to show cause on the first or some subsequent *motion day* after the date of issue of the notice.

38. All interlocutory applications in a suit which has been entered in List (5), (6) or (7), referred to in Rule 51 other than those which may be disposed of by a Deputy Registrar, shall be heard by the Judge to whom the trial of suits entered in such list has for the time being been assigned. If the said Judge is absent or not sitting on the Original Side, any motion in the suit, if urgent, may be made before any other Judge sitting on the Original Side.

39. A defendant who alleges that the time allowed for presenting his written statement is not sufficient must apply for further time to a Deputy Registrar either verbally or by petition on or before the day fixed for putting in the same. In default of such application being made on or before the aforesaid day costs not exceeding Rs. 85 may be allowed to plaintiff against him.

40. Unless otherwise ordered no suit for final disposal shall be heard—

(*a*) If the defendant resides or all the defendants reside within the local limits of the original jurisdiction of the Court until after seven clear days from the service of the summons;

(*b*) If the defendant resides or all the defendants reside in Burma but the defendant or any of the defendants resides beyond the local limits of the original jurisdiction of the Court, until after twenty-one clear days from such service;

(*c*) If the defendant or any of the defendants resides in the Province of Bengal and if any of the defendants who does not reside in Bengal resides in Burma, until twenty-eight clear days after such service;

(*d*) If the defendant or any of the defendants resides in India elsewhere than i Bengal or Burma, until forty-two clear days after such service; and

(*e*) In all other cases, until such date as a Deputy Registrar shall fix, havin regard to the place where the summons is to be served.

41. All acts which may be done by the Court under Order V, Rules 19, 20, and 21 c the first schedule to the Code may be done by a Deputy Registrar and service of summor or other process as may be ordered by a Deputy Registrar shall be as effectual as if th same had been ordered by the Court.

Process.

42. Summonses to parties and witnesses, warrants, notices and other processes sha be signed, sealed, and issued by a Deputy or an Assistant Registrar, provided that ever warrant or order committing a person to custody in jail shall be signed by the Judge.

43. Summonses, notices to show cause, citations, and other processes to be serve within the local limits of the original jurisdiction of the Court shall be delivered for servic to the Bailiff, who shall endorse thereon the date of receipt by him.

44. If the person to be served is personally known to him or to any of his officers wh is at the time available, the Bailiff shall cause the process to be served forthwith. If th person to be served is not so known the Bailiff shall forthwith communicate with th party desiring to have the process served or with his advocate or pleader, appointing time at which one of his officers will be available and ready to proceed to effect servic and requesting that some one who personally knows the person to be served may accoh pany the officer to point him out.

45. A summons and other process to be served in Burma, but beyond the local limit of the original jurisdiction of the Court shall be sent by post to the Court of widest juris diction, not being a Divisional Court, at the headquarters of the Township in which th person to be served resides. If the summons is to be served out of Burma it shall b sent for service as provided by section 28, Order V Rules 21–23 and 25 of the Code t the Court named by the party.

46. Unless otherwise ordered a second or subsequent summons or process shall no be issued until after the one previously issued has been returned.

47. A special list shall be prepared for a Deputy Registrar every Monday under th headings "Summons," and "Notices," and all cases in which a summons, notice o citation is returnable on that day and in which a written statement has not been file or an appearance, caveat or statement of objections has not been entered by or on behal of the defendant or respondent or any of the defendants or respondents up to the previou Saturday shall be entered in the said list for enquiry as to the sufficiency of the servic of the summons, notice or citation. At such enquiry which may, if necessary, b adjourned from time to time, affidavits or further affidavits may be received or evidenc taken *viva voce*. A Deputy Registrar on being satisfied as to the due service of th summons, notice or citation shall deal with the case as provided in Rule 52 or 56 or caus it to be set down for hearing as provided in Rule 53, 54, or 55.

48. The oath of process-servers and identifiers to affidavits in proof of service o summons may be administered by the Bailiff or the Deputy Bailiff. With his return of service of the summons or process, the Bailiff shall submit the affidavit or affidavit as to service.

49. No summons or other process shall be served or executed on Sunday, Christma Day or Good Friday except by leave of a Judge or a Deputy Registrar.

Address for Service.

50. Every party appearing in person shall enter his name and place of abode as als an address within the local limits of the original jurisdiction of the Court (to be called hi address for service) in a book to be kept by the Chief Clerk, and unless otherwise ordered all notices and other judicial processes required to be served on any such party shall b deemed to have been duly served on him if left at his address for service.

Cause Lists, Proof of Service, Hearing, and Disposal of ex-parte *Suits and Matters.*

51. Lists of pending cases shall be kept under the following heads:—
(1) Suits for appearance of defendants.
(2) Uncontested suits.
(3) Miscellaneous proceedings.
(4) Insolvency proceedings.
(5) Contested short suits.
(6) Contested Commercial suit
(7) General contested suits.
(8) Postponed cases.
(9) Daily list of cases for hearing.

52. In a suit which is not defended by the defendant or any of the defendants and is (*a*) one for a liquidated demand, or (*b*) for damages, a Deputy Registrar may, provided that the plaintiff does not desire to be heard by a Judge, record such evidence as may be necessary to prove the claim *ex-parte* and may be tendered on behalf of the plaintiff, and shall if he so records evidence submit the case to the Judge or one of the Judges in Chambers with (*a*) a draft of the minutes of the decree to be passed in the suit or (*b*) a report as to the amount of damages which in his opinion may be awarded to the plaintiff, for an *ex-parte* decree or for such order as may be deemed proper, and the Judge may thereupon either pass an *ex-parte* decree or such order as he may deem proper, or adjourn the case into Court for hearing and disposal.

53. Suits other than those for a liquidated demand or damages which are not defended by the defendant or any of the defendants shall be set down for *ex-parte* hearing and disposal by the Court on the next or any subsequent motion day after the summons has been declared duly served.

54. Cases to be set down in Court under one or other of the last two preceding rules shall be entered in List 2.

55. If a written statement has been put in by the defendant or any of the defendants, the Deputy Registrar on being satisfied as to the due service of the summons on the defendant or defendants, if any who has or have not appeared shall transfer the suit from List 1 to such list of contested suits as he may think the suit should be entered in.

56. The Deputy Registrar, on being satisfied, if necessary, as to the due service of notice of an application on the respondent or all the respondents shall, if or as soon as the application is ripe for hearing and disposal, proceed to dispose of it if it is one which he is empowered to deal with himself or shall refer it to the sitting Judge in Chambers, or set it down for hearing and disposal in Court on the earliest available date.

57. If a summons or notice against any defendant or respondent is found to be not duly served, the Deputy Registrar shall on application being made therefor order a fresh summons or notice to issue subject to the provisions of the rule next following, but the costs of obtaining such fresh summons or notice shall not be allowed as costs in the cause unless so ordered by the Deputy Registrar on being satisfied that a *bonâ fide* endeavour had been made on the part of the plaintiff or petitioner to serve the previous writ.

58. After a summons or notice against any defendant or respondent has been issued and found to be not duly served and no application is made for a fresh summons or notice, or if it has been issued and found to be not duly served three times, the Deputy Registrar may submit the case for orders to the Court.

59. Processes or orders to be served on a party to a suit or proceeding may be served on his advocate or pleader, if any, and when so served shall be presumed to be duly communicated and made known to the party for whom such advocate appears or by whom such pleader has been appointed. For the purposes of this rule an advocate who has once appeared or entered an appearance on behalf of a party shall be deemed to continue to be his advocate unless and until he withdraws his appearance by a statement to that effect made in and recorded by the Court or unless and until he or such party intimates in writing to a Deputy Registrar that he has ceased to be the advocate for such party.

60. Cases for the Daily List will be taken from the other lists, and put on the Daily List for such days and periods as may from time to time be indicated in notices affixed to the notice-board of the Court.

61. Every case appearing on the Daily List shall be deemed to have been fixed or adjourned for hearing on the day on which it appears in such list.

62. A party who desires that a case shall not be brought on to the Daily List in its turn or before a certain date, must promptly apply for an order to that effect.

63. Cases on the Daily List shall be called on for hearing in turn as they appear in the lists.

64. The hearing of a suit entered on the Daily List shall not be postponed except on good cause shown.

65. A copy of the lists shall be kept affixed to the notice-board of the Court and the Chief Clerk and the Bench Clerks shall be responsible that the lists are properly kept from day to day.

66. Nothing hereinbefore contained shall affect the power of the Judge to fix any case for hearing on any particular date, or to order that a case shall be entered in any particular place in any list. A Deputy Registrar shall take the orders of the Judge as to entering in the lists cases in the Admiralty jurisdiction of the Court, and cases in which the Government and Government Officers are concerned.

67. Each written statement shall, by way of list or schedule, refer to any documents not then filed, by which it is intended to be supported. No documents not referred to in such statement or filed in the suit, shall be received in evidence at the hearing unless by consent or by leave of the Judge.

68. When a ground of defence arises after the defendant has filed his written statement the defendant may, within eight days after such ground of defence has arisen, or at any subsequent time by leave of the Court or a Judge, file a further written statement setting forth the same, and in such case shall forthwith serve a copy thereof upon the plaintiff or his advocate.

69. Whenever any defendant in his written statement, or any further written statement, alleges any grounds of defence which have arisen after the commencement of the suit, the plaintiff may file a confession of such defence in the Form No. 1 hereto annexed; and, if such defence is an answer to the whole suit, may thereupon apply to the Judge in Chambers for, and obtain a decree for, his costs up to the time of filing such written statement, or further written statement as the case may be, with leave to withdraw his suit, unless the Judge shall either before or after the filing of such confession, otherwise order.

70. Amendments in pleadings, which are made only for the purpose of rectifying some clerical error or errors in names, dates or sums, may be made on an order of a Deputy Registrar without notice.

71. If in any amendment the new matter does not exceed in any one place one folio (ninety words) the record containing the original document shall be amended by an interlineation, or, if the amendment be by omitting some original matter, the same shall be struck out of the record. In all other cases a new document shall be engrossed and annexed to the original. The amendment or variation shall be made or indicated in red ink.

72. The attestation of any amendment under Order II, Rules 6–7, Order VI, Rule 17, and Order VII, Rule 11, Order VI, Rules 16–17, or Order XXI, Rule 17 of the Code of Civil Procedure shall, unless otherwise ordered by the Court, be done by a Deputy Registrar.

Commercial Suits.

73. In contested commercial suits the plaintiff may take out a general summons for direction returnable in not less than four days. The summons shall be in Form No. 2 in the schedule of forms hereto annexed with such variations as circumstances may require, and shall be addressed to and served upon all parties to the suit or matter, as may be affected thereby.

74. Upon hearing of the summons, the Judge shall, so far as practicable, make such order as may be just with respect to all the interlocutory proceedings to be taken in the suit for the trial and as to the costs thereof, and more particularly with respect to the following matters: Pleadings, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of moveable or immoveable property, commissions, examination of witnesses, place and mode of trial. Such order shall be in Form No. 3

the schedule of forms hereto annexed with such variations as circumstances may require.

75. No affidavit shall be made or used on the hearing of the said summons except by special order of the Judge.

76. Upon the hearing of the summons any party to whom the summons is addressed shall, so far as practicable, apply for any order or directions as to any interlocutory matter or thing in the suit which he may desire.

77. Any application, subsequently to the original summons for any directions as to any interlocutory matter or thing by any party, shall be made under the summons by two clear days' notice to the other party, stating the grounds of the application. Such application must be made to the Judge and not to a Deputy Registrar.

78. Any application by any party which might have been made at the hearing of the original summons shall, if granted on any subsequent application, be granted at the costs of the party applying unless the Judge shall be of opinion that the application could not properly have been made at the hearing of the original summons.

Summary Suits.

79. When an order has been made giving leave to the defendant to defend a suit filed under Order XXXVII of the Code of Civil Procedure, the defendant shall, within one week from the date of such order, file his written statement, unless the Judge, who grants leave, orders the affidavit of the defendant to be taken as his written statement, and the suit shall be set down in List No. 5, 6 or 7 referred to in Rule 51.

Documents filed in Courts.

80. A Deputy Registrar may perform the functions of the Court under Order XIII, Rule 9 (*1*), referring in case of doubt to the Judge.

81. The Judge or a Deputy Registrar may at any time require a party to a suit or proceeding to produce and leave with a Deputy Registrar any document not in the English language in his possession, for the purpose of its being translated by a licensed translator of the Court and may order that the translation when made shall be filed with the record.

82. The Bench Clerk shall make and sign the endorsements enjoined by Order XIII, Rules 4 and 6 of the Code on documents admitted or rejected. The list of documents and articles admitted in evidence shall be prepared in Form $\frac{\text{Judicial}}{\text{General 27}}$ by the Bench Clerk and shall be signed by him.

83. Copies of entries in public records or in books of account shall be examined, compared and attested by a Deputy or an Assistant Registrar or the Chief Clerk when the entry is in English, or by an Interpreter of the Court when the entry is in a language of which there is a Court Interpreter, before the record or book of account is returned to the person producing it under Order XIII, Rule 5 (*3*) of the Code. If the entry is not in such language it must be examined, compared and attested by an Interpreter duly sworn for that purpose.

Discovery and Inspection.

84. Where the transactions which form the subject-matter of a suit have been carried on wholly or principally in Rangoon and any of the parties are not residing in Rangoon at the time an affidavit of documents is required to be filed, such affidavit may be made by the Agent in Rangoon of such absent party on his behalf. For the purposes of this rule, a resident partner in Rangoon shall be the Agent of his non-resident partners.

85. If, in the case provided for by the last preceding rule, any party desires to have such affidavit made by all or any of the absent parties personally, he shall be at liberty to apply for an order to that effect to a Deputy Registrar setting forth the grounds for making such order and the Deputy Registrar after hearing the opposite party, may, if he thinks it right and just, make such order.

86. Any party seeking discovery by interrogatories, shall, before delivery of interrogatories, pay into Court, to abide further order, the sum of Rs. 34, or such greater sum as the Judge may direct. Any party seeking discovery otherwise than by interrogatories

ordered further to pay into Court as aforesaid such additional sum as the Judge shall direct. The party seeking discovery shall with his interrogatories or, where any payment into Court has been so ordered as aforesaid with the order for discovery, serve a copy of the receipt for the said payment into Court, and the time for answering or making discovery shall in all cases commence from the date of the service of the interrogatories or order for discovery. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment, if so ordered as aforesaid, has been made.

87. Unless the Judge shall at or before the trial otherwise order, the amount paid in under the preceding rule shall, after the suit or matter has been finally disposed of, be paid out to the party by whom the same was paid in, if appearing in person, on his request, or to his Advocate on such Advocate's request where such party is represented by Advocate, in the event of the costs of the cause or matter being adjudged to such party, or no order as to costs being made, but, in the event of the Judge ordering such party to pay the costs of the suit or matter, the amount in Court shall be subject to a lien for the costs ordered to be paid to any other party.

88. A Deputy Registrar is authorized to allow any party to a suit or proceeding or his advocate or pleader or agent to inspect in the presence of an officer of the Court at a convenient time any document filed in Court under Order VII, Rule 14, or Order XIII, Rule 1 of the Code, or any document admitted in evidence in the suit or proceeding.

Summonses to Witnesses.

89. A summons to a witness may be applied for by a party to a suit or proceeding or his advocate or pleader at any time after its institution, and during its pendency.

The application should be made to a Deputy Registrar.

90. The party applying shall, within 24 hours from the time when the application is filed, pay to the Bailiff, or, if the summons is to be served beyond the limits of the original jurisdiction of the Court, to the Accountant, such sum for the travelling and other expenses of the person or persons summoned as may be requisite according to the following scale :—

	Maximum.			Minimum.		
	Rs.	A.	P.	Rs.	A.	P.
Soldiers, mariners, labourers, carriers, domestic servants, sircars, etc.	2	8	0	0	12	0
Tradesmen	8	0	0	1	0	0
Merchants, managers of banks, zemindars, gentlemen of property	12	0	0	4	0	0
Auctioneers, brokers, professional accountants	10	0	0	3	0	0
Professional men	16	0	0	8	0	0
Editors, engineers and surveyors	12	0	0	3	0	0
Officers in civil employ drawing not less than Rs. 500 a month according to rank.	12	0	0	6	0	0
Military and Naval officers, according to rank	12	0	0	6	0	0
Shroffs, bunnias, schoolmasters, commanders, and officers of ships	8	0	0	2	0	0
Articled and other clerks	6	0	0	2	0	0
Police Inspectors, petty officers, military or marine	4	0	0	2	0	0
Customs-house officers and engine-drivers	4	0	0	2	0	0
Godown sircars	4	0	0	2	0	0
Females, according to station	5	0	0	1	0	0

In special cases or in cases not provided for in the scale, the Court shall allow such fees as it thinks fit.

91. A Deputy Registrar shall issue summonses as soon as possible after the Bailiff or the Accountant has endorsed the application with his receipt for the money paid and ordinarily without reference to a Judge. In case of any disagreement or doubt as to the scale of travelling and other expenses which should be tendered to a witness, the Deputy Registrar shall refer the matter to the Judge.

92. If a witness' evidence is not taken or completed on the first day on which he has attended in obedience to a summons, the party who has summoned him shall before 4 p.m. on that day deposit with the Bailiff of the Court the same amount as was originally

allowed for the next day of hearing, and if on that day his evidence is not taken or completed, his allowance for the next day of hearing shall be deposited, and so on until the witness has been discharged, or until the case has been concluded.

93. Witnesses must apply in person to the Bailiff for their expenses allowed for attending on every day after the first day.

94. No expenses of witnesses shall be included in the costs allowed, except such as have been paid through the Bailiff or the Accountant or certified by the Judge or by a Deputy Registrar.

Examination of Parties and Witnesses by the Court.

95. The substance of the examination held by the Court under Order X, Rule 2, shall be reduced to writing by the Judge or a Gazetted Officer of the Court and shall form part of the record.

96. In cases, in which an appeal is allowed, other than those dealt with under Rule 52 the evidence of each witness shall be taken down in writing, in the English language, by the Judge or, in the presence and under the superintendence of the Judge, by a Gazetted Officer of the Court not ordinarily in the form of question and answer, but in that of a narrative. Such evidence when completed shall be read over by or to the witness in Court as soon as possible after his statement has been recorded: and the Judge shall, if necessary, correct the same and shall sign it.

97. In cases in which an appeal is not allowed other than those dealt with under Rule 52 it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge or a Gazetted Officer of the Court in the presence and under the superintendence of the Judge as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge or the officer aforesaid and shall form part of the record.

98. Nothing in Order XVIII, Rules 5, 7, 8, 9, 13 and 14 shall apply to the Chief Court in the exercise of its Original Civil Jurisdiction. In the case of such Court acting in the exercise of the said jurisdiction the recording of any matter referred to in Rules 10, 11, and 12 of the said Order may be done by a Gazetted Officer of the Court under the direction of the Judge and Rule 15 thereof shall be read as referring to evidence taken down or made under the rules hereinbefore set out.

Commissions.

99. The hearing of a suit in which a commission has been issued under Order XXVI of the Code shall be postponed until the return of the commission unless the Judge or a Deputy Registrar otherwise directs.

100. An application for a commission shall be made promptly after the grounds on which it is asked for are known, and the petition for it shall be accompanied by an affidavit or affidavits setting out the facts relied upon as grounds for the issue of the commission, and when they first became known to the applicant.

101. When an order for the issue of a commission to take evidence on interrogatories has been made, the party obtaining the order shall, within four days from the date thereof, file his interrogatories and the documents, if any, to accompany the commission, and shall serve a copy of the interrogatories on the other party or his advocate or pleader who shall file his cross interrogatories with the documents, if any, to accompany the same within four days from such service and shall serve a copy on the other party or his advocate.

102. If the commission is to take evidence *vivâ voce*, the party obtaining the order shall pay the necessary costs of and incidental to the same, and both parties shall file a list of their respective witnesses, and all necessary papers and documents within one week from the date of the order.

103. On default in the observance of these rules by a party obtaining an order for a commission, the commission shall not issue without leave of the Judge, or a Deputy Registrar and on default by the opposite party he shall not be allowed to join in the commission without such leave.

104. When—

(*a*) A Commission is issued by the Court for a local investigation or to examine accounts under Order XXVI, Rule 9 or Rule 11 of the First Schedule; or

(*b*) An Arbitrator is appointed by the Court under paragraph 3 of the Second Schedule to the Code of Civil Procedure,

the Commissioner or Arbitrator, as the case may be, shall give notice to the parties to the suit or proceeding of the filing of his report or award and, in submitting his report or award, shall inform the Court in writing that he has given such notice.

Arrangement of Records.

105. The records of regular suits shall be divided into four parts each having a separate facing sheet, namely:—

(1) The main file.
(2) The document file.
(3) The interlocutory file.
(4) The process file.

106. In the main file shall be filed in the following order the—

(1) Diary,
(2) Pleadings,
(3) Issues,
(4) Evidence for the plaintiff taken in the Court and upon commission,
(5) Affidavits (if any) read for the plaintiff at the hearing under Order XIX, Rule 1 of the Code,
(6) Interrogatories administered by him and the answers thereto,
(7) Evidence taken in Court and upon commission for the defendant or each defendant in order,
(8) Affidavits read as aforesaid for him or them,
(9) Interrogatories administered by him or them and answers,
(10) Evidence of witnesses called by the Court under Order XVI, Rule 14 of the Code,
(11) Judgment,
(12) Decree.

NOTE.—The proceedings upon or leading up to the issue or return of a commission, or in connection with interrogatories and answers, shall be filed in the interlocutory file.

107. In the document file shall be filed the list of documents under Order VII, Rule 14, or Order XIII, Rule 1 of the Code, and the list of documents admitted in evidence, and all documents which have been produced and filed as well as those admitted in evidence. Great care shall be taken that in fastening documents together no letters or figures are obliterated or defaced, and they shall be fastened in such a manner that every part of each document may be readily open to view.

108. In the interlocutory file shall be filed all petitions, proceedings, and orders thereon and all other documents not provided for by the two last preceding rules except processes. The documents in it shall be arranged so that the proceedings and orders upon every petition shall be kept together, but as far as possible, consistently with the above, every petition shall be filed in order of date.

109. The process file shall contain besides the flyleaf with table of contents:—

(*a*) Powers of attorney,
(*b*) Summonses and other processes and affidavits relating thereto,
(*c*) Lists of witnesses,
(*d*) Letters, etc., calling for records, etc., and all other papers not included in the main file, the document file or the interlocutory file.

110. The different files shall not be bound together until after the time for appealing has expired, or if an appeal is preferred, until after the record has been received from the Appellate Side.

The Diary.

111. The diary shall be framed so as to show as concisely as possible every stage of, and every proceeding taken in the suit, and the party or parties present in person or by advocate or pleader at every proceeding. Very short proceedings and orders, such as proceedings and orders for the adjournment of a case, may be written on the diary for the signature of the Judge, but when orders not purely formal have to be made. the Bench Clerk should put up a judgment form with the file when submitting it to the Judge.

The Judgment.

112. When judgment is given orally a note thereof in writing or in shorthand shall be taken by an Officer of the Court, or person authorized by the Judge.

Such note shall be submitted to the Judge for correction, and for signature.

Decrees and Formal Orders.

113. When in interlocutory and miscellaneous proceedings an order is made by the Judge after stating his reason therefor, and in any case in which a party may desire it, a formal order shall be drawn up containing the number of the suit, the names of the parties, the order or result of the order made, the costs incurred and by what parties and in what proportion the costs are to be paid.

114. Every decree and formal order shall bear the date on which the judgment or order was pronounced, but the date on which a Judge or a Deputy Registrar has actually signed the decree or order shall be noted beneath his signature.

115. Decrees and formal orders shall be drafted by a Deputy Registrar or an Assistant Registrar. When the draft of a decree is ready a notice shall be posted on the Court notice-board that the draft is ready for inspection in the office of one of the Deputy Registrars If it is not objected to within four days from the date of the notice, a decree in the terms of the draft shall be submitted to a Judge or a Deputy Registrar for signature.

If the parties do not agree to the form which the decree shall take the case shall be set down upon the daily list on as early a date as may be convenient to speak to the minutes of decree.

116. If a party or an advocate intimates to a Deputy Registrar immediately after an order has been passed by a Judge that he wishes to see the formal order before it is submitted to the Judge for signature. the same procedure as for decrees shall be adopted in respect of the draft formal order.

117. Every decree or order for the payment of money out of a fund subject to the order of the Court shall, for the purpose of such payment, be deemed to authorize the sale and subdivision of the securities belonging to the fund, or of a sufficient portion thereof.

118. In a decree for maintenance out of property charged with payment of the allowance the Court may appoint subject to such condition (if any) as it shall think fit, a Receiver thereunder with directions, in case of default in payment of the maintenance, to take possession of the property and sell the same, and out of the sale-proceeds to pay the allowance for maintenance.

119. In every decree and order that is not final, liberty to apply shall be implied.

120. When a suit is allowed to be withdrawn with liberty to bring a fresh suit on the same matter, unless the Court shall otherwise direct, the order shall be drawn up so as to make the payment of the costs of the suit that has been withdrawn a condition precedent to the plaintiff bringing a fresh suit.

Time.

121. In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Court, and not coming under the Statute of Limitations, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday or other day on which the offices are closed, in which case the time shall be reckoned exclusively of that

day also, and any succeeding day or days on which the offices continue closed: provided that written statements due in vacations may be filed on the day the Court reopens.

122. Whereby these rules, or in any decree or order time for doing any act or taking any proceedings is limited by months, and where the word "month" occurs in any document which is part of any legal procedure under these rules, such time shall be computed by calendar months, unless otherwise expressed.

123. The day on which an order for security for costs is served, and the time thence forward until and including the day or which such security is given shall not be reckoned in the computation of time allowed to plead, answer interrogatories, or take any other proceeding in the suit or matter.

Execution Proceedings.

124. Applications under section 39 of the Code to send a decree or order for execution to another Court shall be made by a verified petition in which the reasons for transfer shall be set out and particulars mentioned in clauses (*a*) or (*b*) of the section, if either applies, shall be clearly stated. Every application shall be accompanied by a certified copy of the decree or order.

125. The certified copy together with the other documents mentioned in Order XXI, Rule 6 of the Code shall be sent by registered post.

126. The process-fees prescribed for the warrant of attachment and for the order of sale shall be annexed to every application for execution by attachment and sale of property.

127. In every application for the attachment of moveable property the approximate value of the property sought to be attached shall be stated according to the best of the applicant's belief.

128. In applications for execution by attachment of moveable property it shall be expressly stated whether the property sought to be attached is in the possession of the judgment-debtor or not, and the place where the property is situated shall be fully described.

Sale of Immoveable Property.

129. An application for the sale of immoveable property attached must be accompanied by an affidavit of some person who has searched the register of deeds for entries regarding the property. In the affidavit the result of the search must be stated. An abstract of the title of the judgment-debtor, so far as it can be ascertained from the register of deeds, must also be furnished, and if the original title deeds are in the hands of the decree-holder they must be produced and left with a Deputy Registrar.

130. A Deputy Registrar shall prepare every proclamation of sale of immoveable property, and the party seeking to have the property sold shall be bound to furnish him with all the particulars he may require to enable him to prepare the proclamation in conformity with the provisions of Order XXI, Rule 66 of the Code.

131. The proclamation shall contain a notice that only the right, title, and interest of the judgment-debtor is to be sold, and that purchasers must satisfy themselves as to the judgment-debtor's title to the property, and that the title deeds or an abstract of the judgment-debtor's title will be open for inspection at the Office of one of the Deputy Registrars.

The proclamation shall also state in whose possession and occupation the property is, and the tenancy or terms on which any person is in occupation or possession.

132. At sales other than sales after attachment, a Deputy Registrar may, and shall if requested so to do, fix a reserve price. The fact of the reserve, if any, shall be entered in the proclamation.

133. After completion of the proclamation it shall be sent with a warrant for sale to the Bailiff. The warrant for sale may be signed by a Deputy Registrar.

134. No proclamation of sale of immoveable property shall issue until after the person applying for sale has deposited with the Bailiff an amount sufficient to defray the expense of advertising it daily for one month in a local newspaper or advertiser.

135. Sales shall be conducted by the Bailiff of the Court, and shall ordinarily be

held within the precincts of the Court-house. If the party at whose instance the property is to be sold desires that it should be sold on the spot, he must state his wish in his application for sale and deposit with the Bailiff the prescribed fee for attendance at the spot. After the place of sale has been stated in the proclamation, it shall not be altered.

136. The name of each bidder at the sale of immoveable property shall be noted by the Bailiff and the amount bid by him shall be entered opposite his name. If there be no bid, or the highest be below the reserved price (if any), the Bailiff shall postpone the sale and record the reason of the postponement in his sale-book. If the highest bid be equal to or higher than the reserved price (if any), the Bailiff shall make an entry in the sale-book to the following effect:—

"I declare to have been the highest bidder for the purchase of the property above set forth (or of lot No.) for the sum of Rs. ."

137. An application for an order confirming a sale of immoveable property shall not be necessary. If no application to set aside the sale is made within the period allowed therefor a Deputy Registrar may either pass or submit the sale proceedings to the Judge for an order confirming the sale.

138. When a conveyance to a purchaser at a sale by the Court is necessary, the purchaser shall cause a draft to be prepared and presented to a Deputy Registrar within one week from the date of sale.

Upon receipt thereof the Deputy Registrar shall give notice thereof to the advocates or pleaders of the parties to the suit with an intimation that the draft will be open to their inspection for four days, and that, if not objected to, it will be returned to the purchaser as approved of by the Court.

If the draft is objected to, the Deputy Registrar shall settle the draft after considering the objections to it, and shall then if so required by either party submit it to the Judge for orders.

Sale of Moveable Property.

139. As soon as possible after an attachment of moveable property, the Bailiff shall report to the Court the fact of the attachment and shall furnish a list of the articles attached and their approximate value and shall note if any of them are not liable to attachment or sale.

If any of the articles or things fall within the proviso to Order XXI, Rule 43 of the Code, it shall be so stated in the report and list.

140. The report and list shall be submitted to the Judge or a Deputy Registrar who shall pass such order for sale as he may think fit, although the decree-holder may not apply for a sale order. A warrant for sale shall be transmitted to the Bailiff, who shall forthwith prepare and issue a proclamation.

141. Every proclamation shall be advertised in a local newspaper or advertiser for at least 15 days (except in the case of property mentioned in the proviso to Order XXI, Rule 43 of the Code), and the cost of advertising shall be deducted from the proceeds of sale.

142. Moveable property mentioned in the proviso to Order XXI, Rule 43 of the Code, shall be sold as soon as may be convenient after it has been attached. Other moveable property shall be sold on the third Saturday after the day on which the proclamation shall have been fixed up in the Court.

Garnishee Orders.

143. A Deputy Registrar may in the case of any debt (not secured by a negotiable instrument), any moveable property not in the possession of the judgment-debtor, or any negotiable instrument, which has been attached under Order XXI, Rule 46, 51 or 52 of the Code of Civil Procedure, issue a notice in the Form No. 4 in the schedule of forms hereto annexed to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, or liable on such negotiable instrument to such judgment-debtor, calling upon him to appear before himself and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

144. If the garnishee does not forthwith pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt, or deliver such moveable property, or if he does not appear in answer to the notice, then a Deputy Registrar may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

145. If the garnishee disputes his liability, the Deputy Registrar, instead of making the order abovementioned may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit and may unless either party shall before the hearing desire the trial to be before a Judge, proceed to determine such issue; and upon the determination of such issue, shall pass such order upon the notice as shall be just.

146. Whenever in any proceedings under Rules 143 to 149 inclusive it is suggested or appears to the Judge or a Deputy Registrar to be probable, that the debt or property attached or sought to be attached belongs to some third person, or that any third person has a lien or charge upon, or an interest in it, the Judge, or a Deputy Registrar may order such third person to appear and state the nature of his claim (if any) upon such debt or property, and prove the same, if necessary.

147. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Judge or a Deputy Registrar may pass such order as is hereinbefore provided, or make such other order as he shall think fit, upon such terms, in all cases with respect to the lien, charge or interest (if any) of such third or other person as to such Judge or a Deputy Registrar shall seem just and reasonable.

Such third or other person shall have the same right to require that the trial so far as it may affect his interests shall be before a Judge as is conferred by Rule 145 upon the parties therein named.

148. Payment or delivery made by, or execution levied upon the garnishee under any such order as aforesaid shall be a valid discharge to him as against the judgment-debtor, and any other person ordered to appear as aforesaid, for the amount paid delivered or levied, although such order or the judgment may be set aside or reversed.

149. Debts owing from a firm carrying on business within the jurisdiction may be attached under the foregoing rules, although one or more members of such firm may be resident out of the jurisdiction. Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

150. The costs of any application under the foregoing rules and of any proceedings arising therefrom or incidental thereto, and of any order made thereon, shall be in the discretion of the Judge, or Deputy Registrar, as the case may be.

151. Orders made by a Judge under Rule 150 shall be appealable as other orders in execution.

152. An appeal to the Court shall be allowed from all orders of a Deputy Registrar under Rules 143 to 150.

Motions—Injunctions.

153. Unless the Judge or a Deputy Registrar give special leave to the contrary, there must be at least four clear days between the service of notice of an application or motion and the day named for showing cause against the application or bringing on the motion, and the affidavits in support must be filed and copies thereof served together therewith. Affidavits in answer or reply shall be filed in the Deputy Registrar's Office not later than 4.30 p.m. on the day preceding the day named for the hearing.

154. Except by the leave of the Judge no affidavit in support of the application beyond those served with the notice of such application or notice of motion, as the case may be, nor any affidavit in answer or reply filed later than the time prescribed in Rule 153 shall be used at the hearing nor shall more than one affidavit be made in reply.

155. A party to whom an interim injunction has been granted, shall, before it is issued, unless the Judge otherwise directs, give an undertaking in writing, or through

his advocate, to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such injunction.

Examinations "de bene esse."

156. The examination of a witness under Order XVIII, Rule 16 shall ordinarily be taken by a Deputy Registrar or Assistant Registrar unless the Judge shall otherwise direct.

157. The officer taking an examination *de bene esse* shall have regard to the provisions of the Indian Evidence Act and shall, in case the Advocate or other person examining the witness press any question which such officer shall have disallowed, record such question and the answer thereto for the consideration of the Judge before whom the deposition may thereafter be put in evidence.

158. After the deposition of any witness shall have been taken down, and before it is signed by him, it shall be distinctly read over, and, when necessary, translated to the witness in order that mistakes or omissions may be rectified or supplied. The deposition shall be signed by the witness, and left with the officer who took it down and the latter shall subscribe his name and the date of the examination.

Security to Court.

159. When security is required to be given it shall be taken in the form of a bond with or without sureties as the Judge shall direct and shall be in favour of the senior Judge of the Court for the time being.

160. When sureties are required and persons resident within the jurisdiction of the Court are tendered, a report shall be called for from the Bailiff as to whether the principal and sureties possess within the jurisdiction of the Court property of value equal to the amount of the security required.

161. No sureties shall, without the order of the Judge or a Deputy Registrar, be accepted, unless they make an affidavit or affidavits stating that the property which each of them possesses, or that their properties combined, are equal in value to the amount of the security demanded, over and above any incumbrances to which such properties may be liable; and over and above the amount for which they may have previously given security and for which they are at the time liable as sureties.

162. On the application of the Bailiff summonses may be issued to persons named by him to appear before him or to produce before him documents of title for the purpose of his inquiry into the value of the property of any person tendered as a surety.

Bailiff's Commission on Sales of mortgaged and attached Property.

163. The commission to be drawn by the Bailiff on sales of mortgaged or attached property shall be at the following rates:—

(1) On sales of mortgaged property—	
When the proceeds of sale do not exceed Rs. 500	5 per cent.
When they exceed Rs. 500 but do not exceed Rs. 5,000	5 per cent. on the first Rs. 500 and 2 per cent. on the balance.
When they exceed Rs. 5,000	At the above rates on the first Rs. 5,000 and 1 per cent. on the balance.
(2) On sales of attached property—	
When the proceeds of sale do not exceed Rs. 10,000	5 per cent.
When the proceeds of sale exceed Rs. 10,000	5 per cent. on the first Rs. 10,000 and 1 per cent. on the balance.

164. When a sale of immoveable property is set aside under the provisions of Order XXI, Rule 89, 91 or 92 of the Code of Civil Procedure, no commission shall be paid to the Bailiff for selling the property.

165. Whenever a sale of immoveable property is held by the Bailiff elsewhere than within the precincts of the Court-house, on the application of the party at whose instance the property is to be sold, a fee of Rs. 5 shall be paid by the said party at the time of making the application and shall be credited to Government.

166. Subject to a maximum which shall be the difference between the substantive pay and emoluments of the Bailiff and the sum of Rs. 250, the fees paid each month under the preceding rule shall be drawn and disbursed to the Bailiff at the end of the month.

SCHEDULE OF FORMS.

No. 1 (Rule 69).

IN THE CHIEF COURT OF LOWER BURMA.

Original Civil Jurisdiction.

Suit No. of 19 .

Plaintiff,

vs.

Defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's written statement (or of the defendant's further written statement) filed on the day of 19 .

(Signed)

Plaintiff.

(Signed)

Plaintiff's Advocates

No. 2 (Rule 73).

IN THE CHIEF COURT OF LOWER BURMA.

Original Civil Jurisdiction.

Suit No. of 19 .

Plaintiff,

vs.

Defendant.

Let all parties concerned attend before me in Chambers on the day of at o'clock in the noon, on the hearing of an application on the part of to show cause why an order for direction should not be made in this suit as follows:—

Particulars. [That the deliver within days particulars of and that in default all further proceedings in this suit be stayed until such particulars are delivered (or that the defendant be precluded from giving evidence in support thereof at the hearing of the suit) and that the have days to deliver his after delivery of such particulars.]

[That the file an affidavit of documents in ten days.]

Interrogatories. (For leave to interrogate, the answers to be filed within ten days).

Inspection of documents Commissions.

Inspection of property.

Examination of witnesses.

Any other interlocutory matter or thing.

Dated the day of

No. 3 (Rule 74).

IN THE CHIEF COURT OF LOWER BURMA.

Original Civil Jurisdiction.

Suit No. of 19 .

Plaintiff,

vs.

Defendant.

Upon hearing the Advocates on both sides and upon reading the affidavit of filed herein the following directions are hereby given :—

Particulars.—Defendant in a week to give particulars of

Admissions.—That the plaintiff is

Discovery.—Defendant in a week to produce

Interrogatories.—Plaintiff may interrogate as to only: interrogatories to be initialled by me.

Inspection of Documents.—Plaintiff undertakes to produce at the hearing.

Inspection of Property.—None.

Commissions.—None.

Examination of Witnesses.—To be examined on commission or otherwise as the case may be.

No. 4 (Rule 113).

IN THE CHIEF COURT OF LOWER BURMA.

Original Civil Jurisdiction.

Civil Execution Case No. of 19 .

Plaintiff,

vs.

Defendant.

To

Take notice that you are hereby required on or before the day of 19 to pay to the Bailiff of this Court the sum of attached in your hands by order dated day of 19 , or otherwise to appear in person or by an Advocate or Pleader of this Court before the undersigned at 11.15 a.m. in the forenoon on the day aforesaid and show cause to the contrary in default whereof an order for payment may be passed against you.

Dated this day of 19 .

Advocate / Pleader for

Deputy Registrar.

THE BURMA GAZETTE,

OCTOBER 21ST, 1911, PART IV, P. 945.

Chief Court of Lower Burma.

NOTIFICATION.

Dated Rangoon, the 19th October, 1911.

No. 20 (GENERAL).—With reference to section 122 of the Code of Civil Procedure **1908, and with the sanction of the Local Government, the Chief Court, Lower Burma, makes the following rules** for the regulation of matters connected with its own procedure **in the exercise of its Appellate Civil Jurisdiction :—**

The rules shall be inserted in the First Schedule to the Code **as "Order LIV—Appellate Side Rules of Procedure."**

The rules contained in the First Schedule to the Code of Civil Procedure, 1908, shall, so far as they are inconsistent with or contrary to the Rules herewith published, and, so far as the practice and procedure of the Appellate Side of the Chief Court of Lower Burma only are concerned, be deemed to have been altered or superseded by the rules secondly abovementioned.

ORDER LIV.

Appellate Side Rules of Procedure.

Preliminary.

1. In the absence of the Assistant Registrar the Chief Clerk shall exercise all the functions of the Assistant Registrar under these rules.

2. Except upon close holidays the offices of the Court shall be open to the public on business from 10.30 a.m. until 4.30 p.m. on all week days except Saturdays, and on Saturdays from 10.30 a.m. until 2 p.m.

Initiation of Proceedings.

3. Memoranda, applications, and affidavits shall be either printed, type-written or written in a clear and legible hand, in the English language on durable white foolscap paper on one side only of the paper and so as to leave a clear margin one inch and a half wide on the left side.

The matter shall be divided into paragraphs numbered consecutively, and each paragraph shall contain as nearly as may be a separate ground of objection or allegation. Dates and figures shall be filled in before presentation. When native dates are given, the corresponding English dates shall always be added.

Material corrections or alterations shall be authenticated by the initials of the person signing a memorandum, application or affidavit.

4. All memoranda of appeal and applications shall be presented to the Assistant Registrar.

5. Memoranda of appeal and applications for revision shall be accompanied by certified copies of the following documents:—

(1) The decree or order against which an appeal or an application is made;

(2) The judgment on which such decree or order is founded, unless the Court dispenses therewith, and

(3) In appeals and applications from appellate decrees or orders the judgment of the Court of First Instance, unless the Court dispenses therewith.

6. Whenever a memorandum of appeal or application is presented to the Assistant Registrar and it is in his opinion insufficiently stamped, or if he considers that the relief claimed is under-valued he shall fix a time under section 107 (2) or 141 within which such memorandum of appeal or application shall be properly stamped or the valuation amended.

7. Where a memorandum of appeal or application is amended the Assistant Registrar shall sign or initial the amendment.

8. The date of hearing an appeal or application for revision shall be fixed by the Assistant Registrar and shall be notified in the manner prescribed by Order XLI, Rule 14. He shall also fix the time for filing a memorandum of objections as provided for in Rule 26.

9. The cost of issuing notice of the date of hearing to the respondent shall be deposited within seven days from the date of order directing such notice to issue unless the Assistant Registrar consents to an extension of time.

10. When notice is ordered to issue to the respondent, the appellant or applicant shall in tendering the process-fees furnish as many copies on plain paper of the grounds of appeal or application as there are respondents.

11. On receipt of the records of the lower Court or Courts, the Assistant Registrar shall issue a notice to the appellant or applicant requiring him to state within a specified time what documents in the connected records he wishes to have translated. In the event of such statement not being made within the time allowed he shall either extend the time for good cause shown or in the warning list (*see* Rule 35) for the following week

call upon the party to show cause before him why the case should not be laid before the Court for orders, under Order XVII. Rule 3.

12. When the documents to be translated have been determined, the Assistant Registrar shall cause an estimate of the cost of the translation to be prepared, and shall proceed as provided in the rules for the translation of documents.

13. The Assistant Registrar is authorized to take necessary steps to cause the service of fresh notices, if required, to dispose of applications for substituted-service, to grant postponements by consent and dispose of applications for bringing legal representatives of deceased parties on the record and granting postponements, if necessary, for the purpose of service.

14. When a notice is returned unserved, or not duly served, and the Assistant Registrar orders the issue of fresh notice and fixes a fresh date, the case should be called out in the presence of the Assistant Registrar in open Court fifteen minutes before the Court sits on the date originally fixed, in case the respondent may put in an appearance, and, if he does, he should be informed of the postponed date and his signature taken.

Process.

15. Warrants, notices and other processes shall be signed, sealed and issued by the Assistant Registrar, provided that every warrant or order committing a person to custody in jail shall be signed by the Judge.

16. Notices and other processes to be served within the local limits of the original jurisdiction of the Court shall be delivered for service to the Bailiff, who shall endorse thereon the date of receipt by him.

17. If the person to be served is personally known to him or to any of his officers who is at the time available, the Bailiff shall cause the process to be served forthwith. If the person to be served is not so known the Bailiff shall forthwith communicate with the party desiring to have the process served or with his advocate or pleader, appointing a time at which one of his officers will be available and ready to proceed to effect service. And requesting that some one who personally knows the person to be served may accompany the officer to point him out.

18. The oath of process-servers and identifiers to affidavits in proof of service of process may be administered by the Bailiff or the Deputy Bailiff. With his return of service of the process, the Bailiff shall submit the affidavit or affidavits as to service.

19. Notices and other process to be served in Burma, but beyond the local limits of the original jurisdiction of the Court, shall be sent by post to the Court of widest jurisdiction not being a Divisional Court at the headquarters of the Township in which the person to be served resides. If the Notice is to be served out of Burma it shall be sent for service as provided by section 28, Order V, Rules 21—23 and 25 to the Court named by the party.

20. Unless otherwise ordered a second or subsequent notice or process shall not be issued until after the one previously issued has been returned.

21. Processes to be served on a party to a case may be served on his advocate or pleader, if any, and when so served shall be presumed to be duly communicated and made known to the party for whom such advocate appears or by whom such pleader has been appointed. For the purposes of this rule an advocate who has once appeared or entered an appearance on behalf of a party shall be deemed to continue to be his advocate unless and until he withdraws his appearance by a statement to that effect made in and recorded by the Court or unless and until he or such party intimates in writing to the Assistant Registrar that he has ceased to be the advocate of such party.

22. To bring promptly to notice the failure to serve process, every process issued after the first shall have its number, second, third, fourth and so on, written clearly on it.

Address for Service.

23. Every party appearing in person shall enter his name and place of abode as also an address within the local limits of the original jurisdiction of the Court (to be called his address for service) in a book to be kept by the Chief Clerk, and unless otherwise ordered all notices and other judicial processes required to be served on any such party shall be deemed to have been duly served on him if left at his address for service.

Benches—Classes of cases to be heard by and composition of.

24. The following classes of cases shall be heard and determined by a Bench of at least two Judges, namely:—

(*a*) Application for review of judgment by a Bench of two Judges.
(*b*) First appeals from original decrees and orders of Divisional and District Courts.
(*c*) Second appeals in cases exceeding Rs. 3,000 in value.
(*d*) References made under Order XLVI, Rule 1.
(*e*) References and inquiries under the Legal Practitioner's Act, 1879, and rules thereunder, into the conduct of Advocates and Pleaders.
(*f*) Matters connected with appeals to His Majesty in Council.
(*g*) Any appeal, review, revision, or original suit which the Senior Judge may order to be heard or determined by a Bench of Judges.

Note.—This rule must be read subject to the operation of express provisions of law, such as section 18 of the Indian Press Act, 1910.

25. A Full Bench shall consist of all the Judges, or of such number of Judges, not being less than three, as the Senior Judge may determine.

26. The Senior Judge and the Barrister Judge of first place in rank and precedence (when such Judge is not the Senior Judge) shall ordinarily be members of a Full Bench consisting of less than the full number of the Judges.

27. Unless other orders are given, all Bench cases, when the hearing is completed and they are ready for judgment, shall be laid before the Senior Judge of the Bench. He will then arrange for the consideration or writing of the judgment.

Lists to be maintained by the Assistant Registrar.

28. The Assistant Registrar will maintain and keep posted up three lists of pending Civil appeals, applications for revision, and miscellaneous applications:—

A. List of all incomplete cases.
B. List of cases ripe for hearing that are to be called on a fixed date.
C. List of cases ripe for hearing that await their turn for hearing.

The Chief Clerk shall be responsible that the lists are properly kept from day to day.

29. No case shall be put on the B or the C lists until the notice on the respondent has been duly served.

30. The B list shall contain all cases ripe for hearing in which any party is not known to be represented by an Advocate or Pleader.

31. Any case in which the Assistant Registrar receives intimation, before the date fixed for hearing, that all parties are represented by Advocates or Pleaders shall forthwith be transferred to the bottom of the C list, to await its turn for hearing.

32. Cases in the B list shall be called on the day fixed for hearing and shall either be for disposal on that or immediately subsequent days of sitting, or shall be postponed under the orders of the Court, to some subsequent fixed date.

33. When a case has once been transferred to the C list, no further date will be fixed for hearing but it will come up for hearing in its turn, as it stands on that list.

34. When a case on the C list is called for hearing, and the hearing is for any reason postponed, the case shall remain in its original place in the C list. It will appear in the daily list of the next court day appropriate to such case, unless the Judge, or Bench, when postponing it directs that it shall not be called again before a specified date.

35. On every Friday the Assistant Registrar shall issue a list of cases which will be on the lists for disposal during the following week, including B list cases fixed for hearing on a day in such week, and cases on the A list in which the parties have failed to show proper cause before him as to non-inspection of records or non-payment of copying, translation or process-fees.

36. A daily list shall also be issued showing the cases for the day taken from the warning list issued on the Friday of the previous week.

37. At the close of the week, unless the Court has otherwise ordered, the remaining cases of the week's list shall be transferred to the top of the list of cases for hearing for the following week.

38. When a case under the Indian Divorce Act, in which a decree for dissolution or

nullity of marriage has been passed, is submitted for confirmation, a letter shall invariably be addressed to the Divisional Judge who passed the decree, asking him to inform the parties that this Court will take the decree into consideration at the expiry of six months from the date on which it was pronounced with a view to confirming it or passing such order as may seem fit, that if either party wishes to make any application relating to the decree he or she must do so within the said period of six months, and that if no such application is made, the Court will proceed to pass orders in the absence of the parties.

The Diary.

39. The diary shall be framed so as to show as concisely as possible every stage of and every proceeding taken in the case, and the party or parties present in person or by advocate or pleader at every proceeding. Very short proceedings and orders, such as proceedings and orders for the adjournment of a case may be written on the diary for the signature of the Judge but when orders not purely formal have to be made, the Bench Clerk should put up a judgment form with the file when submitting it to the Judge.

The Judgment.

40. Judgments may be written by the Judge himself or be delivered orally. When judgment is given orally a note thereof in writing or in shorthand shall be taken by an Officer of the Court, or person authorized by the Judge.

Such note shall be submitted to the Judge for correction, and for signature.

Rule 31 of Order XLI shall not apply to the Chief Court.

Decrees and Formal Orders.

41. Decrees shall be signed by a Deputy Registrar.* The advocates (if any) on both sides shall be required to affix their signatures to the decrees before they are signed by a Deputy Registrar. When any advocate has not signed the decree, the cause of his failing or refusing to sign shall be certified on the decree.

Care must be taken that each decree is in itself clear and intelligible. It should not be necessary to refer to any other documents to ascertain what it really means and implies.

42. When in interlocutory and miscellaneous proceedings an order is made by the Judge after stating his reason therefor, and in any case in which a party may desire it, a formal order shall be drawn up containing the number of the case, the names of the parties, the order or result of the order made, the costs incurred and by what parties and in what proportion the costs are to be paid.

43. Every decree and formal order shall bear the date on which the judgment or order was pronounced by the Judge; but the date on which the Judge or an Assistant Registrar has actually signed an order or a Deputy Registrar, a decree, shall be noted beneath his signature.

44. When the draft of a decree is ready a notice shall be posted on the Court notice-board that the draft is ready for inspection in the Assistant Registrar's office. If it is not objected to within four days from the date of the notice, a decree in the terms of the draft shall be submitted to a Deputy Registrar for signature.

If the parties do not agree to the form which the decree shall take the case shall be set down upon the daily list on as early a date as may be convenient to speak to the minutes of decree.

45. If a party or an advocate intimates to the Assistant Registrar immediately after an order has been passed by a Judge that he wishes to see the formal order before it is submitted to the Judge for signature, the same procedure as for decrees shall be adopted in respect of the draft formal order.

General.

46. In every appeal and petition, if any Burmese name is not spelled in accordance with the Government system of transliteration, the Assistant Registrar shall cause the

* *Note.*—So much of Rule 35 of Order XLI as requires the decree to be signed and dated by the Judge or Judges who passed it, does not apply to the Chief Court of Lower Burma in the exercise of its appellate jurisdiction. *See* section 16 (*3*), Lower Burma Courts Act, 1900.

spelling to be corrected unless the advocate concerned shows any good reason to the contrary.

If the name was incorrectly spelled in the Lower Court it should nevertheless be correctly spelled in the Chief Court, the name as previously incorrectly spelled being added in brackets, if necessary, to prevent confusion. The same rule shall be applied as far as practicable to names of natives of India. But any person who writes English has the right to spell his own name in any way he likes, and the spelling of his ordinary signature should be adopted in all documents in Court.

47. No correspondence relating to cases before the Court can be attended to, but any person having business in the Court or its office shall transact the same in person or by a duly authorized agent, advocate or pleader.

48. The Registrar, Deputy Registrars, Assistant Registrars and the Senior Interpreters attached to the Chief Court for Burmese, Hindustani, Gujarati, Chinese, Tamil and Telugu, are empowered to administer the oath to deponents of affidavits to be filed in the Chief Court.

The Senior Interpreters shall exercise the power conferred by this rule only within the precincts of the Court.

49. The Chief Clerk shall certify the copies referred to in Order XLI, Rule 37.

Appeals to the Privy Council.

50. Petitions for leave to appeal to His Majesty in Council shall be presented to the Assistant Registrar, who, if the petition is in order, will issue notice in the form attached on the respondent to show cause before a Bench consisting of at least two Judges (see Rule 24 above), why the certificate prayed for should not be granted.

51. When a certificate is granted, the appellant shall, within the period prescribed by Order XLV, Rule 7, give security for the costs of the respondent to the extent of Rs. 4,000. In cases of special magnitude and importance, the Court may require security for a larger sum; provided that security shall not in any case be required for a sum exceeding Rs. 10,000.

52. Security shall be furnished either by the deposit of cash or Government securities to the amount required or, subject to the provisions of Rule 54 by a first mortgage of immoveable property. Cash deposited under this rule shall be paid to the Bailiff of the Court. Government securities so deposited shall be made over to the Registrar or a Deputy Registrar.

53. When cash or Government securities are deposited under Rule 52 a security bond shall be executed in Form A or Form B attached, as the case may be.

54. If a charge on immoveable property is tendered as security, the appellant shall file a draft mortgage-bond together with a valuation of the property verified by affidavit. The value of the property shall be at least double the amount of the security required; and in the case of land on which there are buildings which are brought into the valuation of the property, or where a mortgage of buildings only is tendered, the buildings must be insured.

55. On tender of a charge on immoveable property as security, notice of the tender shall be given to the opposite party requiring him to show cause, if he wishes to do so within a time to be fixed by the Court, why the security tendered should not be accepted.

56. If the security tendered appears to the Court to be unsatisfactory, the appellant shall be so informed.

57. In every security bond, the appellant shall bind himself to pay such costs of the opposite party as may be allowed by the Court in the event of the appeal not being prosecuted.

58. Within the period prescribed by Order XLV, Rule 7, the appellant shall also deposit with the Bailiff of the Court the sum of Rs. 1,000 or such sum as the Assistant Registrar may determine to defray the expenses of printing, translating, transcribing, indexing and transmitting a copy of the record.

59. If the appellant shall fail within the time prescribed to furnish security for costs, or to deposit the amount required for the preparation of the transcript record in accordance with Rules 51 and 58 the proceedings shall be placed before the Court for dismissal.

60. When the Court admits the appeal, it shall always clearly state in its order who are the actual parties at the time of admission.

61. When the Court has declared the appeal admitted, the Registrar shall serve upon the parties notice calling on them to specify within one month what accounts attached to the record they wish to be included in the copy. It shall be in the discretion of the Registrar or the Assistant Registrar to omit from the transcript any accounts which have not within the time specified, been expressly asked for by the parties. The Assistant Registrar shall also on payment to him of a fee of Rs. 16 furnish to the parties a list of the papers, which make up the record; and shall require each party within fourteen days to indicate any paper which he considers immaterial. If the parties are agreed as to the papers to be omitted, those papers shall not be transcribed. If the Assistant Registrar thinks that any paper, as to the omission of which the parties are not agreed, should be omitted, he shall refer the matter for the determination of the Court. Where it is decided to include any paper against the wish of any party, the transcript shall show clearly that the inclusion of the paper was objected to by that party.

62. The Assistant Registrar shall arrange the papers in the transcript in the order specified below and shall prefix an index to the transcript. He shall also attach to the index a certified list of all papers omitted from the transcript under Rule 61 :—

Order of arrangement of Papers.

1. Diary sheet of the Original Court.
2. Plaint.
3. Written statement.
4. Examinations by the Court under Order X.
5. Issues settled.
6. Oral evidence for the party beginning, including evidence given by a witness for such party on commission.
7. Oral evidence for the opposite party or parties, including evidence given by a witness for such party or parties on commission.
8. Documentary evidence for the party beginning.
9. Documentary evidence for the opposite party.
10. The judgment of the Original Court.
11. The decree of the Original Court.
12. The diary sheet of the Appellate Court.
13. The memorandum of appeal to the Appellate Court.
14. Respondent's memorandum of objections under Order XLI, Rule 22.
15. The judgment of the Appellate Court.
16. The decree of the Appellate Court.
17. The application for a certificate and for leave to appeal to His Majesty in Council.
18. The certificate granted.
19. The Registrar's or a Deputy Registrar's certificate that the provisions of Order XLV, Rule 7, have been complied with.
20. The order declaring the appeal admitted.

Appendix I.—Interlocutory proceedings and orders in the Original Court, except such as the parties agree should be excluded, or the Court directs to be excluded.

Appendix II.—Interlocutory proceedings and orders in the Appellate Court, except such as the parties agree should be excluded, or the Court directs to be excluded.

Appendix III.—List of formal and other documents excluded.

63. The charges for translation and copying shall be regulated by the rules dealing with these matters except that the fees paid for copying shall be credited to Government. It shall not be necessary to translate any papers which have already been translated.

64. All translations, whether previously made or made for the purpose of the appeal to His Majesty in Council, shall be authenticated by the person by whom they were made.

65. When the record is to be printed the style to be adopted shall be as follows :—

(i) The form known as Demy Quarto (*i.e.*, 54 ems in length and 42 in width) shall be followed.

(ii) The size of the paper used shall be such that the sheet, when folded and trimmed shall be 11 inches in length and 8½ inches in width.

(iii) The type to be used in the text shall be Pica type. but Long Primer shall be used in printing accounts, tabular matter and notes.

(iv) The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

66. When the record is printed in India, 100 copies of the transcript shall be struck off. Twenty copies shall be supplied to the party at whose cost the record is printed. Any other party to the suit shall be supplied with copies of the record on payment of the cost price. Copies so supplied shall not be certified. A charge of Re. 1 for every 750 words shall be made for proof-reading. Money paid for proof-reading shall be credited to Government.

67. When the transcript is ready, if it is to be printed in England, one certified copy shall be transmitted to the Registrar of His Majesty's Privy Council, Whitehall, at the expense of the appellant. Where the transcript has been printed in India, and 100 copies struck off under Rule 66 forty copies shall be sent, at the expense of the appellant, to the Registrar of His Majesty's Privy Council, one of which shall be certified to be correct by the Registrar or a Deputy Registrar of the Court by his signing his name on, or initialling, every eighth page thereof and by affixing the seal of the Court thereto. Where part of the record is printed in India and part is to be printed in England, this rule shall, as far as practicable, apply to such parts as are printed in India and such as are to be printed in England respectively.

68. All costs incurred in British India whether allowed by the Court under Rule 57 or otherwise, shall be recoverable, as if they were the amount of a decree for money.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO HIS MAJESTY IN COUNCIL SHOULD NOT BE GRANTED. (Rule 50.)

Code of Civil Procedure, Order XLV, Rule 3 (2).

IN THE CHIEF COURT OF LOWER BURMA.

CIVIL MISCELLANEOUS APPLICATION NO. OF 19 .

Arising out of Civil Appeal No. of 19 .

Applicant,

vs.

Respondent.

To

Take notice that the applicant abovenamed has through applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of section 110 of the Code of Civil Procedure, or that it is otherwise a fit one for appeal to His Majesty in Council.

The day of 19 is fixed for you to show cause why the Court should not grant the certificate asked for.

Given under my hand and the seal of the Court, this day of 19 .

Process fee, Rs. realized.

Assistant Registrar.

FORM A. (Rule 53).

BOND BY AN APPELLANT TO HIS MAJESTY IN COUNCIL FOR SECURITY FOR THE COSTS OF THE RESPONDENT WHEN CURRENCY NOTES ARE OR CASH IS DEPOSITED.

KNOW ALL MEN by these presents that I son of native of now residing at am held and firmly bound to the Senior Judge of the Chief Court of Lower Burma in the sum of Rupees to be paid to the said Senior Judge his successors in office or assigns for which payment well and truly to be made I bind myself my heirs and legal representatives

IN WITNESS WHEREOF I have hereunto set my hand at this day of 19 .

Signature of Appellant.

Signed by the said

in the presence of

Address.

Occupation.

son of

WHEREAS I the above-bounden

was $\frac{\text{an appellant}}{\text{the respondent}}$ in Civil $\frac{\text{1st}}{\text{2nd}}$ Appeal No. of 19 in the said Chief Court AND WHEREAS the decision of the Court upon the said appeal having been adverse to me I presented a petition to the said Court praying for a certificate on which an appeal to His Majesty in Council might be admitted AND WHEREAS such certificate was granted to me on the day of 19 AND WHEREAS I was called upon to furnish security for the costs which may be incurred by the respondent in this Court and before His Majesty's Privy Council upon or in consequence of my said appeal to His Majesty to the amount of Rupees AND WHEREAS on the day of 19 I deposited in the said Chief Court the sum of Rs. NOW THE CONDITION of the above-written bond is such that if the said respondent shall be paid such costs as I or my heirs or legal representatives shall be ordered to pay to him by the decree or order of His Majesty in Council or by order of this Court as costs incurred on or in consequence of my said appeal then the above-written bond shall be void and of no effect otherwise the same shall remain in full force and virtue AND I HEREBY agree and declare that the said amount deposited by me as aforesaid shall remain under the control of the said Chief Court as and for security for payment by me or my heirs or legal representatives of such amount or amounts as may be made payable by me or them as costs as aforesaid and that upon my failure to pay such amount or amounts the Court may order that the said amount deposited or so much thereof as may be necessary shall be paid towards the discharge of the amount or amounts which may be payable by me or my heirs or legal representatives as aforesaid: PROVIDED that if no costs shall be ordered to be paid by me or by my heirs or legal representatives the amount deposited shall unless otherwise detained be returned to me or them.

FORM B. (Rule 53).

BOND BY AN APPELLANT TO HIS MAJESTY IN COUNCIL FOR SECURITY FOR THE COSTS OF THE RESPONDENT WHEN GOVERNMENT PROMISSORY NOTES ARE DEPOSITED.

KNOW ALL MEN by these presents that I

son of native of

now residing at

am held and firmly bound to the Senior Judge of the Chief Court of Lower Burma in the sum of Rupees to be paid to the said Senior Judge his successors in office or assigns for which payment well and truly to be made I bind myself and my heirs and legal representatives.

IN WITNESS WHEREOF I have hereunto set my hand at

this day of 19

Signature of Appellant.

Signed by the said

in the presence of

Address.

Occupation.

son of

WHEREAS I the above-bounden

was $\frac{\text{an appellant}}{\text{the respondent}}$ in Civil $\frac{\text{1st}}{\text{2nd}}$ Appeal No. of 19

in the said Chief Court AND WHEREAS the decision of the Court upon the said appeal having been adverse to me I presented a petition to the said Court praying for a certificate

on which an appeal to His Majesty in Council might be admitted AND WHEREAS such certificate was granted to me on the day of 19 AND WHEREAS I was called upon to furnish security for the costs which may be incurred by the respondent in this Court and before His Majesty's Privy Council upon or in consequence of my said appeal to His Majesty in Council to the amount of Rupees AND WHEREAS on the day of 19 I endorsed and delivered to the Registrar of the said Court the Government Promissory notes particulars of which are set out in the Schedule hereunder NOW THE CONDITION of the above-written bond is such that if the said respondent shall be paid such costs as I or my heirs or legal representatives shall be ordered to pay to him by the decree or order of His Majesty in Council or by the order by this Court as costs incurred on or in consequence of my said appeal then the above-written bond shall be void and of no effect otherwise the same shall be and remain in full force and virtue.

AND I HEREBY agree and declare that the Government Promissory notes deposited by me as aforesaid or such other Government Promissory notes as may be held in lieu thereof and the interest which may accrue thereon shall remain under the control of the Chief Court of Lower Burma as and for security for payment by me or my heirs or legal representatives of such amount and amounts as may be made payable by me or them as costs as aforesaid, and that upon my or their failure to pay such amount or amounts the said Court may order that the same be sold and that the proceeds be applied so far as they may extend towards the discharge of the said amount or amounts PROVIDED that if no costs shall be ordered to be paid by me or my heirs or legal representatives to the respondent on my said appeal the said Government Promissory notes or such Government Promissory notes as they may have been replaced by shall unless otherwise detained be returned to me or them.

The Schedule above referred to—

No.	Date.	Rate of Interest	Amount.
1	2	3	4
		Rs.	Rs.

THE BURMA GAZETTE.

21ST OCTOBER, 1911, PART IV, P. 952.

CHIEF COURT OF LOWER BURMA.

NOTIFICATION.

Dated Rangoon, the 19th October, 1911.

No. 21 (GENERAL).—With reference to section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court, Lower Burma, makes the following rules of procedure to be followed in the Court of Small Causes at Rangoon :—

The rules shall be inserted in the First Schedule to the Code as "Order LV—Small Cause Court Rules of Procedure."

The rules contained in the First Schedule to the Code of Civil Procedure, 1908, shall, so far as they are inconsistent with or contrary to the Rules herewith published, and, so far as the practice and procedure of the Small Cause Court only are concerned, be deemed to have been altered or superseded by the rules secondly above-mentioned.

ORDER LV.

THE COURT OF SMALL CAUSES, RANGOON.

RULES RELATING TO ITS PROCEDURE.

Preliminary.

1. In these rules, unless there is something repugnant in the subject or context,—
 (1) the word "Judge" means the Judge or Additional Judge of the Small Cause Court, Rangoon;
 (2) the words "plaintiff" and "defendant" respectively include petitioner and respondent in miscellaneous proceedings.

2. In the absence of the Chief Clerk the second clerk shall exercise all the functions of the Chief Clerk under these rules.

3. Except on close holidays the offices of the Court shall be open to the public for business from 10.30 a.m. until 4.30 p.m. on all week days except Saturdays, and on Saturdays from 10.30 a.m. till 2 p.m.

Institution of Proceedings.

4. Plaints, written statements, petitions and affidavits shall be printed, type-written or written in a clear hand in the English language on durable white foolscap paper on one side only of the paper, and so as to leave a margin one inch and a half wide on the left side:

Provided that, in proceedings to which all the parties are Burmans and in which the relief sought does not exceed Rs. 500, the pleading, petitions or affidavits may be in Burmese.

5. The matter shall be divided into paragraphs numbered consecutively, and each paragraph shall contain as nearly as may be a single allegation. Where a native date is given, the corresponding English date shall be added.

6. Material corrections or alterations shall be initialled either by the signatory or his pleader.

7. In plaints and in petitions initiating miscellaneous proceedings the names, descriptions, and places of residence of the parties must be fully set out or the omission to do so must be explained to the satisfaction of the Judge.

8. In every document relating to a suit or proceeding already instituted, the number of the suit or proceeding shall be entered before presentation.

9. The Chief Clerk is empowered to administer affidavits to the deponents of affidavits to be filed in the Court.

10. Copies of pleadings, petitions and affidavits must be served on the opposite party not less than twenty-four hours before the date fixed for hearing.

11. Plaints, written statements, petitions and affidavits shall be presented to the Chief Clerk. Urgent applications may be presented to the Judge on his taking his seat on the bench. On a close holiday urgent applications may be presented to the Chief Clerk, who will forward them to the Judge.

12. Upon receiving a document bearing a court-fee label the Chief Clerk shall examine it. If the court-fee be insufficient, he shall return the document; if it be sufficient, he shall cancel the stamp. If the Chief Clerk and the party presenting the document are not agreed as to the sufficiency of the stamp, the matter shall be placed before the Judge for determination.

13. If a plaint or petition be defective in grammar, form or otherwise, it shall be returned under the orders of the Judge or the Additional Judge, to the person presenting it.

14. A diary form shall be used in every proceeding, and the Chief Clerk shall enter on it the name of the person presenting the plaint or petition and the date of presentation.

15. No correspondence or telegrams relating to suits or proceedings before the Court will be attended to, but any person having business in the Court or its office shall transact the same in person or by a duly authorized agent or pleader.

16. The Chief Clerk shall divide the plaints as follows:—

(*a*) plaints in suits for sums not exceeding Rs. 150.

(*b*) plaints in suits between Burmans for sums not exceeding Rs. 500.

(*c*) all other plaints.

17. Plaints falling within 16 (*a*) and 16 (*b*) and all miscellaneous proceedings arising out of them shall be placed before the Additional Judge, and plaints falling within 16 (*c*) and all miscellaneous proceedings arising out of them shall be placed before the Judge, for admission and disposal.

18. If the Judge entertains no doubt as to the admissibility of the plaint, or as to granting the prayer of the petition *ex-parte*, he shall pass orders admitting or granting the same. Otherwise the plaint or petition shall be placed on the daily cause list for argument as to the admission or granting the prayer, as the case may be.

19. If the person verifying a plaint or petition is not a party to the suit or proceeding he shall obtain leave to verify, and his petition shall be supported by an affidavit showing his connection with the case, and how the facts deposed to come within his knowledge or belief.

20. An agent desiring to institute or defend a suit shall, at the time of presenting the plaint or written statement, produce his power-of-attorney for the scrutiny of the Chief Clerk, who shall examine it and note its production on the diary.

The power-of-attorney shall be returned with a warning that it must be produced on the day of hearing for the inspection of the opposite party, or his pleader.

21. When an original document is produced by the plaintiff under Order VII, Rule 14, of the Code, the Chief Clerk shall put thereon his initials and a note of the date of presentation. If the document is not in English it must (except in cases where the proceedings are in Burmese) be accompanied by an authenticated translation by a translator in accordance with the rules as extended to the Court of Small Causes, Rangoon, regulating the translation of documents in the Chief Court of Lower Burma.

22. If a copy is delivered to be filed with the plaint in lieu of the original, the Chief Clerk shall compare the copy with the original and, if found correct, shall endorse on the copy "Compared with the original and found correct" and shall initial the same.

23. When a plaint or document initiating a proceeding has been admitted it shall be numbered and registered.

All applications arising out of a suit shall bear the number of such suit unless they be applications for execution, for attachment, or arrest before judgment, for removal of attachment, for review of judgment, to restore a suit to the file, for sanction to prosecute, or miscellaneous applications which necessitate separate judicial proceedings, or in which the petitioner is not a party to the suit.

24. The Chief Clerk shall fix a day for the defendant's appearance, and upon receipt of the process-fees, shall sign and issue the process as required by Order V of the Civil Procedure Code. Unless the necessary process-fees are paid within 48 hours from the admission of the suit or petition, the suit or petition shall be dismissed. In suits the value of which exceeds Rs. 1,000, summonses shall be for the settlement of issues, and shall require a written statement to be filed on or before the date fixed for the appearance of the defendant. In all other cases summonses shall be for final disposal.

25. The date for the appearance of a defendant shall be fixed with due regard to the provisions of Order V, Rule 6, of the Code.

26. Ordinarily there shall be at least the following intervals between the date of issue of process and the day fixed for hearing:—

(*a*) Where all the defendants reside within the local limits of the jurisdiction of the Court:—

(1) In suits the value of which exceeds Rs. 1,000,—fourteen days.

(2) In all other cases,—seven days.

(*b*) Where any one defendant resides in Burma but beyond the local limits of the jurisdiction of the Court,—twenty-eight days.

(*c*) Where any one defendant resides in India,—eight weeks.

(*d*) Where any one defendant resides out of India,—three months.

Miscellaneous and execution applications will ordinarily be heard on Mondays and Fridays.

27. Ordinarily a defendant residing within the local limits of the jurisdiction of the Court shall not be deemed to have had sufficient time to appear and answer unless the process was served on him not less than three clear days before the day fixed for hearing.

28. All processes and warrants shall be signed, sealed and issued by the Chief Clerk, except warrants committing persons to or releasing them from jail, and warrants of commissions issued to other Courts, which shall be signed by the Judge.

29. Processes and warrants for service or execution within the local limits of the jurisdiction of the Court shall be delivered to the Bailiff for service or execution, who shall endorse thereon the date of receipt by him.

If the person to be served is known to the Bailiff or to any of his staff, the Bailiff shall cause the process to be served forthwith. If the person to be served is not so known, the Bailiff shall require the party applying for the process to provide some person to identify the person to be served, and shall fix a time when one of his officers will be ready to proceed to effect service.

30. Processes for service in Burma but beyond the local limits of the jurisdiction of the Court shall be sent by post to a Court at the headquarters of a township in which the person to be served resides. If the process is to be served out of Burma, it shall be sent for service as required by section 28 and Order V, Rules 21 to 23 and 25, of the Code to the Court named by the party.

31. Unless otherwise ordered, a second or subsequent process shall not be issued until the previous one has been returned.

32. Proof of service may be made by affidavit. Such affidavits must state fully all particulars which must necessarily be proved before the summons or process can be held to have been duly served. The Bailiff and Deputy Bailiff are empowered to administer the oath to the deponents of such affidavits.

33. No summons or other process shall be served or executed on a Sunday, Christmas Day, or Good Friday except by leave of the Judge.

Hearing.

34. On the day fixed for hearing, if the defendant appears, the Judge shall ascertain from him what is his defence, if any. If it appears to the Judge that a written statement is necessary, he shall give the party reasonable time within which to file it, and shall postpone the case accordingly; otherwise, the Judge shall record the defence stated and proceed with the disposal of the case as soon as may be convenient.

Daily File and Cause List.

35. All undisposed of cases shall be entered in the daily file under the respective dates fixed for hearing.

36. A daily cause list shall be prepared from the daily file and shall show the causes for hearing in the following order:—

(1) Executions.
(2) Miscellaneous applications.
(3) Regular suits—
 (*a*) For settlement of issues.
 (*b*) For disposal—
 (i) defended.
 (ii) undefended.

37. Cases in the daily list shall be called on in turn in the order in which they appear in the list.

38. The daily cause list shall be affixed to the notice-board in the Court, and the Chief Clerk shall be responsible for its accuracy.

39. Nothing herein shall affect the power of the Judge to fix the hearing of any case for any particular date, or to order that a case may be taken out of its turn.

Documents filed in Court.

40. Documents not impounded under the Stamp Act or ordered by the Judge to be retained shall, on application made, be returned after fifteen days from the date of

judgment, unless the proceedings have in the meanwhile been sent for by the Chief Court.

41. Except in cases in which the proceedings are in Burmese, no document not in the English language shall (unless the Judge so orders) be read or received in evidence without a translation thereof in English made by a translator of the Court in accordance with the rules as extended to the Court of Small Causes, Rangoon, regulating the translation of documents in the Chief Court of Lower Burma.

42. The Bench Clerk shall make and sign the endorsements enjoined by Order XIII, Rules 4 and 6, of the Code on documents admitted or rejected.

Inspection of Documents filed.

43. The Chief Clerk is authorized to permit the inspection of any document filed in Court by a party or his pleader in the presence of an officer of the Court.

Summons to Witnesses.

44. A summons to a witness may be applied for by a party to a suit or proceeding or his pleader at any time after its institution and during its pendency. The application shall be presented to the Chief Clerk. If he thinks that for any reason it shall not be granted, he shall take the orders of the Judge on the point.

45. The party applying shall, within twenty-four hours from the time when the application is filed, pay to the Bailiff such sum for the travelling and other expenses of the person or persons summoned as may be requisite according to the following scale :—

	Maximum.			Minimum.		
	Rs.	A.	P.	Rs.	A.	P.
Soldiers, mariners, labourers, carriers, domestic servants, sircars, etc.	2	0	0	0	4	0
Tradesmen	4	0	0	1	0	0
Merchants, managers of banks, zemindars, gentlemen of property	12	0	0	2	0	0
Auctioneers, brokers, professional accountants	10	0	0	1	0	0
Professional men	10	0	0	2	0	0
Editors, engineers, and surveyors	10	0	0	2	0	0
Officers in civil employ drawing not less than Rs. 500 a month, according to rank.	12	0	0	6	0	0
Military and naval officers, according to rank	12	0	0	6	0	0
Shroffs, munnias, schoolmasters, commanders, and officers of ships	6	0	0	2	0	0
Articled and other clerks	6	0	0	2	0	0
Police Inspectors, petty officers, military and marine	4	0	0	2	0	0
Customs-house officers and engine-drivers	4	0	0	2	0	0
Godown sircars	2	0	0	1	0	0
Females, according to station	4	0	0	0	8	0

In special cases or in cases not provided for in the scale, the Court shall allow such fees as it thinks fit.

46. The Chief Clerk shall issue summonses as soon as possible after the Bailiff has endorsed the application with his receipt for the money paid.

47. Fees paid to witnesses otherwise than through the Bailiff shall be certified to the Court before a witness is examined, or they shall not be allowed in taxation of costs.

48. In cases where the witnesses reside beyond the jurisdiction of the Court of Small Causes, Rangoon, the Bailiff shall remit the expenses of the witnesses by money-order to the Court to which the summons is to be sent for service.

49. The Bailiff shall receive all money sent by other Courts as expenses of witnesses and commissions.

50. On receipt of a summons to a witness issued by another Court, the Chief Clerk shall send it to the Bailiff, who shall note on it whether any and what money has been received as expenses of the witness. If the expenses are sufficient, the Chief Clerk shall then make an order for the issue of the summons.

51. On receipt of a commission for the examination of a witness from another Court, the Chief Clerk shall send it to the Bailiff, who shall note on it whether any and what money for expenses has been received as expenses of the witness. If sufficient money has been received, the Chief Clerk shall make an order for the issue of the summons to the witness.

52. Any money received as expenses of witnesses remaining unexpended shall be returned by the Bailiff, under the orders of the Judge, to the Court of issue.

Commissions.

53. The hearing of a suit in which a commission has been issued under Order XXVI of the Code shall be postponed until the return of the commission, unless the Judge otherwise directs.

54. An application for commissions shall be made promptly after the grounds on which it is asked for are known, and the petitions for it shall be accompanied by an affidavit or affidavits, setting out the facts relied upon as grounds for the issue of the commission, and when they first became known to the applicant.

55. In commissions for the examination of witnesses which are addressed to the Judge and in which the delegation of the Commissioner's duties to an Advocate or Pleader has not been authorized, the Judge shall have power to appoint such advocate or pleader or official of the Court as he may determine to execute the commission.

56. When an order for the issue of a commission to take evidence on interrogatories has been made, the party obtaining the order shall, within four days from the date thereof, file his interrogatories, and the documents, if any, to accompany the commission, and shall serve a copy of the interrogatories on the other party or his pleader, who shall file his cross-interrogatories, with the documents, if any, to accompany the same, within four days from such service, and shall serve a copy on the other party or his pleader.

57. If the commission is for the examination of witnesses *vivâ voce*, the party obtaining the order shall pay the necessary costs of and incident to the same, and both parties shall file a list of witnesses, and all necessary papers and documents within one week from the date of the order.

58. On default in the observance of these rules by a party obtaining an order for a commission, the commission shall not issue without leave of a Judge, and on default by the opposite party, he shall not be allowed to join in the commission without such leave.

Arrangement and Numbering of Records.

59. The records shall be arranged in the following order :—

A.—Regular Suit File.

(1) Facing sheet.
(2) Diary.
(3) Pleadings.
(4) Evidence taken by the Judge.
(5) Evidence taken on commission.
(6) Documents tendered in evidence.
(7) Judgment.
(8) Decree.
(9) Processes in the regular suit.

B.—Miscellaneous Proceedings File.

(1) Facing sheet.
(2) Application.
(3) Evidence.
(4) Order.
(5) Processes in the miscellaneous proceedings.

C.—Execution File.

(1) Facing sheet.
(2) Application.
(3) Order.
(4) Processes in the execution.

60. The diary shall be framed so as to show as concisely as possible every stage of and every proceeding taken in the suit, and the party or parties present in person or by pleader at every proceeding, and shall ordinarily be signed by the Bench Clerk. But

if it is the sole record of a judicial order other than that of a postponement or of an adjournment or of a direction for the issue of process, then it shall be signed by the Judge.

Judgments, Orders and Decrees.

61. Judgments and orders shall only be pronounced after they are written, and shall bear the date on which they are delivered.

Decrees shall bear the date of delivery of judgment, and also the date of signature in the hand of the Judge.

If a party or his pleader intimates to the Chief Clerk immediately after a decree or order has been passed by the Judge, that he wishes to see the formal decree or order before it is submitted to the Judge for signature, he may be allowed to do so, and if there is any disagreement as to the form of decree or order, or the taxing of the costs, the case shall be set down on the daily list, on as early a date as may be convenient, to speak to the minutes of decree.

Pauper Suits.

62. After the disposal of every suit in which a pauper is concerned, the Chief Clerk shall send to the Collector of Rangoon a memorandum of the Court-fees due and payable by the pauper.

Execution Proceedings.

63. Applications under section 39 of the Code to send a decree or order for execution to another Court shall be made by verified petition, and shall be accompanied by a certified copy of the decree or order.

64. The certified copy, together with the other documents mentioned in Order XXI, Rule 6, of the Code shall be sent by registered post.

65. The process-fees prescribed for the warrant of attachment and for the order of sale shall be annexed to every application for execution by attachment and sale of property.

66. In every application for the attachment of moveable property the approximate value of the property sought to be attached shall be stated according to the best of the applicant's belief.

67. In applications for execution by attachment of moveable property it shall be expressly stated whether the property sought to be attached is in the possession of the judgment-debtor or not, and the place where the property is to be found shall be clearly indicated.

68. The second clerk shall examine every application for execution and shall report whether the requirements of the Code and of these rules have been complied with before the application is submitted to the Judge.

Sale of Attached Property.

69. As soon as possible after an attachment of moveable property, the Bailiff shall report to the Court the fact of the attachment and shall furnish a list of the articles attached and their approximate value, and shall note if any of them are not liable to attachment or sale.

If any of the articles or things fall within the proviso of Order XXI, Rule 43, of the Code, it shall be so stated in the report and list.

70. The report and list shall be submitted to the Judge, who shall pass such order for sale as he may think fit, although the decree-holder may not apply for a sale order. A warrant for sale shall be transmitted to the Bailiff, who shall forthwith prepare and issue a proclamation.

71. Every proclamation shall be advertised in a local newspaper or advertiser for at least fifteen days (except in the case of property mentioned in the proviso to Order XXI, Rule 43, of the Code), and the cost of advertising shall be deducted from the proceeds of sale.

72. Moveable property falling within the proviso to Order XXI, Rule 43, of the Code, shall be sold as soon as may be convenient after it has been attached. Other moveable

property shall be sold on the third Saturday after the day on which the proclamation shall have been fixed up in the Court.

Security to Court.

73. When security is required to be given it shall be taken either in cash or in the form of a bond. Such bond shall be with or without sureties as the Judge may direct, and shall be in favour of the Bailiff of the Court for the time being.

74. When sureties are required and persons resident within the jurisdiction of the Court are tendered, a report shall be called for from the Bailiff as to whether the principal and sureties possess within the jurisdiction of the Court property of value equal to the amount of the security required.

75. No sureties shall, without the order of the Judge, be accepted unless they make an affidavit or affidavits stating that the property which each of them possesses, or that their properties combined, are equal in value to the amount of the security demanded, over and above any incumbrances to which such properties may be liable, and over and above the amount for which they have previously given security and for which they are at the time liable as sureties.

76. On the application of the Bailiff summonses may be issued to persons named by him to appear before him, or to produce before him documents of title for the purpose of his inquiry into the value of the property of any person tendered as a surety.

Bailiff's Commission on Sales of Attached Property.

77. The Bailiff's commission on sales of attached property is the same as in Order LIII, Rules 163, 164, 165 and 166.

THE BURMA GAZETTE.

26TH AUGUST, 1911, PART IV, P. 760.

CHIEF COURT OF LOWER BURMA.

NOTIFICATION.

Dated Rangoon, the 22nd August, 1911.

No. 16 (GENERAL).—With reference to section 128, sub-section (*1*), of the Code of Civil Procedure, 1908, the **following rules for the classification and arrangement of Civil Records** which have been made by the Chief Court of Lower Burma, in supersession of this Court's Notification No. 44, dated the 17th November, 1904, as amended by Notifications Nos. 1 and 4 (General), dated the 9th January, 1906, and 25th January, 1906, respectively, and sanctioned by the Local Government, are published for the information and guidance of all Civil Courts in Lower Burma.

The rules shall be inserted in the first schedule to the Code as "Order LVI- Rules for the classification and arrangement of Civil Records."

RULES.

I.—*Classification of Records.*

1. The records of civil judicial proceedings, whether suits or cases, in all Civil Courts other than Small Cause Courts, and exclusive of suits and cases disposed of under Small Cause Court procedure by Courts invested with Small Cause Court jurisdiction, shall be divided into the following four classes :—

Class I.—Records of—

(*a*) suits and cases affecting immoveable property, including suits for foreclosure, redemption, or sale ;

(*b*) suits in respect of the succession to an office or to establish or set aside an adoption, or otherwise to establish the status of an individual;

(*c*) suits relating to public trusts, charities, or endowments;

(*d*) administration suits;

(*e*) suits between landlord and tenant to determine the rate of rent, or in which a question of right to enhance or vary the rent of a tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, is in issue.

Class II.—Records of the following suits and cases except such of them as affect immoveable property—

(*a*) contested and uncontested suits and cases for probate and letters of administration and for the revocation of the same;

(*b*) cases under the Guardians and Wards Act, 1890, relating to the guardianship of minors and the administration of their property;

(*c*) cases under the Lunacy (District Courts) Act, 1858, relating to the guardianship of lunatics and the care of their estates.

NOTE.—An application by an executor or administrator or by the guardian of a minor or lunatic, to sell, mortgage, etc., property belonging to the estate is an application in the case, and together with all the proceedings connected with it, must form part of the record of the case.

Class III.—Records of—

(*a*) all suits which do not come under Class I or Class II;

(*b*) cases under the Succession (Property Protection) Act, 1841;
cases under the Succession Certificate Act, 1889;
cases under Parts III and IV of the Land Acquisition Act, 1894;
cases under the Provincial Insolvency Act (III of 1907) for a declaration of insolvency other than those in which Receivers appointed under that Act have transferred or otherwise dealt with immoveable property;
cases under the Code of Civil Procedure to transfer a decree when no application for execution is pending;

(*c*) such other cases as the Chief Court may from time to time direct to be included.

NOTE.—Proceedings under the Code of Civil Procedure for the restoration of a suit or appeal, or for a review of judgment, are proceedings in the suit or appeal and must form part of the record relating thereto.

Class IV.—Records of execution proceedings.

NOTE.—Each application for execution shall be treated as a separate case, the record of which shall include the papers on all matters connected with the execution from the date on which the application was presented until it is finally disposed of, excepting only applications under Order XXI, Rule 58 of the Code of Civil Procedure which are dealt with in Miscellaneous Proceedings and come under Class III.

In this rule the word "suit," "case" or "proceeding" includes an appeal.

II.—*Arrangement of Records.*

2. Every record under Class I, Class II, and Class III shall be divided as the trial proceeds into two files, A and B.

File A shall be called the Trial Record and, in cases other than appeals, shall contain besides the flyleaf with index of contents—

(*a*) Diary.

(*b*) Plaint or petition instituting the case.

(*c*) Plans attached to the plaint to define the land sued for.

(*d*) List of documents produced with the plaint when not endorsed on the plaint, Order VII, Rule 9.

(*e*) List of documents relied on by plaintiff, but not produced, Order VII, Rule 14.

(*f*) List of documents produced by the parties at the first hearing, Order XIII, Rule 1 (2).
(*g*) Written statements or counter petitions of the parties.
(*h*) Petitions, proceedings, and orders in interlocutory matters.
(*i*) Opening proceedings.
(*j*) Issues.
(*k*) Oral evidence for plaintiff * taken in Court and on commission.
(*l*) List of documents admitted in evidence for plaintiff.*
(*m*) Documents ‡ admitted in evidence for plaintiff.*
(*n*) Oral evidence for defendant † taken in Court and on commission.
(*o*) List of documents admitted in evidence for defendant.†
(*p*) Documents ‡ admitted in evidence for defendant.†
(*q*) Report of Commissioner appointed under Order XXVI.
(*r*) Award of arbitrators or petition of compromise.
(*s*) Report or account of a Receiver.
(*t*) Judgment.
(*u*) Decree.
(*v*) Final decree in mortgage or administration suits
(*w*) Copies of orders and decrees in appeal and revision.
(*x*) Order absolute for sale in mortgage cases, together with proclamation, sale report, order of confirmation, and certificate of sale.

The judgment of the Appellate Court, if any, shall be filed after the decree and any other evidence recorded and any finding of the lower Court, together with the final order in appeal, shall be filed thereafter in that order.

File B shall be called the Process Record and shall contain besides the flyleaf with table of contents—

(*a*) Powers-of-attorney.
(*b*) Summonses and other processes and affidavits relating thereto.§
(*c*) List of witnesses.
(*d*) Petitions relating to adjournments, attendance of witnesses, etc.
(*e*) Other papers not included in Trial Record.
(*f*) Letters, etc., calling for records, etc.

3. Every record under Class IV shall consist of two files, A and B.

File A shall contain besides the flyleaf with table of contents—

(*a*) Diary.
(*b*) Application for execution.
(*c*) Papers received from Court which passed the decree, Order XXI, Rule 6.
(*d*) Plans of lands to be attached.
(*e*) Petitions, proceedings, and orders in interlocutory matters.
(*f*) Petitions objecting to the execution, other than claims under Order XXI, Rule 58.
(*g*) Warrants and prohibitory orders issued to effect execution by attachment or delivery of property, and returns thereto.
(*h*) Warrant of sale.
(*i*) Proclamation of sale.
(*j*) Report of result of sale.
(*k*) Order confirming sale.
(*l*) Copy of certificate of sale.
(*m*) Applications for payment of money in deposit and the orders thereon.
(*n*) Receipts or acknowledgments of satisfaction.
(*o*) Final order.
(*p*) Copy of order in appeal or revision.

File B shall contain all other papers.

* Substitute "defendant" if defendant begins.
† Substitute "plaintiff" if defendant begins.
‡ Documents not admitted in evidence must not be filed with the record, but should be returned to the party who produced them.
§ Returns of process-servers proving service in *ex-parte* cases should be on the A file.

4. The A file of the trial record of an Appellate Court shall contain, besides the flyleaf with tables of contents—

(*a*) Diary.
(*b*) Memorandum of appeal.
(*c*) Copy of judgment and decree of Lower Court.
(*d*) Written statements, if any.
(*e*) Petitions, proceedings, and orders in interlocutory matters.
(*f*) Oral evidence, if any.
(*g*) Judgment.
(*h*) Decree.
(*i*) Copy of judgment and decree in second appeal or revision.

The B file shall contain all other papers.

5. The record of suits decided by Small Cause Courts, or tried under Small Cause Court procedure, shall consist only of one file.

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